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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 811247

ESSIE MAE NASH

Appellant

v.

LESLIE CURTIS JEWELL

Appellee

JOINT APPENDIX

Robert C. Stackhouse
Peter W. Smith
STACKHOUSE, ROWE
& SMITH
1400 Virginia National
Bank Building
Norfolk, VA 23514

Counsel for Appellant

John S. Norris, Jr.
WILLIAMS, WORRELL,
KELLY & GREER
1700 Virginia National
Bank Building
Norfolk, VA 23514

Counsel for Appellee

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MOTION FOR JUDGMENT

To The Honorable Judges of the aforesaid Court:

The plaintiff moves the Court for judgment against the defendant on the grounds and in the amount as hereinafter set forth:

1. On December 2, 1975, plaintiff was a passenger in a motor vehicle operated by Hezekiah Nash, proceeding in an easterly direction on Lincoln Street at or near its intersection with Third Street in the City of Portsmouth, Virginia.

2. At the time and place aforesaid, the defendant was operating a motor vehicle in a northerly direction on Third Street in the City of Portsmouth, Virginia.

3. That the defendant did then and there so carelessly, recklessly, and negligently operate his motor vehicle so that same was caused to collide with the vehicle in which plaintiff was a passenger with great force and violence.

4. As a direct and proximate result thereof, plaintiff was caused to sustain serious and permanent injuries, has been prevented from transacting her business, has suffered and will continue to suffer great pain of body and mind; has sustained permanent disability, deformity and loss of earning capacity; has incurred and will incur in the future hospital, doctors' and related bills in an effort to be cured of said injuries.

WHEREFORE, Plaintiff demands judgment against the defendant in the sum of Seventy-five Thousand Dollars (\$75,000.00), and her costs in this behalf expended.

ESSIE MAE NASH

By _____
Of Counsel

Peter W. Smith
STACKHOUSE, WEINBERG & ROWE, p.q.
P. O. Box 3333
Norfolk, Virginia 23514

GROUND OF DEFENSE

The defendant, Leslie Curtis Jewell, as and for his grounds of defense to the Motion for Judgment filed herein comes and says:

1. That he admits the allegations set forth in paragraph 1 of plaintiff's Motion for Judgment.
2. That he admits the allegations set forth in paragraph 2 of plaintiff's Motion for Judgment.
3. That he denies the allegations set forth in paragraph 3 of plaintiff's Motion for Judgment and expressly denies any and all allegations of carelessness, recklessness or negligence proximately contributing to the accident and/or injuries alleged herein.
4. That he denies the allegations set forth in paragraph 4 of plaintiff's Motion for Judgment and expressly denies that plaintiff has sustained the injuries and damages alleged therein and demands strict proof of same.
5. That to the extent they are applicable, this defendant will rely on the defenses of contributory negligence and assumption of the risk.
6. That he denies that plaintiff is entitled to recover the sum of Seventy Five Thousand Dollars (\$75,000.00) or any other sum.

WHEREFORE, defendant, Leslie Curtis Jewell, moves for judgment in his favor and his costs herein incurred.

LESLIE CURTIS JEWELL

By 

Of Counsel

John Franklin, III
Williams, Worrell, Kelly & Greer
1700 Virginia National Bank Building
P. O. Box 3416
Norfolk, Virginia 23514

I hereby certify that a true copy of the foregoing
Grounds of Defense was mailed to Mr. Peter W. Smith, counsel for
plaintiff on this 10th day of April, 1978.

A handwritten signature in cursive script, likely of John Franklin, III, written over a horizontal line.

May 21, 1980

Walter M. Edmonds, Clerk
Circuit Court
City of Portsmouth
P. O. Drawer 1217
Portsmouth, Virginia 23705

Re: Essie Mae Nash v. Leslie Curtis Jewell
Docket No. 77-926

Dear Mr. Edmonds:

On behalf of the defendant, Leslie Curtis Jewell,
I ask that you take steps pursuant to Va. Code §8.01-335 A
to have the above referenced matter discontinued from the
Court's docket.

Very truly yours,

John S. Norris, Jr.

JSN:rg

bcc: Mr. E. S. Ducker
X05 396 126 A

P R A E C I P E

I certify that the above-styled case is matured for trial on its merits and request the Clerk to place it on the docket to be called on June 5, 1980 to be set for trial, WITH (X) a jury or WITHOUT () a jury.

Dated this 27th day of May, 1980.

PETER W. SMITH

Counsel for:

ESSIE MAY NASH

CERTIFICATE OF SERVICE

I certify that on the 27th day of May, 19 80, I mailed or delivered a true copy of the foregoing Praecipe to all counsel of record herein pursuant to the provisions of Rule 1:12 of the Rules of the Supreme Court of Virginia.

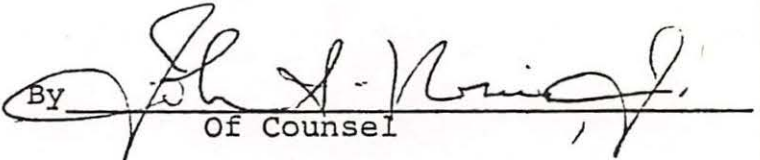
PETER W. SMITH

STACKHOUSE, ROWE & SMITH
1400 Virginia National Bank Building
P. O. Box 3333
Norfolk, Virginia 23514
(804) 623-3555

MOTION TO DISCONTINUE

Now comes the defendant, Leslie Curtis Jewell, by counsel, pursuant to Va. Code §8.01-335 A and moves the Court to discontinue this matter from the Court's docket.

LESLIE CURTIS JEWELL

By  Of Counsel


N O T I C E

Take notice that argument in support of the foregoing Motion to Discontinue will be presented to the Court on Monday, July 28, 1980 at 9:45 a.m.

John S. Norris, Jr., Esquire
Williams, Worrell, Kelly & Greer
1700 Virginia National Bank Bldg.
Post Office Box 3416
Norfolk, Virginia 23514

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Discontinue was mailed or delivered to all counsel of record this 7th day of July, 1980.



INTERROGATORIES AND
REQUEST FOR PRODUCTION

Now comes the defendant, Leslie Curtis Jewell, by counsel, pursuant to Rules 4:8 and 4:9 of the Rules of the Supreme Court of Virginia, and propounds the following Interrogatories and Request for Production to be answered by the plaintiff, under oath, within twenty-one (21) days:

1. State your name, age, present address and social security number.
2. State the names and present addresses of any individuals who were passengers with you in the vehicle which you were occupying at the time the accident in question occurred.
3. State the name of the driver of your vehicle at the time of the accident in question.
4. State where you had been prior to occupying your vehicle at the time in question. State where you were going at the time in question.
5. State whether you had consumed within a 12 hour period prior to the accident in question any alcoholic beverage, medication or drug of any type and, if so, state the nature of the substance consumed including brand names, and the times and amounts of such consumption.
6. State the particulars of any earnings or other income, the value of which you claim as damages in this action.
7. State your present occupation and the name and address of your present supervisor.

8. State your occupations during the past five years and the names and addresses of your supervisor for each of those occupations.

9. State the wages which you earned during each of the occupations listed in the preceding interrogatories.

10. Itemize any medical expenses or other special damages, in addition to those provided in the answer to the last interrogatory, which you claim in this action.

11. State any injuries for which you claim damages in this case.

12. State whether any of said injuries is claimed to be permanent, and if so, which.

13. State any physical or mental complaints which you have at the present time, and for which you claim damages in this case.

14. State the name and address of any physician who has seen, examined, treated or consulted with you within the last five years, and the dates thereof.

15. Please attach a copy or make available to counsel for defendant for copying, any medical report or record, or letter from any physician, nurse or other practitioner of the healing arts, pertaining to your or your health within the last five years.

16. State the name and address of any hospital or other medical facility in which you have been seen, examined, treated or confined within the last five years, and the dates thereof.

17. Attach a copy, or make available to counsel for defendant for copying, any record, report, writing, x-ray or other document of such hospital or medical facility as identified in the last preceding interrogatory, for the last five years.

18. State whether or not any photographs have been taken of the area or equipment involved in the alleged accident, or of the plaintiff or any other relevant subject, and if so, please attach prints to your answers to these interrogatories, stating the date such photographs were taken and the name and address of the person taking them.

19. State the name, present address and occupation of any person you intend to call as a witness at trial, specifying which of such witnesses is a factual witness and which may be an expert witness.

20. With respect to each expert whom you expect to call as a witness at trial, or who has been retained or specifically employed by you in anticipation of litigation or preparation for trial, but who is not expected to be called as a witness, give the following information:

(a) Name, address, employment and qualifications, including education, writings, memberships and experience.

