NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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RETIRED JUDGES


July 25, 2024

**LETTER OPINION**

J. Caleb Jones
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*Counsel for Defendants*

RE: *Brian Morrison v. George Mason University, et al.*
Case No. CL-2021-7808

Dear Counsel:

This cause is before the Court on Plaintiff's Amended Motion for Entry of Nonsuit Without Prejudice, the Court having to determine whether claims barred by a granted plea in bar and demurrers sustained without leave to amend can be nonsuited if the Court has not yet dismissed those claims. The Court finds Virginia Code § 8.01-380(A) limits a plaintiff's ability to take a nonsuit in circumstances where the Court has ruled on a

dispositive motion such as a demurrer or plea in bar even when the associated claim has not been formally dismissed. Here, the Court's rulings on Defendants' Demurrers and Pleas in Bar eliminated certain claims from proceeding, and thus those claims cannot be nonsuited, but must instead be dismissed with prejudice.

Accordingly, the Court shall enter a separate order dismissing those causes for which a dispositive ruling was made and granting Plaintiff's nonsuit as to the remaining claims.

## BACKGROUND

Plaintiff filed his original Complaint on May 25, 2021, against Defendants George Mason University ("GMU"), Rowan, and Ross, claiming whistleblower retaliation, fraud, defamation, and common law conspiracy to defame and retaliate. Plaintiff's Amended Complaint became operative on April 15, 2022, adding Defendants Kissal, Sanavaitis, and Ly as parties. *See Ahari v. Morrison*, 275 Va. 92, 96 (2008). Defendants filed demurrers which were resolved by the Court through orders entered on December 20, 2023. The below chart summarizes the surviving claims post-demurrers:

| | WR[1] | Fraud | Consp. Fraud[2] | Def.[3] | IIED[4] | Const. Disc.[5] | Wrong. Disc.[6] | Consp. P, R, D[7] | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | Def.[3] | CD[5] | WD[6] | IIED[4] |
| Kissal | | | | | [8] | | | | | | |
| Ly | | | | | | | | | | | |

[1] Whistleblower retaliation.
[2] Conspiracy to defraud.
[3] Defamation.
[4] Intentional infliction of emotional distress.
[5] Constructive discharge.
[6] Wrongful discharge.
[7] Conspiracy to punish, retaliate and defame.
[8] Plaintiff makes no allegations Defendant Kissal committed IIED. Rather, Plaintiff seeks to hold her liable based on conduct done as part of the conspiracy. Conspiracy to commit IIED is not a viable claim. The Court gave Plaintiff leave to amend to withdraw any such contention with respect to Defendant Kissal.

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Sanavaitis | | | | [9] | | | | | | | |
| GMU | | | | | | | | | | | |
| Ross | | | | | | | | | | | |
| Rowan | | | | | | | | | | | |

| | |
|---|---|
| Not applicable | |
| Sustained with leave to amend | |
| Sustained without leave to amend | |
| Overruled | |

Plaintiff subsequently filed a Motion to Reconsider with respect to two findings in the order concerning Defendants GMU and Sanavaitis' demurrers. Plaintiff requested the Court reconsider its findings GMU cannot be held liable under The Fraud and Whistle Blower Protection Act ("FAWPA"), and that the FAWPA cannot support a *Bowman* claim. On February 8, 2024, the Court issued an order affirming its previous findings for the reasons as stated in its first Letter Opinion of February 6, 2024. By agreement of the parties, the Court refrained from requiring Plaintiff to amend his Amended Complaint until after the Court had an opportunity to consider the Pleas in Bar filed by Defendants.

On April 26, 2024, the Court held a hearing wherein it detailed its view that the bulk of such Pleas required a jury trial, taking one discrete statute of limitations defense under consideration. On May 2, 2024, the Court issued its second Letter Opinion addressing the basis for its subsequent order of May 10, 2024, in which the Court dismissed subsection a (hereinafter "Subsection A") of Count I as against Defendants Ross and Rowan based on the finding the claim violated the statute of limitations. In the same order, the Court ruled the remaining Pleas in Bar required an evidentiary hearing before a jury.

