NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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RETIRED JUDGES

January 8, 2024

Maureen E. Danker
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Allison M. Mazzei
THE GELLER LAW GROUP, PLLC
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Re: *Michael S. Kellogg* v. *Alahna L. Kellogg,* CL 2018-12096

Dear Ms. Danker and Ms. Mazzei:

This matter is before the court on Plaintiff's request for attorney fees as set forth in *Plaintiff's Counterclaim Opposing Defendant's Motion To Modify Child Support And Plaintiff's Independent Request For Attorney Fees And Costs.* A hearing on Defendant's motion to modify child support was held on December 12, 2023. For the reasons set forth below, the court DENIES the request.

THE PARTIES' POSITIONS

Plaintiff asserts that his claim for attorney fees: 1) is a counterclaim pursuant to Rule 3:9 and 2) is authorized by paragraph 18 of the parties' *Marital Settlement Agreement.* Plaintiff does not rely on any statutory authority. Further, Plaintiff asserts that the court may reserve jurisdiction, in a first nonsuit order, to award attorney fees, notwithstanding Code § 8.01-380(B) ("in the event *additional* nonsuits are allowed," the court may "assess costs and reasonable attorney fees against the nonsuiting party") (emphasis added).

Defendant opposes Plaintiff's motion on four grounds: 1) Plaintiff's claim for attorney fees is not a counterclaim; 2) paragraph 18 of the parties' *Marital Settlement Agreement* does not provide a contractual right for attorney fees; 3) Plaintiff has no right to attorney fees pursuant to Code § 20-99(6) ("Such suit shall be instituted and conducted as other suits in equity, except as otherwise provided in this section: Costs may be awarded to either party as equity and justice may require"); and 4) because Code § 8.01-380(B) allows the court, "in the event additional nonsuits are allowed," to "assess costs and reasonable attorney fees against the nonsuiting party," the court may not assess reasonable attorney fees against the nonsuiting party in connection with a first nonsuit.

ANALYSIS

1) Plaintiff's Claim For Attorney Fees Is Not A Counterclaim

Under Rule 3:9, a counterclaim is a "cause of action that the defendant has against the plaintiff . . . ." A cause of action is "a set of operative facts which, under the substantive law, may give rise to a right of action." *Roller v. Basic Construction Co.*, 238 Va. 321, 327 (1989). Plaintiff's claim for attorney fees in his pleading entitled *Plaintiff's Counterclaim Opposing Defendant's Motion To Modify Child Support And Plaintiff's Independent Request For Attorney Fees And Costs* is not a "cause of action" as it does not "give rise to a right of action." Thus, Plaintiff's claim for attorney fees is not a counterclaim.

2) The Parties' *Marital Settlement Agreement* Does Not Provide For An Award Of Attorney Fees

Plaintiff's only articulated basis for an award of attorney fees is a contractual basis: paragraph 18 of the parties' *Marital Settlement Agreement*. Plaintiff did not articulate a statutory basis for an award of attorney fees.

Paragraph 18 of the parties' *Marital Settlement Agreement* provides in pertinent part:

> However, except as specifically provided in this paragraph, nothing contained in this Agreement shall *bar or prevent* either party from requesting an award of attorney's fees in any future court proceedings between them. Notwithstanding anything herein to the contrary, nothing herein shall *prevent* a court of competent jurisdiction from making an award of reasonable attorney's fees and costs (including, without limitation to, costs of experts and private investigators) related to either party's motion or request related to spousal support, child support, custody and visitation. Jurisdiction and authority for such court to award such attorney's fees and costs is hereby reserved unto and conferred upon said court of competent

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jurisdiction. (Emphasis added).

By its plain terms, this part of paragraph 18 (except for the last sentence) is merely a rule of construction for the parties' *Marital Settlement Agreement* in that it only articulates that nothing in the parties' *Marital Settlement Agreement* shall "bar or prevent" the award of attorney fees; it does not *create* a contractual right to be awarded attorney fees.

With respect to the last sentence, it also does not provide a contractual right for attorney fees; it merely purports to create subject matter jurisdiction for a "court of competent jurisdiction" to award attorney fees. Apart from the circularity of the language, the parties "cannot waive the absence of subject matter jurisdiction or confer it upon a court by their consent." *Cilwa v. Commonwealth,* 298 Va. 259, 266 (2019). Rather, jurisdiction of the subject matter "'can only be acquired by virtue of the Constitution or of some statute . . . .'" *Id.*

3) Code § 20-99(6) Does Not Apply
To A Motion To Modify Child Support

Although Plaintiff did not articulate any statutory basis for an award of attorney fees, because Defendant argues that Code § 20-99(6) does not apply, the court, for completeness, will address Code § 20-99(6).