(b) The subject matters about which the expert or experts expect or are expected to testify or about which the expert or experts are consulted.

(c) The substance of the facts and opinions to which the expert or experts are expected to testify or about which he or they have been consulted.

(d) A summary of the grounds for each such opinion.

21. State the name and address of any person (whether or not intended to be a witness at trial) who has any knowledge of the facts and circumstances of the alleged accident, of the area of the accident, of the damages which you allege, and any other facts set forth in the Motion for Judgment or to be relied upon by you at trial.

22. Please attach a copy of any book, document, letter or other tangible thing to be relied upon by you at trial, or to be the subject of testimony offered by you at trial.

23. State whether you have ever been convicted of a felony or a crime involving moral turpitude. If so, state the place and date of each such conviction and whether you pled guilty on any such occasion.

24. State whether you have ever suffered any prior or subsequent injuries to any of the parts of the body or bodily functions which you allege were injured or damaged by the accident in question. If so, produce any and all documentation pertaining to such injury or the treatment therefor.

25. State in detail how the accident in question occurred. Include in your answer when you first saw the defendant, the direction and speed of his vehicle at the time, the distance it was from your vehicle at the time and the nature of any actions which you took up to the time of collision.

26. State whether the defendant made any statements to you concerning the accident in question. If so, relate as accurately as you can the content of such statement. State the name and address of any individual who heard the defendant make such statement.

27. State whether there was any physical damage to the vehicle you were occupying as a result of the accident in question. If so, describe in detail the nature of such damage.

28. State whether you made any statement to the defendant or to the investigating police officer for the accident in question regarding the condition of your health immediately after the accident. If so, set forth in detail the nature of such statement.

29. State when and where you first began to notice pain or other physical discomfort as a result of this accident. Describe the nature of such pain or physical discomfort and give the name and present address of all individuals who were present at the time or who you later made a complaint to regarding such discomfort.

All requests for production shall be complied with by providing a copy of the document so requested at the offices of Williams, Worrell, Kelly & Greer, 1700 Virginia National Bank Building, Norfolk, Virginia 23514, within twenty-one (21) days from the date of the request where counsel for the defendant shall have custody of the documents so produced for purposes of inspection and copying.

LESLIE CURTIS JEWELL

BY  Of Counsel

John S. Norris, Jr., Esquire
Williams, Worrell, Kelly & Greer
1700 Virginia National Bank Building
Post Office Box 3416
Norfolk, Virginia 23514

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Interrogatories and Request for Production was mailed or delivered to all counsel of record this 7th of July, 1980.



PLAINTIFF'S ANSWERS TO
DEFENDANT'S INTERROGATORIES

Now comes the Plaintiff, ESSIE MAE NASH, and for her Answers to the Interrogatories propounded to her herein, states as follows:

1. ESSIE MAE NASH, age 53, 2020 Atlanta Avenue, Portsmouth, Virginia, Social Security Number 224-30-5326.
2. None.
3. HEZEKIAH L. NASH, 2020 Atlanta Avenue, Portsmouth, Virginia.
4. Prior to occupying the vehicle at the time in question, I was at home. At the time in question, I was accompanying my husband to pick up our daughter from work at the Norfolk Naval Shipyard.
5. None.
6. None.
7. Housewife.
8. Housewife.
9. Not applicable.
10. See copies of medical records and statements from purveyors of medical services already provided.
11. Cervical and lumbosacral spine sprains. I also claim damages for aggravation of a pre-existing condition of degenerative osteoarthritis of the cervical and lumbar spine

which condition prior to the accident was asymptomatic.

12. Unknown.

13. I continue to suffer from pain in my lower back, left hip, which pain runs down my left leg to my left foot. I suffer from extreme nervousness and have been unable to perform normal and ordinary chores or live a normal life because of the continuous pain.

14. (1) William M. Hoffler, Jr., M.D., 549 Brambleton Avenue, Norfolk, Virginia; I have seen Dr. Hofler as my family doctor for a number of years with more or less continuous visitation.

(2) David L. Durica, M.D., 3315 County Street, Portsmouth, Virginia; I began seeing Dr. Durica on December 3, 1975 and he has had me under treatment off and on ever since through this date.

(3) E. A. Barham, Jr., M.D., 640 North Street, Portsmouth, Virginia; I saw Dr. Barham during the summer of 1976.

(4) Theordore Bliss, M.D., Lafayette Towers, Suite 1-D, 4601 Mayflower Road, Norfolk, Virginia; I saw Dr. Bliss for treatment during the late spring and summer of 1979.

(5) Jose T. Delos Angeles, M.D., 3703 County Street, Portsmouth, Virginia; I saw Dr. Angeles during the spring and summer of 1978.

15. Copies of all medical reports have previously been furnished to counsel for Defendant.

16. Portsmouth General Hospital, Leckie Street and Fort Lane, Portsmouth, Virginia; December 2, 1975.

Norfolk Community Hospital, 2539 Corprew Avenue, Norfolk, Virginia; April 7, 1977 through May 9, 1977.

17. Copies of all documentation have been provided previously to counsel for Defendant.

18. My husband took photographs of the car in which I was a passenger shortly after the accident. These pictures were taken by my husband, HEZEKIAH L. NASH, who lives at 2020 Atlanta Avenue, Portsmouth, Virginia. Photocopies of these pictures are attached hereto.

19. (a) Hezekiah L. Nash (address supplied above) - factual.

(b) William M. Hoffler, Jr., M.D. (address supplied above) - expert.

(c) Jose T. Delos Angeles, M.D. (address supplied above) - expert.

(d) Theodore Bliss, M.D. (address supplied above) - expert.

(e) David L. Durica, M.D. (address supplied above) - expert.

20. (a) See answers to interrogatory 19 above; each of the witnesses which I expect to call as expert witnesses is a licensed physician practicing medicine in the tidewater area.

(b) Each of the expert witnesses shown above are expected to testify concerning the injuries sustained by me in the motor vehicle accident which is the subject of this action.

(c) See copies of medical reports already supplied;

(d) See copies of medical reports already supplied;

21. None other than those enumerated above.

22. Copies of all documentation expected to be relied upon by me at trial have already been delivered to counsel for Defendant. Should further documentation come into the hands of

Plaintiff or Plaintiff's counsel, copies of same will be provided to Defendant.

23. No.

24. No.

25. I was a passenger in a motor vehicle being driven by my husband, HEZEKIAH L. NASH, proceeding in an easterly direction on Lincoln Avenue in the City of Portsmouth, Virginia. The Defendant was proceeding in a northerly direction on Third Avenue toward Lincoln. Defendant approached the intersection of Third Avenue and Lincoln Avenue where there was a stop sign requiring that he stop before entering the intersection. The Defendant did not stop but proceeded into the intersection and struck the vehicle in which I was a passenger in the area of the right front door. I first saw the Defendant's vehicle almost immediately prior to the impact when that vehicle was some 15 to 25 feet away. That vehicle was proceeded directly at me and it was impossible for me to judge the speed of the vehicle at that time.

26. No.

27. The vehicle in which I was a passenger sustained physical damage to the windshield, right front fender and right front door (see copies of pictures of accident vehicle attached hereto).

28. No.

29. I experienced pain immediately after the impact as a result of this accident. That pain was experienced in my neck and back immediately. Later I experienced continual pain in my neck and back and soreness throughout my body. I have spoken with regard to such pain to my husband and to my doctors

whose names and addresses are supplied above.

ESSIE MAE NASH

Subscribed and sworn to before me this _____ day of
August, 1980.