[9] Defendant Sanavaitis withdrew his Demurrer to the defamation claim. Thus, the Court did not rule whether the Amended Complaint sufficiently alleged defamation against Defendant Sanavaitis.

Both parties agreed the jury trial on the Pleas in Bar should be held in abeyance until Plaintiff amended his first Amended Complaint. On May 17, 2024, the Court entered an order granting Plaintiff leave to amend his first Amended Complaint by June 17, 2024.

Prior to June 17, Plaintiff filed a Motion for Entry of Nonsuit Without Prejudice. The proposed nonsuit order was not entered at the time because defense counsel had not endorsed the order, and the motion indicated Plaintiff moved to nonsuit its case against GMU only, whereas the proposed order stated the nonsuit was to the case as a whole. Plaintiff subsequently filed his Amended Motion for Entry of Nonsuit Without Prejudice, clarifying Plaintiff was moving to nonsuit the entire case. Defendants did not initially object to the nonsuit, but later filed a brief arguing only those claims pending without a dispositive resolution may be nonsuited. Plaintiff also filed a brief acknowledging he can only nonsuit certain claims. On June 17, the Court suspended the deadline granting Plaintiff leave to amend in order to enable consideration of the Court's question regarding its authority under Virginia Code § 8.01-380(A) to enter a nonsuit as to those claims for which there has been a dispositive ruling but no formal dismissal. Having considered the briefs of the parties on the issue presented the Court rules based on papers as detailed herein.

## ANALYSIS

Virginia Code § 8.01-380 directs,

> [a] party *shall not be allowed* to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, *unless* he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or *before the action has been submitted to the court for decision*.

Va. Code § 8.01-380(A) (emphasis added). Thus, a plaintiff may only nonsuit a cause of action or claim prior to (1) grant of a motion to strike the evidence as to the cause in question, (2) the jury retiring for deliberations, or (3) submission of the applicable claim to the court for decision. *Id*. Here, the motions at issue are demurrers and pleas in bar, which were not heard by a jury. Hence, the Court must determine whether the action has been submitted to the Court for decision.

**I. "Submitted to the Court for Decision"**

For an action to be submitted to the court for decision, "it is necessary for the parties to have yielded the issues to the court for consideration and decision." *Atkins v. Rice*, 266 Va. 328, 331 (2003); *see also Bio-Medical Applications of Va. v. Coston*, 272 Va. 489, 494 (2006). Issues are yielded to the court when both parties have completed briefing and argument, and no further briefing and argument on the issues are expected by either the parties or the court. *Gordon v. Kiser*, 296 Va. 418, 423 (2018) (holding the circuit court erred in denying a motion for nonsuit because appellant had not submitted the motions at issue to the circuit court for decision and had requested additional time to respond to appellee's motions); *Anheuser-Busch Cos. v. Cantrell*, 289 Va. 318, 319 (2015) ("[T]he circuit court erred in granting Cantrell's motion for nonsuit after the parties had completed their briefing and argument on the demurrers. Neither the parties nor the court anticipated any further proceedings on the demurrers, which therefore were committed to the court for its ruling. Thus, the case was 'in the hands of the trial judge for final disposition' at the time of Cantrell's motion." (internal citation omitted)); *Moore v. Moore*, 218 Va. 790, 795-96 (1978) (holding the yielding of the issues to the court can be

accomplished "either as the result of oral or written argument, formal notice and motion, or by tendering a jointly endorsed sketch for a decree (or in the case of disagreement over the form, two separate drafts upon notice and motion)").

In this cause, once argument and briefing on *dispositive* motions was yielded to the Court for resolution, the case could not then be nonsuited pending decision on those matters. However, this bar to the nonsuit may at times only be temporary. If the court issues a decision on the matter, a nonsuit cannot be had for that matter if the ruling on the claim is dispositive with finality (i.e., the ruling makes a finding of liability or nonliability). In contrast, if the dispositive motion is denied, deferred for trial, or subject to leave for further action to correct a deficiency, the bar to the nonsuit posed by such previously pending motion is removed. *See Bremer v. Doctor's Bldg. P'ship*, 251 Va. 74, 80 (1996) (holding a nonsuit was not barred by § 8.01-380(A) because the "trial court's determination that the warranties contained in the purchase agreement survived the subsequent amendment to the agreement" . . . "did not resolve any issue of liability"); *see also Anheuser-Busch Cos.*, 289 Va. at 319.