Code § 20-99(6) provides: "Costs may be awarded to either party as equity and justice may require." "Costs" which may awarded pursuant to Code § 20-99(6) include attorney fees, *see e.g., Sobol v. Sobol,* 74 Va. App. 252, 288 (2022) ("award by a trial court of attorney fees and costs in a divorce case is authorized by . . . Code § 20-99(6)") and *Tyszcenko v. Donatelli,* 53 Va. App. 209, 222 (2008) (Code § 20-99(6) "provide[s] the statutory basis for the broad discretionary authority circuit courts have to award attorney's fees and other costs as the equities of a divorce case and its ancillary proceedings may require").[1]

Nonetheless, while attorney fees are "Costs" within the meaning of Code § 20-99(6), Code § 20-99(6) does not apply to a post-divorce motion to modify child support because its plain language is limited to "[s]uch suit," which is a reference to Code § 20-97 ("No suit for annulling a marriage or for divorce"). Plaintiff thus has no right to attorney fees pursuant to Code § 20-99(6).

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[1] The "ancillary proceedings" referred to by *Tyszcenko* include only divorce and pre-divorce proceedings (such as *pendente lite* relief) and do not include post-divorce motions, such as a motion to modify child support. This is evident from the cases cited by *Tyszcenko* in support of its quoted statement concerning "ancillary proceedings," all of which involved divorce proceedings: *Ingram v. Ingram,* 217 Va. 27 (1976); *Verrocchio v. Verrocchio,* 16 Va. App. 314 (1993); *Kaufman v. Kaufman,* 7 Va. App. 488 (1988); and *D'Auria v. D'Auria,* 1 Va. App. 455 (1986).

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4) A Court May Reserve Jurisdiction To Award Attorney Fees In a First Nonsuit Order

As Plaintiff has not shown any basis for an award of attorney fees, the court need not address whether it may reserve jurisdiction, in a first nonsuit order, to award attorney fees. Nevertheless, because the parties dispute whether the court may reserve jurisdiction in a first nonsuit order to award attorney fees, the court will, for completeness, address the issue.

In *Johnson v. Woodard,* 281 Va. 403 (2011), addressing whether a circuit court may retain jurisdiction to award attorney fees on a nonsuit (which was apparently the first nonsuit),[2] the Court explained:

> [A] circuit court may avoid the application of the 21 day time period in Rule 1:1 by including specific language stating that the court is retaining jurisdiction to address matters still pending before the court. . . . Under our holding in *Super Fresh* [*Food Markets of Virginia, Inc. v. Ruffin*, 263 Va. 555 (2002)], the nonsuit order was not a final order under Rule 1:1 because the language was sufficient for the court to retain jurisdiction to consider the motions for attorney's fees and costs and sanctions.

281 Va. at 409-410.

Johnson v. Woodard did not suggest that a first nonsuit was to be treated any differently than an "additional" nonsuit for purposes of reserving jurisdiction to award attorney fees.

5) Code § 8.01-380(B) Does Not Bar An Award Of Attorney Fees In Connection With A First Nonsuit

As noted, *supra*, Defendant argues that, because Code § 8.01-380(B) allows the court, "in the event additional nonsuits are allowed," to "assess costs and reasonable attorney fees against the nonsuiting party," the court may not assess reasonable attorney fees against the nonsuiting party for a first nonsuit. As Plaintiff has not shown any basis for an

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[2] That the nonsuit at issue was apparently the first nonsuit is based upon the Court's description of the proceeding in the circuit court:

> The circuit court appointed a special prosecutor to litigate the removal action, and to prosecute the supervisors on the criminal charges alleged in the indictments. The criminal charges against the supervisors were later dismissed upon a motion to dismiss filed by the special prosecutor.
>
> The special prosecutor then moved to nonsuit the removal action.

281 Va. at 407.

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award of attorney fees, the court need not address Defendant's argument. Nevertheless, because the parties dispute the application of Code § 8.01-380(B), the court will, for completeness, address the issue.

In support of her position, Defendant cites to a 2001 unpublished opinion of the Court of Appeals, *Croom v. Byrum,* 01 Vap UNP 2134001 (2001).[3] In *Croom*, the trial court had awarded appellees:

> "attorney's fees and costs in this matter" of $8,000, specifically noting that the relief was not "any type of sanction relative to the nonsuit" but resulted from a finding that appellants had "used the courts inappropriately and . . . [were] proponents of an unnecessary litigation."

*3.