NOTARY PUBLIC

My commission expires:

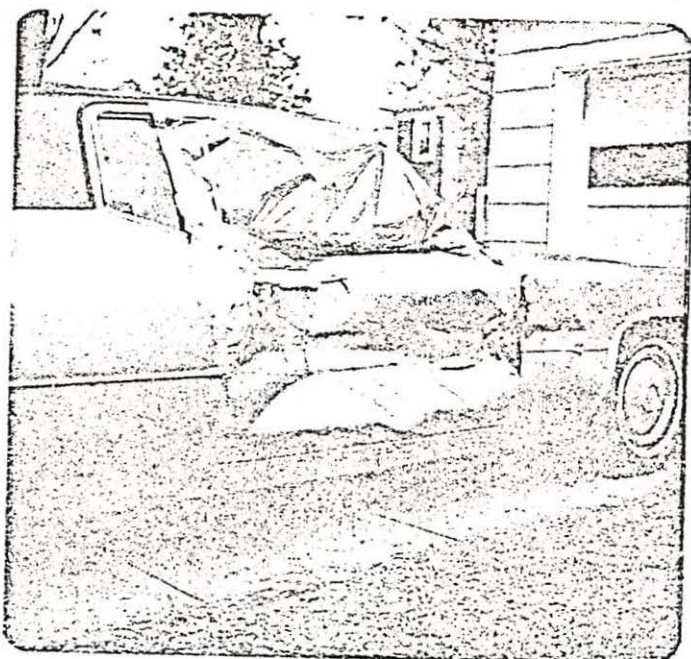
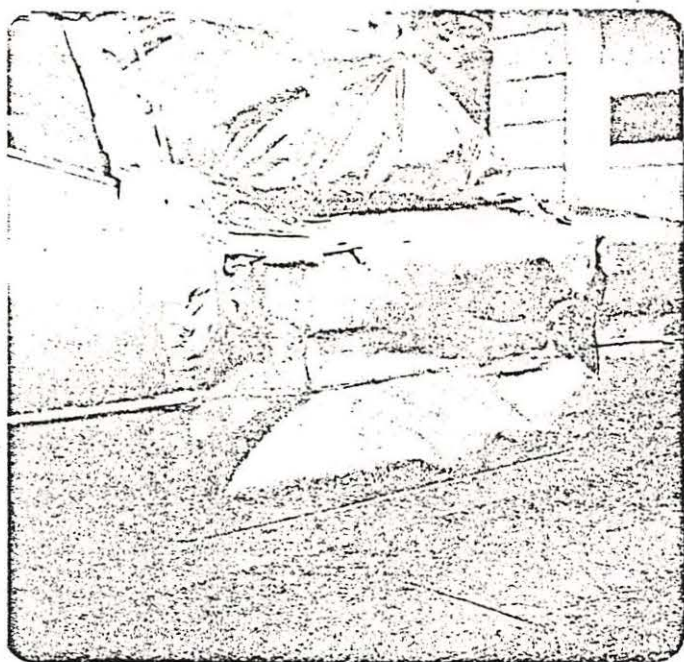
Peter W. Smith, Esquire
STACKHOUSE, ROWE & SMITH
1400 Virginia National Bank Building
Norfolk, Virginia 23510

p.q.

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing Plaintiff's
Answers to Defendant's Interrogatories was mailed to John S.
Norris, Jr., counsel for Defendant, 1700 Virginia National Bank
Building, P.O. Box 3416, Norfolk, Virginia 23514 on this _____
day of August, 1980.

PETER W. SMITH



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

-----:
)

ESSIE MAE NASH, :
Plaintiff,)

vs. : LAW NO. 77-926
)

LESLIE CURTIS JEWELL,)
Defendant. :

)
-----:

Before The Honorable Lester E. Schlitz, Judge

Portsmouth, Virginia

August 12, 1980.

-----oOo-----

APPEARANCES: Messrs. Stackhouse, Rowe & Smith
By: Mr. Peter W. Smith, appearing
on behalf of the plaintiff.

Messrs. Williams, Worrell, Kelly &
Greer

By: Mr. John S. Norris, Jr., appearing
on behalf of the defendant.

-----oOo-----

1 MR. SMITH: You heard us about two weeks
2 ago on Mr. Norris' motion to discontinue this
3 matter, on Section 8.01-335. So I suppose it's
4 up to me to proceed and I'm prepared to do so.

5 Just for the record, I told Mr. Norris
6 because of the unusual nature of this that I would
7 state for the record just what happened.

8 The matter was heard on July 28 on Mr.
9 Norris' motion to discontinue, 8.01-335. We both
10 stated our reasons why it should or should not be
11 discontinued at the close of that hearing. I,
12 as counsel for the plaintiff, indicated to the
13 Court I would be willing to take a nonsuit in the
14 matter.

15 Upon reflection and further research
16 I have come to the conclusion I was unable to do
17 so. After speaking with Mr. Norris by telephone
18 and Judge Schlitz by telephone, Judge Schlitz has
19 granted me a rehearing in the matter. From that
20 point I am ready to proceed today.

21 THE COURT: Now as you understand, no
22 order of nonsuit has been entered. He just
23 indicated that is what he was going to do, that
24 would be his right.

25 MR. NORRIS: I have a position on that.

1 I don't want - my position is this case has been non-
2 suited. Mr. Smith did not indicate any intention
3 not to nonsuit at the earlier hearing because at
4 the earlier hearing the Court indicated it was going
5 to rule and it was going to give Mr. Smith the
6 opportunity to nonsuit or suffer the Court's ruling.
7 At that point then Mr. Smith said, Your Honor, I
8 nonsuit the case.

9 THE COURT: I understand that, but it's
10 not nonsuited until I enter an order to nonsuit.

11 MR. NORRIS: I disagree and I have case
12 law.

13 THE COURT: The discontinuance of a
14 nonsuit, I have since determined for all practical
15 purposes is the same thing, at least something that
16 says that is a discontinuance.

17 MR. SMITH: I believe Your Honor is
18 referring to the case Payne versus Buena Vista
19 Extract Company, 124 Va. 296 which does indicate
20 that the effect of the discontinuance would be the
21 same as a nonsuit.

22 THE COURT: Right. I think the facts
23 have been thoroughly stated here. Counsel did
24 indicate that he would take a nonsuit, but you say
25 you have case law that is saying that makes it

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mandatory, that I have to allow it without benefit of an order.

MR. NORRIS: The two cases, one Berryman versus Moody, 205 Va. 516 and an earlier case just recently decided by the Supreme Court, Newton versus Veney. I have it reported from New Reporter Series.

THE COURT: I will look at this.

MR. NORRIS: Both of these cases, Your Honor, where at the end of plaintiff's evidence the defendant's counsel made a motion to strike. In both of these cases the Court started talking about the evidence --

THE COURT: Like Courts frequently do.

MR. NORRIS: -- in a negative manner, indicating at least the plaintiff, not the Court, was going to strike the evidence. In both of these cases counsel for the plaintiff then said, Your Honor, I nonsuit in both of these cases. The Trial Court decided that it was too late to nonsuit and the Court struck the evidence on appeal in both cases. The Virginia Supreme Court said nonsuit is an absolute right, it's a matter of right that counsel for the plaintiff can take at any time before the Court actually rules.

1 THE COURT: I agree with that one
2 hundred percent, but the difference, the only thing
3 I want to say in regard to that is suppose a person
4 wants to take a nonsuit, indicates he wants to take
5 a nonsuit, now he has a right to do it and the
6 Court can't deny him that right. He has an absolute
7 right to take a nonsuit and the Court can't deny it.

8 I'm familiar with this case, but the
9 question is that when does a nonsuit become effective?
10 Does it become effective when he says I want to take
11 a nonsuit or does it become effective - okay, I
12 sustain the motion to take a nonsuit. That is the
13 issue that is here.

14 MR. SMITH: If I might interject, even
15 beyond that lies another issue, is that there is a
16 law - I do not have a citation, but in my research
17 in preparation for this hearing I did find law to
18 the effect that counsel upon a proper motion can
19 retract that nonsuit and ask for a rehearing of the
20 matter which is precisely what I have done.

21 THE COURT: If we could find that law
22 it would be most helpful, the case that says you can
23 retract it. It would certainly remove this issue.

24 MR. NORRIS: I have a case, Wickham versus
25 Green, 111 Va. 199, 1910 case and it was dealing

6
1 there with - I'm not sure I understand the whole
2 procedure correctly. Apparently after filing suit
3 the plaintiff had to file something by the next rule
4 day, I think called declaration, and upon failure
5 to do so the case could be dismissed. In this case
6 apparently the plaintiff failed to do so but somehow
7 he was allowed an extension of time. And the Court
8 in ruling on that analogized the situation to the
9 nonsuit. And if I could just read from where the
10 Court said:

11 "These dismissals by the Clerk
12 partake of the nature of nonsuits, and
13 the prevailing rule is that motions to
14 set aside a nonsuit, or to reinstate a
15 suit after dismissal, are addressed to the
16 judicial discretion of the Court."

17
18 But let me continue, and I'm going to skip
19 a sentence here that goes to a Statute about
20 declaration. The Court says:

21 "It is not to be reinstated merely
22 upon showing that the plaintiff would
23 suffer inconvenience or loss by reason of
24 its dismissal, as that would as effectually
25 repeal the Statute as though its enforcemen

1 were left entirely to the arbitrary
2 discretion of the Court. In brief, the
3 plaintiff, on moving to reinstate his
4 suit, should be required to show good
5 cause for his motion.....