Virginia courts have held demurrers and pleas in bar dispositive motions for purposes of § 8.01-380(A). *See Wells v. Lorcom House Condos.' Council of Co-Owners*, 237 Va. 247, 252 (1989); *Miller v. Miller*, 97 Va. Cir. 73, 74 (Loudoun 2017); *Figliuzzi v. Schuiling*, 17 Va. Cir. 11, 11-12 (Fairfax 1988). However, whether a nonsuit as to associated claims is barred after the court has issued its ruling on a demurrer depends on whether the demurrer was sustained without leave to amend. If a party moves to nonsuit after the court has sustained the demurrer with leave to amend but before the

time to amend has run, the nonsuit is not barred by § 8.01-380(A). *See Henderson v. Singleton Grove Homeowners Ass'n*, 108 Va. Cir. 145, 146 (Fairfax 2021); *Drapeau v. Kaiser*, 54 Va. Cir. 88, 89 (Richmond City 2000).

In the instant case, the Plaintiff may be granted a nonsuit as to those of his claims which have not been subject to dispositive rulings, because those remain active pending further resolution. *Dalloul v. Agbey*, 255 Va. 511, 514 (1998) ("As used in Code § 8.01-380(A), the term 'the action' refers to the action then pending before the court, namely, the counts or claims remaining in a case at the time the nonsuit request is made. Claims dismissed with prejudice are not part of a pending action, because a dismissal with prejudice is generally as conclusive of the parties' rights as if the action had been tried on the merits with a final disposition adverse to the plaintiff. Thus," . . . "under the language of Code § 8.01-380(A), 'the action' subject to a plaintiff's nonsuit request is comprised of the claims and parties remaining in the case after any other claims and parties have been dismissed with prejudice *or otherwise eliminated* from the case." (emphasis added)).

Distilling the applicable limiting principle, "when the trial court has reached a final determination in a proceeding regarding any claims or parties to claims, those claims and parties are excluded by operation of law from any nonsuit request." *Id.* Regardless of whether the dispositive ruling explicitly states further that a count is dismissed with prejudice, a nonsuit cannot be had for any claim for which a final disposition has been obtained, absent the court first vacating such ruling on the merits. *See id.* at 514-15 (holding that "[a]lthough the order dismissing Count VII did not state that the 'duress' claim was dismissed with prejudice, the trial court's ruling that Virginia does not recognize such

a cause of action eliminated the 'duress' claim from the pending action," and thus plaintiff could not nonsuit Count VII). In sum, a judge's authority is circumscribed by the language in Virginia Code § 8.01-380(A) that a nonsuit "shall not be allowed" as to claims eliminated by dispositive rulings.

## II. The Court's Rulings on the Demurrers and the Pleas in Bar Proscribe Nonsuit of the Entire Case

In the case at bar Plaintiff requested a nonsuit after the Court had rendered its written rulings on the Demurrers and the Pleas in Bar. Some of the Court's rulings were dispositive of certain claims, and thus a nonsuit is not permitted with respect to those claims as discussed heretofore. Based on the Court's dispositive rulings on the Demurrers and Pleas in Bar, the following Counts cannot be nonsuited and thus will be dismissed with prejudice:

- Count I, Subsection A pled against any Defendants[10]
- Count I in its entirety pled against GMU[11]
- Count IV as pled against Defendants Kissal and Ly[12]
- Count V as pled against Defendant Kissal[13]
- Count VI as pled against all Defendants[14]

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[10] The Plea in Bar based on statute of limitations concerning Count I, Subsection A was granted.

[11] On demurrer, the Court found GMU is not an employer under the FAWPA and thus cannot be held liable for any alleged violations of the FAWPA. This ruling was later reaffirmed in this Court's first Letter Opinion issued on February 6, 2024.