The trial court did not, however, indicate the basis for the award of attorney fees, *i.e.*, whether it was contractual or statutory and, if statutory, which particular statute was relied upon.

The Court of Appeals explained:

> Code § 8.01-380(B) expressly provides that "[o]nly one nonsuit may be taken to a cause of action . . ., as a matter of right." Should the court thereafter permit "additional nonsuits," the court "may assess costs and reasonable attorney's fees against the nonsuiting party." Code § 8.01-380(B).

*4.

The Court of Appeals concluded that, "under the circumstances, the court was without authority to then impose such expenses upon appellants" and "reverse[d] the order awarding appellants attorney's fees and costs incurred attendant to the subject proceedings." *4.

Four years earlier, in contrast to *Croom*, the Court of Appeals, in *Sanchez v. Sanchez,* 97 Vap UNP 0195974 (1997), held:

> [W]e disagree with husband's contention that the trial court exceeded its authority under Code § 8.01-380 by sanctioning husband for nonsuiting his petition to change child custody. Although Code § 8.01-380 empowers a trial court to assess attorney fees against a nonsuiting party only after a second or subsequent nonsuit of a cause of action, the trial court's award of sanctions against husband was not based upon husband's

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[3] Defendant also relies upon *Nash v. Jewell,* 227 Va. 230 (1984), *Trout v. Commonwealth Transp. Commissioner,* 241 Va. 69 (1991), and *Ipsen v. Moxley,* 49 Va. App. 555 (2007). None of these cases is helpful as all address only the right to take a nonsuit and the effect thereof; none address the effect of Code § 8.01-380(B).

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> nonsuit. Instead, the record indicates that the trial court sanctioned husband for using "the judicial process to harass [wife] and run up her counsel fees without justification."

Unlike the trial court in *Croom*, the trial court in *Sanchez* apparently awarded attorney fees based upon Code § 8.01-271.1 in that the Court of Appeals held:

> Under Code § 8.01-271.1, a trial court has the power to sanction a *pro se* litigant who files pleadings or motions "for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation."

Although *Croom* did not make any reference to *Sanchez*, *Sanchez* controls as "the decision of a prior panel of this Court . . . cannot be overruled except by the Court of Appeals sitting *en banc* or by the Virginia Supreme Court." *Johnson* v. *Commonwealth*, 75 Va. App. 475, 481 (2022). Further, overruling by implication is not favored. *See e.g.*, *Clark* v. *Virginia Dep't of State Police*, 292 Va. 725, 735-36 (2016), where the Court adopted the position of the United States Supreme Court: "'[O]ther courts,' the [United States] Supreme Court has said, should not 'conclude our more recent cases have, by implication, overruled an earlier precedent.'" 292 Va. at 735-36.

Moreover, *Sanchez* accepted that the trial court relied upon Code § 8.01-271.1, despite Code § 8.01-380(B). That holding is consistent with the rule of statutory construction that:

> [r]epeal of a statute by implication is not favored, and, indeed, there is a presumption against a legislative intent to repeal "where express terms are not used, or the later statute does not amend the former." (citation omitted). If apparently conflicting statutes can be harmonized and effect given to both of them, they will be so construed.

Albemarle County v. Marshall, Clerk, 215 Va. 756, 761 (1975).

Thus, a statute allowing for the award of attorney fees, *e.g.*, Code § 8.01-271.1, cannot be viewed as having been repealed by Code § 8.01-380(B) as there is nothing in either statute which refers to the other, let alone amends or repeals the other. The court, therefore, rejects Defendant's argument that Code § 8.01-380(B) deprives the court of the authority to award attorney fees, if another statute, such as Code § 8.01-271.1, provides a basis for an award of attorney fees. In the case at bar, however, as Plaintiff did not articulate a statutory basis for an award of attorney fees, there can be no analysis of whether Code § 8.01-380(B) has been amended or repealed by another statute.

Plaintiff's request for attorney fees is DENIED.

An appropriate order will enter.

OPINION LETTER

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

OPINION LETTER

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MICHAEL S. KELLOGG	)	
	)	
Plaintiff	)	
	)	
v.	)	CL 2018-12096
	)	
ALAHNA KELLOGG	)	
	)	
Defendant	)	

ORDER

THIS MATTER came before the court on Plaintiff's request for attorney fees after a hearing on December 12, 2023.

THE COURT, having considered the oral and written arguments of the parties, hereby DENIES Plaintiff's request for the reasons set forth in the letter opinion of today's date.

ENTERED this 8th day of January, 2024.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

Maureen E. Danker
Counsel for Plaintiff

Allison M. Mazzei
Counsel for Defendant