6 "It is always to be regretted when a
7 case has to be disposed of on other grounds
8 than those that go to the very right and
9 merits of the cause. The Court cannot,
10 however, permit considerations of hardship
11 in particular cases to cause them to
12 disregard and set at naught the plain
13 provisions of a positive Statute."

14 I think the situation here is if in
15 effect the Court let's this paragraph saying I
16 nonsuit to prevent an adverse ruling of the Court
17 and then go home and reflect on it more and come
18 back and change its mind it is going contrary to
19 the converse of that, what these cases set up. He
20 can't have his cake and eat it, too.

21 THE COURT: Let me tell you - equity is
22 equity, all of this was done without a reporter
23 being present and I think what has been stated is a
24 fair representation of the hearing. We had no
25

1 reporter present, I think counsel has been quite
2 honest, but to make the record totally complete
3 we discussed the fact here among counsel that he
4 could take a nonsuit and that under the six months'
5 rule of the Statute that he could rebring his suit,
6 he could rebring his suit within six months. The
7 Court discussed this with counsel.

8 Now after counsel indicated under the
9 circumstances, since I was inclined to dismiss the
10 suit otherwise, which all I could do is continue, I
11 couldn't dismiss, I could discontinue, which
12 apparently is the same thing like a nonsuit. Counsel
13 went back and reflected on it and then became
14 somewhat disturbed.

15 I understand the fact that there is
16 presently before the Supreme Court a question of
17 whether or not, because there is a change in law on
18 the nonsuit, whether, in fact, he would be able to
19 bring his case back within six months, because this
20 case arose before that six months' provision was
21 placed in the law. And therefore it became a
22 question of whether or not he could rebring his suit.
23 Now the Court was trying to expedite this matter
24 and saying it's been a long time, you don't move
25 forward, I'm going to, in effect, discontinue, but

1 if you want to bring it back, if you feel so
2 advised, you can have the time to do it. It now
3 appears from what I have been told by counsel that
4 this matter is presently pending before the Supreme
5 Court.

6 MR. SMITH: I can give you the citation.

7 THE COURT: The Court in all equity would
8 not feel that it's the right thing to do to deprive
9 this plaintiff of its right because of some action
10 the Court has taken which indicated to counsel that
11 a nonsuit - that if he took a nonsuit he could still
12 bring his suit. I don't think that is fair. It
13 may be fair or not fair under the law, it's done,
14 and that is it. I don't think that is the case.

15 What I am going to do, if I'm going to
16 continue this entire matter until the Supreme Court
17 rules on those cases. I'm just going to let the
18 thing - it's been sitting here this long, it can
19 sit a little longer until the Supreme Court rules
20 on this case. It may be that they'll rule the
21 nonsuit is a procedural matter and the nonsuit
22 applies to old cases. Many people think that is so.
23 Many people believe that is so, but it's no need
24 for me to make a ruling that could only take us to
25 the Supreme Court on the very point that the Supreme

1 Court is now deciding.

2 So what I'm going to do is I'm going to
3 continue this matter until such time as the Supreme
4 Court rules on it. I would expect counsel to bring
5 it back to my attention because I won't be watching
6 this thing, you understand, waiting for it to come up.
7 I can't set up a particular date, so I would
8 expect counsel to motion this matter to be reheard.

9 MR. SMITH: If we could agree on the case
10 that is involved, there is a case pending, the
11 writ was granted in August of 1979, the case is
12 Fidelity and Deposit, Maryland versus Celotex
13 Corporation.

14 THE COURT: If the writ was granted in
15 '79 it ought to be coming down before too long.

16 MR. SMITH: I called the Clerk of the
17 Supreme Court and the Clerk advised me it was pending
18 on the open docket, had not been docketed for
19 argument.

20 THE COURT: As I say, the case has been
21 sitting here two years and really for no reason
22 that is apparent to me why it sat so long, but it's
23 been there that long and I'm going to let it sit for
24 a longer time until such time as the Supreme Court
25 rules on this matter. And I'm going to say to you

1 that I feel certainly you made a good argument as
2 to why I shouldn't do it, but I feel there are
3 certain equities involved that people shouldn't
4 lose their cases because of what the Judge does, so
5 therefore I'm going to take this matter under
6 advisement until such time as the Supreme Court
7 rules on it.

8 MR. NORRIS: We have this case set for
9 trial.

10 THE COURT: Will you all enter an order
11 continuing it on the Court's motion?

12 MR. NORRIS: Thank you, Your Honor.

13 MR. SMITH: Thank you, Your Honor.

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16 -----oOo-----
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C E R T I F I C A T E

COMMONWEALTH OF VIRGINIA:

CITY OF PORTSMOUTH, to-wit:

I, Audrey Johnson Grizzle a Court
Reporter, certify that the foregoing is a correct transcript
of the testimony adduced and proceedings had in the case of
ESSIE MAE NASH versus LESLIE CURTIS JEWELL, tried in said
Court on August 12, 1980.

I further certify that I am not a relative
or employee or attorney or counsel of any of the parties,
or a relative or employee of such attorney or counsel, or
financially interested in the action.

Given under my hand this 13th day of
April, 1981.


Court Reporter

CSR NO. 2492, RPR

|| ON THE 1ST DAY OF SEPTEMBER, 1980.

ORDER

This day came the parties, by counsel, on Plaintiff's motion to rehear the Defendant's motion to discontinue this action pursuant to Virginia Code § 8.01-335 A, and, also, on Plaintiff's motion to withdraw her oral nonsuit of this action which was taken by her on July 28, 1980, prior to a ruling by this Court on that day on the Defendant's motion to discontinue aforesaid, and the matters were argued by counsel.

UPON CONSIDERATION WHEREOF, and it appearing to the Court that it is proper to do so in this action, and upon motion of the Court, it is

ADJUDGED and ORDERED that the Plaintiff's motion to withdraw her July 28, 1980 oral nonsuit is granted, over the objection of the Defendant, and further that the hearing on Plaintiff's motion for a rehearing of Defendant's motion to discontinue this matter be and same is hereby continued pending the decision by the Supreme Court of Virginia in the case of Fidelity & Deposit Company of Maryland v. Celetex Corp., which action is now pending in the Supreme Court of Virginia, Docket No. 790082. Following the decision of the Supreme Court of Virginia in said case, this Court will hear further argument on Plaintiff's motion to rehear Defendant's motion for a discontinuance.

It is further ADJUDGED and ORDERED that the trial in this action previously scheduled for August 21, 1981 be and the same is hereby continued generally.

Enter this day of , 1980.

Judge

I ask for this:

12/2/81 p.q.

Seen and objected to:

John M. Herring p.d.

1 COPY, TESTE: WALTER M. EDWARDS, CLERK OF THE CIRCUIT
COURT OF THE CITY OF PORTSMOUTH, VIRGINIA

BY Leland R. McLean . D. C.

MOTION TO DISMISS

Now comes the defendant, Leslie Curtis Jewell, by counsel, and moves the Court to dismiss this action based on the voluntary nonsuit requested by the plaintiff herein and/or to discontinue this case in accordance with Virginia Code §8.01-335A.

LESLIE CURTIS JEWELL

By John S. Norris, Jr.
Of Counsel

N O T I C E

Take notice that argument in support of the foregoing motion will be made before a Judge of the Circuit Court of the City of Portsmouth on Thursday, April 9, 1981 at 9:00 a.m. or as soon thereafter as counsel may be heard.

John S. Norris, Jr. Esquire
WILLIAMS, WORRELL, KELLY & GREER
1700 Virginia National Bank Bldg.
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss was mailed or delivered to all counsel of record this 5th day of March, 1981.

John S. Norris, Jr.

1 VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

2 -----:
3)
4 ESSIE MAE NASH, :
5 Plaintiff,)
6 :
7 vs. : LAW NO. 77-926
8 :
9 LESLIE CURTIS JEWELL,)
10 Defendant. :
11 -----:
12)

13 Before The Honorable Lester E. Schlitz, Judge

14 Portsmouth, Virginia

15 April 9, 1981.

16 -----oOo-----

17 APPEARANCES: Messrs. Stackhouse, Rowe & Smith
18 By: Mr. Peter W. Smith, appearing
19 on behalf of the plaintiff.

20 Messrs. Williams, Worrell, Kelly &
21 Greer

22 By: Mr. John S. Norris, Jr., appearing
23 on behalf of the defendant.

24 -----oOo-----

1 MR. SMITH: And the Court really said to
2 me, I understand you have a six months' period in
3 which to bring this suit and why don't you just take
4 a nonsuit, basically put me on terms, you either
5 nonsuit or I will dismiss, with the feeling and
6 thought that perhaps this matter - that the new
7 Statute would cover the situation that we're in.