[12] Plaintiff did not allege Defendants Kissal and Ly committed defamation but sought to hold them jointly and severally liable based on their actions in pursuit of the alleged conspiracy. As such, the Court treated Count IV as pled against Defendants Kissal and Ly and, on demurrer, sustained Count IV without leave to amend because those Defendants could not be held directly liable for defamation.

[13] Plaintiff did not allege Defendant Kissal committed IIED but sought to hold her jointly and severally liable for IIED based on her actions in pursuit of the alleged conspiracy. The Court sustained Count V as against Defendant Kissal with leave to withdraw any such contention because conspiracy to commit IIED is not permitted, and Defendant Kissal could not be held directly liable for IIED.

[14] Plaintiff did not allege Defendants Kissal, Ly, Sanavaitis, or GMU committed constructive discharge but sought to hold Defendants Kissal, Ly, and Sanavaitis jointly and severally liable based on their actions in pursuit of the alleged conspiracy and sought equitable relief from GMU pursuant to Count VII. As such, Count VII was treated as pled against Defendants Kissal, Ly, Sanavaitis, and GMU. Count VII was sustained without leave to amend because constructive discharge claims are not recognized in Virginia.

- Count VII as pled against Defendants Kissal, Ly, Sanavaitis, and GMU[15]
- Count VIII as pled against all Defendants but GMU to the extent Plaintiff claimed civil conspiracy to commit constructive discharge and civil conspiracy to commit IIED.[16]

Non-dispositive rulings as to the Demurrers and Pleas in Bar on some of the counts of Plaintiff's first Amended Complaint essentially returned those claims to further action by the parties, turning them from causes submitted for final resolution to unresolved claims. Thus, with respect to the claims to which demurrers were sustained with leave to amend, overruled, or not ruled upon, Plaintiff may take a nonsuit; with respect to the portions of Counts II, III, IV, VII, and VIII where the Court ruled an evidentiary hearing by jury is required to resolve the Pleas in Bar, those may likewise be nonsuited.

## CONCLUSION

The Court has considered whether Plaintiff may avail himself of a nonsuit of those claims for which there has been a dispositive ruling in the form of Demurrers sustained without leave to amend and the granting of a Plea in Bar. The Court finds Virginia Code § 8.01-380(A) limits a plaintiff's ability to take a nonsuit in circumstances where the Court has ruled on a dispositive motion such as a demurrer or plea in bar, even when the

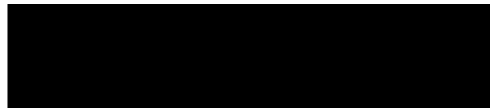
[15] Plaintiff did not allege Defendants Kissal, Ly, Sanavaitis, and GMU committed wrongful discharge but sought to hold Defendants Kissal, Ly, and Sanavaitis jointly and severally liable and sought equitable relief from Defendant GMU pursuant to Count VII. As such, Count VII was treated as plead against these Defendants. Because Defendants could not be held directly liable for wrongful discharge, the Court sustained Count VII without leave to amend. Additionally, the Court found Plaintiff cannot use Virginia Code § 2.2-3011 as the basis for a wrongful discharge claim and that Plaintiff did not sufficiently allege Defendants violated the other statutes Plaintiff cited or that Plaintiff was within the class of people those statutes meant to protect.

[16] It was unclear from the Amended Complaint what underlying tort was alleged for Count VIII. To the extent Plaintiff claimed civil conspiracy to commit constructive discharge, the Court sustained the demurrer without leave to amend because constructive discharge is not a recognized claim in Virginia. To the extent Plaintiff claimed civil conspiracy to commit IIED, the Court sustained the demurrer with leave to withdraw such contention because the Supreme Court of Virginia has ruled such a claim is not permitted.

associated claim has not been formally dismissed. In the instant case, the Court's rulings on Defendants' Demurrers and Pleas in Bar eliminated certain claims from proceeding, which same cannot be nonsuited but must instead be dismissed with prejudice.

Consequently, the Court shall enter a separate order dismissing those causes for which a dispositive ruling was made and granting Plaintiff's nonsuit as to the remaining claims, and until such time, this cause continues and is not final.

Sincerely,



David Bernhard
Judge, Fairfax Circuit Court