8 In terms of time, as soon as I got back to
9 the office and was able to take a quick look at the
10 Statute I called Your Honor, I think you recall,
11 after talking to Mr. Norris, advising you that I
12 would do so. And it was my understanding in my
13 conversation with Your Honor that you would allow
14 me to withdraw.

15 THE COURT: The issue here is can I.
16 That's the issue.

17 MR. SMITH: Your Honor, it seems to me
18 that we are basically talking about the same thing.

19 THE COURT: If the Statute of Limitations
20 has run --

21 MR. SMITH: A reinstatement of the existing
22 action is not the same as filing a new one. A
23 reinstatement can be filed after a nonsuit. It's a
24 continuation of the same suit. It's basically the
25 same thing as if you had discontinued this action

1 under the two-year rule.

2 THE COURT: Suppose you came in and made
3 a legitimate nonsuit and suppose the Statute of
4 Limitations run and you wanted to bring that suit
5 again. Is it that you could come to me and say I
6 want to reinstate?

7 MR. SMITH: I think a motion to reinstate
8 would lie.

9 THE COURT: Not in my judgment. If the
10 Statute of Limitations run - if the Statute of
11 Limitations run, here is what I got before me.

12 In September I entered an order which I
13 believe has now been standing since September in
14 which I allowed the motion to withdraw the oral
15 nonsuit. Whether that was right or wrong, I allowed
16 it. And then I continued this matter on the motion
17 - the only thing seems to me left here is the
18 defendant's motion for a discontinuance. Whether I
19 was right or wrong, the nonsuit was withdrawn and
20 counsel may be right, that this was the wrong thing
21 for me to do. Nonetheless that was done, as there
22 is an order allowing that of record.

23 The only thing now that it seems to me
24 to be before me, that there is a case that's been
25 sitting on the docket for three years in which

nothing was done, nothing was done for almost three years and then there was a motion for a discontinuance which in my judgment is the same thing as a nonsuit if I grant it. It doesn't stop the plaintiff from coming back and refileing his suit if he is within the Statute of Limitations, you understand - if he is within the Statute of Limitations. I think that's correct. Now the problem is that the law says that people have to go forward with this suit. You can't just sue people and leave it sitting on the books forever. The Courts say if you don't move or do something within a reasonable time then maybe you ought to be dismissed from the docket because you haven't acted on your cause. And the legislature has said that is discretionary with the Court, that after two years - if you sit there for two years and no order is entered in the two-year period - no order is entered into the two-year period, the Court in its discretion has the right to discontinue the cause for failure to prosecute.

You gentlemen disagree with that as far as the basic law on this continuance is concerned.

MR. SMITH: No, sir --

THE COURT: That is the way this thing originally came to me. And as I recall, and we didn't

1 have a reporter there - if I'm wrong in what I say
2 you correct me. As I recall we had a discussion,
3 I was somewhat inclined to discontinue this case
4 and I did say this, that I am about to discontinue
5 this thing. If you want to take a nonsuit that is
6 your privilege. And I think based on that you asked
7 for a nonsuit. Then we left here and then you called
8 back and having considered the fact that you might
9 be barred under the Statute of Limitations, I
10 believe I mentioned to you that I didn't know -
11 I may be incorrect, but I believe there was some
12 discussion. We didn't know because of this case
13 that was pending before the Supreme Court.

14 MR. SMITH: If I might interject, I
15 believe the discussion came up at the second hearing,
16 not the first.

17 THE COURT: Anyway there was some question
18 about whether or not the Supreme Court was going to
19 decide that case that was brought before the new law
20 went into effect on nonsuits, whether or not that
21 law applied to those cases. And so then you called
22 me and said that you had reflected on it and you
23 were afraid that you might be barred by the Statute
24 ultimately and therefore you wanted to withdraw your
25 motion for a nonsuit and I allowed you to do so over

1 objection of the defendant. I allowed you to do
2 so over objection of the defendant and then I
3 continued this matter as far as the matter of
4 discontinuance was concerned to determine at that
5 time - because nothing had changed. I still felt
6 like there had been some lack of diligence on the
7 part of the plaintiff in pursuing his case. And I
8 said, well, whether you can take a nonsuit or not -
9 I didn't want to put the attorneys in the position
10 of maybe a malpractice situation by taking a nonsuit
11 when the Statute of Limitations had run. But I
12 said I would continue this matter pending the
13 decision of the Fidelity Deposit versus Celotex.
14 That is exactly what happened. And we now know if
15 this case is nonsuited you will be barred by the
16 Statute. That is my reading of the Statute. But
17 that puts us back to square one and square one is
18 why should I allow this case to go on when the
19 plaintiff has sat still for almost three years
20 without doing anything to prosecute his case.

21 MR. SMITH: If I may speak to that, the
22 suit was filed in this matter on December 1st, 1977,
23 which was within the Statute of Limitations. Service
24 was tried on the defendant in the City of Portsmouth
25 and service was failed, returned not found. Service

1 was then made through the DMV with the service
2 returned indicating service had been received by the
3 DMV and they had made an effort to serve the
4 defendant in Arapahoe, North Carolina, where I am
5 unable to. So that information was passed on to me
6 by Mr., I believe John Franklin, who was then
7 representing the defendant in the Williams office.

8 THE COURT: That was March, '78.

9 MR. SMITH: That's correct, April 10,
10 '78.

11 The defense in this matter was filed by
12 the defendant within the proper time frame. Now
13 praecipe was filed in this matter by me requesting
14 that the matter be set for trial on April 10. The
15 praecipe was issued from my office, May 27, 1980,
16 requesting that the matter be set for docket - trial
17 on June 5th, 1980. And the case was called and set
18 for trial on August 21st, 1980. Then after all this
19 had happened the defendant filed his motion to
20 discontinue.

21 THE COURT: Then over two years without a
22 single order or anything reflected in this file.

23 MR. SMITH: That's correct.

24 THE COURT: Over two years went by and the
25 next thing that came was a motion to discontinue the

1 case.

2 MR. SMITH: No, the first thing - the
3 next thing that came after the two years was my
4 praecipe.

5 THE COURT: Praecipe you said was filed
6 in August of '78.

7 MR. SMITH: May of '78.

8 THE COURT: Then no other order of this
9 court until I enter the order on September 1st, 1980.

10 MR. SMITH: Motion for discontinuance was
11 filed by the defendant on July 7, 1980, which was
12 three months after the praecipe.

13 THE COURT: What was the section?

14 MR. NORRIS: 8.01-335.

15 THE COURT: No order for over two years.

16 MR. NORRIS: 8.01-335A.

17 MR. SMITH: The first action taken was
18 my filing of the praecipe, not the order for
19 discontinuance. That is the point I was trying to
20 make.

21 THE COURT: Let's get down to what the
22 basic law says.

23 "Any court in which is pending an
24 action, wherein for more than two years
25 there has been no order or proceeding

1 except to continue it, may, in its
2 discretion" --

3
4 MR. SMITH: I have no problem with the
5 fact that the case falls within the factual
6 limitations of the Statute. It was more than two
7 years in which there was no order entered.

8 THE COURT: You see a notice - a praecipe,
9 that's just an action by you that has no action by
10 the Court whatsoever, no proceeding by the Court.

11 MR. SMITH: The case was called at docket
12 call on June 5th, 1980 and set for trial. All of
13 this --

14 MR. NORRIS: Prior to the praecipe, the
15 court file should reflect on May 22 I wrote a letter
16 to the Court that the clerk should, pursuant to 335A,
17 to discontinue the cause. This was six days after I
18 wrote that letter that the praecipe was filed.

19 MR. SMITH: I believe you'll admit no
20 copy of that letter was sent to my office. I had no
21 notice that the defendant had taken any action to
22 have this matter dismissed. And the fact that my
23 praecipe was filed six days --

24 THE COURT: Praecipe was filed on May 27,
25 1980.

1 MR. SMITH: That's correct.

2 THE COURT: And motion to discontinue was
3 filed on July 7, 1980. But between the time - but
4 no order or proceeding of this court has taken place
5 for a period of two years, no question about that.

6 MR. SMITH: That's correct.

7 THE COURT: Now the Statute says it shall
8 - it may, in its discretion, and it shall be
9 discontinued. In other words that is discretion,
10 discretion upon the Court.

11 Now we're back to what I originally believe
12 when I continued the case, I wanted to get into the
13 equities about why a person - first of all why a
14 defendant who has been proceeded against by service
15 on the Division of Motor Vehicles, certainly no
16 reason for delay that I know of, why a case within a
17 two-year period couldn't have been proceeded against
18 and gone forward with. I would like to hear your
19 reasons for why that wasn't done.

20 MR. SMITH: I will explain. The case
21 involves a lady who in the accident suffered a
22 cervical spine injury. That injury, according to
23 the doctors reports, has aggravated what appears
24 to be a preexisting arthritic condition.

25 THE COURT: Excuse me, one thing - service

1 was effected in this case in March of 1978.

2 MR. SMITH: That's correct.

3 THE COURT: There wasn't another thing
4 done with the record in this court at all until
5 May of 1980 when the praecipe was filed.

6 MR. NORRIS: Other than the grounds of
7 defense.

8 THE COURT: The Answers that were filed
9 in the case. But as far as action by this court or
10 anything at all, the next real thing that came along,
11 you might say of any substance in this file, was
12 over two years later.

13 MR. SMITH: That's correct.

14 THE COURT: Now I'm sorry to interrupt you,
15 but I thought the record --

16 MR. SMITH: That's all right, I'm
17 perfectly willing to go under oath on the record if
18 the Court wants me to do so on my view of this case.

19 The reason I took the action is I took --

20 THE COURT: I don't think you can be a
21 witness in a case, I don't think the law permits you
22 to be counsel and witness, too.

23 MR. SMITH: That's right, but you asked me
24 why we did what we did.

25 The plaintiff, as I said, suffered a

1 cervical spine injury as a result of the automobile
2 accident and according to the reports of the doctors
3 that injury apparently aggravated a preexisting
4 arthritic condition. The reports of the doctors
5 were such that there was a continuing problem there.
6 My client continued to experience severe pain from
7 time to time, in fact, almost virtually continuous.
8 I had received in 1977 shortly before the suit was
9 filed a letter from my client's physician, Dr.
10 Durica, which appeared to me to be a final report
11 and I, at that time, began settlement negotiations
12 with the adjuster involved, in which settlement
13 negotiations had to be terminated because my client
14 came in and said she was experiencing continuing
15 pain and difficulties and had to go back to the
16 doctor. The Answers to Interrogatories, which should
17 be in the file, will show a continuing of medical
18 visits throughout this period, right on through the
19 spring of 1980. In fact they are still continuing
20 although on a less frequent basis.

21 The reports that I have been receiving from
22 the doctors, and I talked with Dr. Durica personally
23 and Dr. Hoffer, Mrs. Nash's personal physician,
24 who referred her to Dr. Durica, the specialist, and
25 they were unable to be conclusive with me, what

1 relationship the existing pain bore to the injury
2 and where it cut off and where the arthritis took
3 over and where aggravation was. And with a client
4 who is continuing to experience pain, reports
5 serious pain and continue to seek medical treatment,
6 I felt that the matter was really immature and not
7 ready for trial.

8 The reason I went forward in May, keep
9 in mind, that I had - nothing was being done by the
10 defendant in the sense that nothing was being done
11 to push me to trial. So I felt in the best interest
12 of my client - it was a judgment call on my part,
13 Your Honor, and I was well aware of the Statute
14 when I did it. I must say in my experience at the
15 bar I have never run into a decision or heard of a
16 decision where a Judge discontinued a case where
17 the plaintiffs came in and said it was actively
18 ready to pursue it. That colored my thinking. I
19 thought about it and my judgment was that I could
20 not reasonably go to trial until my client's
21 medical situation cleared up or at least at a point
22 where a doctor was able to tell me it's cleared up
23 to the best it's going to be cleared up or I'm
24 certain we're now out of the injury phase and we're
25 dealing strictly with symptoms of arthritis. It wa

1 that kind of a problem and very difficult for me
2 to handle as an attorney.

3 My judgment was that I should delay. I
4 talked with Dr. Durica in April or May of 1980 and
5 he, at that time, told me that he felt my client may
6 be suffering as much from the problems involved with
7 a pending lawsuit and worrying about it as she was
8 this. And if I ever get the case to trial, he
9 indicated to me that he felt that the emotional upset
10 of the pending litigation - and there was other
11 litigation involving the same plaintiff at the same
12 time - may be as bad as the injury and the arthritis
13 itself. And he felt it would be in her best
14 interest to get the matter tried as quickly as
15 possible.

16 At that point I discussed the matter with
17 my client and we decided to go ahead and go to trial,
18 although I still felt medically, and as far as the
19 specialists were concerned, the case was not ready
20 to try. That is why I waited until May of 1980.

21 If my judgment is incorrect I suppose
22 it's my problem, not Mrs. Nash's. I feel it would
23 be very unfair for her to suffer loss of her claim
24 totally.

25 THE COURT: You said you never heard of a

1 Judge discontinuing. What do you think the Statutes
2 are here for if Judges don't do it?

3 MR. SMITH: You want what I feel? I feel
4 the Statutes are to spur plaintiffs to promptly
5 litigate their cases. I don't think it's there to
6 bar plaintiffs from proceeding with their actions
7 if there is a reasonable reason why they have not
8 proceeded and if there is no horrible prejudice to
9 the defendant. On that line the Court said, when
10 we heard that, he said why allow these cases to sit
11 on my docket to the prejudice of the defendant.
12 Mr. Norris indicated when he was here the first day,
13 the only recollection I have of any prejudice to
14 the defendant, he indicated at that time that he
15 was unable to find the defendant. He seemed to
16 intimate that was as a result of my delay.

17 I think he told me since that he never
18 has known where the defendant was and the file will
19 reflect that no one knows where he was at the time.
20 And since that time Mr. Norris has indicated to me
21 that he has found the defendant.

22 MR. NORRIS: I have several responses. I
23 don't know where the defendant is today.

24 THE COURT: I think you made your position
25 pretty clear. What is your position? Why do you

1 feel - I'm concerned about one phase of it, why you
2 didn't make your motion to discontinue until after
3 the case was set down for trial.

4 Now it seem to me that here is a man,
5 if he hadn't gone forward as fast as he thought it
6 ought to was not now going forward with his case and
7 then you woke up and said it's been over two years,
8 I want to discontinue.

9 MR. NORRIS: That is not the case. If
10 the Court will look again at the file, I wrote a
11 letter to the clerk prior to the filing of the
12 praecipe, six days prior to the filing of the praecipe
13 asking the clerk to set in motion a discontinuance.
14 Then I received a praecipe. I went to the docket
15 call and objected at docket call to the setting of
16 the case for trial on the grounds that I had written
17 the clerk and requested that the matter be
18 discontinued under the two-year rule, that the notice
19 be sent out. The Court set it down for trial over
20 my objection. After it was set for trial then the
21 clerk sent out the notices for discontinuance and we
22 came here formally on a motion to discontinue.

23 THE COURT: Why are you any worse off
24 today than you were three years ago? If you didn't
25 know where the defendant was three years ago and don't

1 know today, why are you worse off?

2 MR. NORRIS: First of all this case was
3 filed one day before the running of the Statute of
4 Limitations. We are talking about something that
5 happened five-and-one-half years ago. The accident
6 happened in December, 1975 and one day before the
7 Statute ran out the suit was filed.

8 Now after we filed the grounds of defense,
9 Mr. Smith has explained that his reason for delaying
10 was the uncertainty of the medical posture of the
11 case. On May 6 of 1978 I wrote to Mr. Smithh, I
12 told him I wanted to discuss the case with him to
13 see if there was any possibility of settlement.
14 There was never a written or telephonic response.
15 I wrote again on August 23, 1978 and said please,
16 may I have a response to my May letter. I want to
17 discuss the case. Never any response whatsoever.

18 I waited for the two years to run, I wrote
19 the clerk and asked for the discontinuance to take
20 place. The medical records I have - and I may be
21 wrong, and Mr. Smith I'm sure will correct me if I
22 am - jump from a doctor's report in July, '77 to a
23 doctor's report dated August 1, 1980. If there was
24 ongoing medical treatment --

25 MR. SMITH: What are the contents of the

1 report? What do they indicate regarding continuing
2 visits?

3 MR. NORRIS: I don't see any office visits
4 between - I see an office visit on August 23, 1977
5 and the next office visit I see on this bill is
6 March 12, 1980.

7 Judge, to finish up, I think I'm being
8 prejudiced in this case. That is, I do not know
9 where my defendant now is, I am not trying to
10 represent to the Court that I can find him. We are
11 talking about something that happened five-and-a-half
12 years ago. No effort on the part of this plaintiff
13 through her attorney to respond to any of our efforts
14 to negotiate this case back in 1978 and I think the
15 court will be well within its discretion to tell this
16 plaintiff you have just delayed too long.

17 MR. SMITH: If Your Honor please, if I may
18 respond to one thing. John, is it not true that you
19 told me in the elevator in the building some time in
20 the late fall of 1980 that you had found the
21 defendant, you now knew where he was?

22 MR. NORRIS: I have talked to this
23 defendant before, I do not know where he is. I am
24 not here to give testimony, not to be examined.
25 I am representing to the Court that I, at one time,

1 spoke to the defendant. I have not now spoken to
2 him.

3 MR. SMITH: You did indicate that you had
4 not spoken to him prior to this hearing taking place
5 last September or August, and since that time you
6 have talked to him.

7 MR. NORRIS: If the Court wants me to
8 answer some questions I will be happy to.

9 THE COURT: My problem - I have several
10 problems. I don't know whether the Court - Number
11 One, the Court may have already committed error in
12 allowing you to withdraw the nonsuit, I don't know.
13 If that was in error you understand then everything
14 we're talking about now is a nullity. That's
15 Number One.

16 Number Two, I still have to consider the
17 equities here of somebody who waits a long time
18 without going forward in a cause of action. I am
19 looking in the nonsuit section of the code and there
20 is a case I would like to look at, Mallory versus
21 Taylor, which says that a nonsuit is not a final
22 judgment and which may mean that I could allow a
23 withdrawal of it, I don't know.

24 MR. SMITH: Michie's Jurisprudence is
25 replete with West Virginia cases that it is within the

1 sound discretion of the Court.

2 THE COURT: In other words you're requesting
3 a voluntary nonsuit I believe is a matter of right.
4 I don't believe a Court can stop a person from taking
5 a voluntary nonsuit if a person wants to take one.
6 If he says he wants to take a nonsuit, whether there
7 is an order necessary after that allowing that
8 nonsuiting - certainly I don't think the Court can
9 stop you from taking a nonsuit if you want to take
10 one.

11 The question, can the Court allow you to
12 withdraw a nonsuit which I have done under the
13 peculiar circumstances involved here. To be frank
14 with you, for whatever criticism might be drawn at
15 the Court, the Court was making an effort to protect
16 counsel from whatever might be a malpractice suit.
17 That was the only reason for the Court doing so, you
18 understand.

19 MR. SMITH: I understand that perfectly
20 and I appreciate it.

21 THE COURT: But that doesn't give me the
22 right to do it if you don't have the right. You
23 understand what I mean.

24 Now we've got a situation of equity here
25 that is very difficult in the equities involved here

1 A suit that is five years old is difficult to defend,
2 witnesses disappear, police officers disappear. It
3 gets to be very difficult to defend. And the fact
4 that the suit was brought the last day of the Statute
5 of Limitations in my judgment doesn't - in my
6 judgment that is the right of the plaintiff to bring
7 his suit. He has a right to do it.

8 Here we have an accident that took place
9 December 2nd, 1975 and five years went by without -
10 five years without any real movement in the case as
11 far as bringing it to trial. And it's true,
12 sometimes cases - it take a long time for a person
13 to get his damages together, but it seems to me that
14 people that have to defend this suit, certainly their
15 job has been made very difficult for them through
16 no fault of their own.

17 MR. SMITH: If Your Honor please, if I
18 might respond, there is nothing in the code or the
19 procedure that would prevent the defendant if he is
20 in a position - that would prevent the defendant if
21 he feels his case is in jeopardy because the witness
22 is about to be lost, there is nothing, absolutely
23 nothing to keep the defendant from setting the case
24 for trial himself. Nothing that requires the
25 plaintiff to set the case, nothing to prevent the

1 defendant from setting the case.

2 THE COURT: Why should a person when it
3 appears that there is not going to be any prosecution
4 of the claim against him, and it appears that all he
5 has to do is patiently await his time, why should he
6 precipitate the matter?

7 MR. SMITH: If he is concerned about
8 losing witnesses that could be the reason.

9 THE COURT: I am of the opinion that the
10 plaintiff slept on his rights for too long in this
11 case and I'm going to grant the discontinuance and
12 draw up the order.

13 MR. SMITH: Does Your Honor understand
14 that by doing this Mrs. Nash is out of court?

15 THE COURT: I understand, but Mrs. Nash
16 waited a long time.

17 MR. SMITH: If the Court is of the opinion
18 that the fault belongs to me --

19 THE COURT: I don't know whose fault it is.
20 I understand you say there were some other attorneys
21 involved.

22 MR. SMITH: No.

23 THE COURT: I feel there's been a long
24 period of time that has elapsed and I'm going to
25 grant the discontinuance.

1 MR. SMITH: Please make note of my
2 objections and exceptions.
3

4 -----oOo-----

5
6 C E R T I F I C A T E
7

8 COMMONWEALTH OF VIRGINIA

9 CITY OF PORTSMOUTH, to-wit:
10

11 I, Audrey Johnson Grizzle, a Court
12 Reporter, certify that the foregoing is a correct transcript
13 of the testimony adduced and proceedings had in the case of
14 ESSIE MAE NASH versus LESLIE CURTIS JEWELL, tried in said
15 Court on April 9, 1981.

16 I further certify that I am not a relative
17 or employee or attorney or counsel of any of the parties,
18 or a relative or employee of such attorney or counsel, or
19 financially interested in the action.

20 Given under my hand this 13th day of
21 April, 1981.

22 
23 Court Reporter

24 CSR NO. 2492, RPR
25

M O T I O N

Now comes the Plaintiff, by counsel, and moves the Court for a rehearing on its Motion to Reinstate the above cause, discontinued pursuant to Virginia Code Section 8.01-335, and for reinstatement of this cause.

ESSIE MAE TWITTY NASH

By 

Of Counsel

NOTICE

TO: Curtis Leslie Jewel
c/o John S. Norris, Jr., Esq.
Williams, Worrell, Kelly & Greer
1700 Virginia National Bank Bldg
P O Box 3416
Norfolk, Va. 23514

PLEASE TAKE NOTICE that on Tuesday, April 28, 1981 at 9:15 a.m., before the Honorable Lester E. Schlitz, Circuit Court of the City of Portsmouth, Portsmouth, Virginia, I will bring the above motion on for hearing and argument.

ESSIE MAE NASH

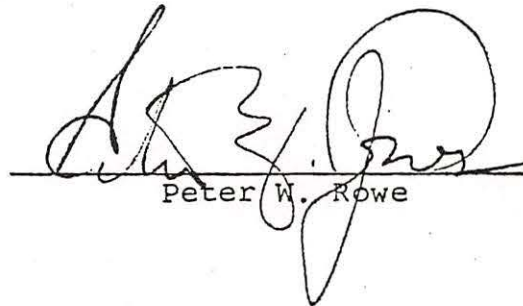
By 

Of Counsel

Peter W. Rowe, Esq.
Peter W. Smith, IV, Esq.
STACKHOUSE, ROWE & SMITH
1400 Va. National Bank Bldg
P O Box 3570
Norfolk, Va. 23514

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Motion and Notice was mailed to John S. Norris, Jr., Esq. at 1700 Va. National Bank Bldg, P O Box 3416, Norfolk, Va. 23514 this 10th day of April, 1981.



Peter W. Rowe

ORDER OF DISCONTINUANCE

This day came the parties, by counsel, on defendant's Motion to Discontinue this matter pursuant to Va. Code § 8.01-335 A, and, on defendant's Motion to Dismiss, and was argued by counsel.

Upon consideration whereof, the Court denies defendant's Motion to Dismiss, which is based on plaintiff's voluntary oral nonsuit, taken by her on July 28, 1980 and which the Court allowed her to withdraw by its Order of September 1, 1980, to which defendant has noted his objection.

It is further ORDERED that defendant's Motion to Discontinue, pursuant to Va. Code § 8.01-335 A is granted and the Clerk is hereby ORDERED to strike this case from the Court's docket and this case shall be, and hereby is, discontinued, to which plaintiff has noted her objection.

Plaintiff's Motion to Reinstate this Case on the Court's docket in accordance with Va. Code § 8.01-335 A is denied, to which plaintiff notes her objection.

Enter:

Judge

Seen with all objections saved:

p.q.

p.d.

1 VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH
2 -----:
3)
4 ESSIE MAE NASH, :
5 Plaintiff,)
6 vs. : LAW NO. 77-926
7)
8 LESLIE CURTIS JEWELL,)
9 Defendant. :
10 -----:
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Before The Honorable Lester E. Schlitz, Judge
Portsmouth, Virginia
April 28, 1981.

-----oOo-----

APPEARANCES: Messrs. Stackhouse, Rowe & Smith
By: Messrs. Robert C. Stackhouse and
Peter W. Smith, appearing on
behalf of the plaintiff.

Messrs. Williams, Worrell, Kelly &
Greer
By: Mr. John S. Norris, Jr., appearing
on behalf of the defendant.

-----oOo-----

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THE COURT: All right.

MR. NORRIS: Judge Schlitz, the memorandum which you have just been handed I have seen for the first time one minute ago.

THE COURT: Well, I'm glad we got a reporter here.

Let me put this case in its proper posture so we'll know where we stand. This is a case where - and I'm reciting from my recollection and if I'm wrong in anything I say I hope you will correct me, but as I recall this is a suit that was brought and was involving an automobile accident. And it was brought just inside the Statute of Limitations originally. As I recall it was brought on the last day the Statute of Limitations was to run.

Then there was an answer filed and then a two-year period went by and there was no order of this Court although there were some Interrogatories or something taken. There was no proceeding in this Court for a period of two years. At which time defendant made - moved the Court to dismiss the case under the two-year rule.

When the matter was heard counsel for the defendant came and argued his case to the Court and

1 at that time he argued that he had been put in a
2 position where they waited too long to bring the
3 suit and waited too long without doing anything,
4 that he had been put in a position where witnesses
5 had disappeared and it was almost impossible for him
6 to defend the case because of the great delay that
7 had taken place. And he felt that equity in this
8 matter was - that this case should be dismissed.

9 The Court at that time was expressing an
10 opinion that the Court felt that the defendant had
11 been prejudiced by undue delay when there was no
12 reason shown or offered. Although there was some
13 reason offered there was no reason that the Court
14 felt was adequate for the delay and the Court was in
15 the process of expressing an opinion that perhaps it
16 would dismiss the case when the defendant - there
17 was a discussion about the plaintiff taking a
18 nonsuit. And the plaintiff stated to the Court that
19 he would take a nonsuit in the matter and the Court
20 allowed him to take a nonsuit.

21 The parties left - the parties left the
22 Court chambers, that was in the morning, and that
23 afternoon counsel for the plaintiff called the Court
24 and informed the Court that he was worried about a
25 case that was pending before the Supreme Court of

1 Virginia regarding nonsuits and new law had been
2 passed regarding nonsuits, whether or not he would
3 be permitted to reinstate the suit within the six
4 months period under the new law, this case having
5 occurred prior to the enactment of the new nonsuit
6 law. And he asked for permission to withdraw his
7 nonsuit - asked for permission to withdraw his
8 nonsuit. The Court at that time agreed that he
9 might withdraw the nonsuit.

10 I believe at this stage of the game that
11 the Court acted erroneously. I believe once a
12 nonsuit was taken it can't be withdrawn.

13 MR. STACKHOUSE: No, we have an authority --

14 THE COURT: I'm stating my belief.
15 Certainly the case I'm most familiar with involves
16 the case where a Judge who was getting ready to strike
17 the evidence and the plaintiff took a nonsuit. The
18 Judge refused to allow him to take a nonsuit and the
19 Supreme Court said he had a right to take the nonsuit
20 whether he got permission from the Judge or not
21 before the final determination of the case, before
22 the Judge sustained the motion to strike. And once
23 he elected to take a nonsuit it was binding on the
24 Court. I don't believe that law has been changed
25 in any way.

1 Anyway the plaintiff was allowed to
2 withdraw his nonsuit and an order was entered - an
3 order was entered over the objection of the defendant
4 allowing him to withdraw his nonsuit and continuing
5 the matter as to whether or not the case would be
6 disposed of under the two-year rule until such time
7 as the Supreme Court had acted on the new nonsuit law.
8 This matter then came before the Court after the
9 Supreme Court had acted and the Court having heard
10 both sides and equity of it ruled that it would
11 allow a discontinuance of this case on the defendant's
12 motion on the grounds that the plaintiff had slept on
13 her rights for a long period of time and that the
14 equities in the case were such that it put the
15 defendant in a very serious posture and therefore the
16 Court allowed a discontinuance of the case and asked
17 an order be submitted which has not yet been done.
18 As far as the record shows the order has not been
19 entered yet but the Court ruled on it - made a
20 ruling on it.

21 This matter now comes before the Court on
22 a motion to reinstate the discontinued case.

23 Now I believe that is the correct posture
24 of the case, gentlemen. If any of you disagree with
25 what I have said, I think that is everything that

happened as far as this Court is concerned.

MR. SMITH: The only thing that I might add, not necessarily by way of correction, but at the beginning of the Court's discourse in stating the posture of the case, the Court indicated that nothing had happened from the time of the filing of the grounds of defense until the time of the filing of the motion to discontinue which is not quite accurate. In between there, a couple of months before the filing of the matter to discontinue the matter was praeciped by us and set for trial at the June, 1980 docket call. The motion to discontinue was not filed until July, 1980.

THE COURT: I think that's right, but no action by this Court.

MR. STACKHOUSE: No order entered.

Judge, if you will, sir, I will go ahead and argue and then Mr. Norris can reply. I assume he probably will want some time to reply to the memorandum of law we have filed here this morning.

It's true, Your Honor, this case did arise out of an accident, an automobile accident which happened on the second day of December, 1975 at the intersection of Lincoln and 3rd Streets in the City of Portsmouth, Virginia. And a review of

1 the plaintiff's position in this case from the
2 Interrogatories and both from the motion for
3 judgment would indicate that the defendant was
4 guilty of negligence or certainly we allege that,
5 because he ran a stop sign and struck the car in
6 which the plaintiff was a passenger. So the case
7 was brought in December of 1977 as the Court indicates,
8 within the Statute but toward the end of the running
9 of the Statute.

10 Now I submit to the Court that when the
11 case was brought I don't think it's particularly
12 significant in this case as long as it was brought
13 during the Statutory period. Service was attempted
14 upon the defendant in the City of Portsmouth but
15 they could not get service on him there. So they
16 subsequently served the defendant by serving the
17 Commissioner of Motor Vehicles on the 23rd day of
18 March, 1978. The defendant filed his grounds of
19 defense on April 6, 1978. On May 20th the plaintiff
20 filed - 1980 - the plaintiff filed a praecipe
21 indicating that she was ready to proceed to trial
22 and requested that the matter be set for trial.

23 In the interim, at the next docket call
24 held on June 5th, I believe, that Mr. Norris objected
25 to the case being set. The case was scheduled for.

1 trial nonetheless for August the 21st, 1980.

2 Thereafter on July 7th, 1980 --

3 THE COURT: It seems to me if I'm not
4 mistaken, and I'm just going to rely on my memory,
5 the motion for discontinuance was made prior to the
6 time of the praecipe and the setting of the case.

7 MR. STACKHOUSE: No, it was not.

8 MR. NORRIS: Judge, a letter was sent by
9 me to the Clerk on May 21, 1980 requesting the Clerk
10 of the Court to initiate action under 8.01-335 and
11 then the praecipe came and the case was set at
12 docket call over my objection. Then I filed a motion
13 on July 28 --

14 MR. STACKHOUSE: Now we did not get a copy
15 of that letter that was sent to the Clerk, I want to
16 make that clear to the Court.

17 MR. NORRIS: That's correct.

18 MR. STACKHOUSE: So Mr. Smith at the time
19 he filed his praecipe had no knowledge of the letter
20 to the Clerk to discontinue the case. So that the
21 praecipe was actually filed before the motion to
22 discontinue was made and at the same time the motion
23 for discontinuation was made I believe that the
24 defendant filed written Interrogatories to the
25 plaintiff simultaneously with it for the first time.

1 Now at the initial hearing on the
2 defendant's motion being scheduled for July 28, and
3 I think we are in agreement as to what happened at
4 that hearing with regard to the nonsuit Statute which
5 is Virginia Code 8.01-299 of the 1950 Code as amended,
6 it was believed that the Statute provided that if a
7 nonsuit was taken at that particular time, if the
8 plaintiff suffered a nonsuit she would be able to
9 rebring the case within a six-month period. Whether
10 that was right or wrong at that particular time the
11 Court took into consideration the fact that a refiling
12 could be had if the Statute read in the case - if it
13 was during the six-month period.

14 Now the Court has some concern about error
15 being committed and I'm not going into the cases
16 in great detail, but there are two cases cited at
17 the end of this brief Wickham versus Green, 111 Va.
18 199, a 1910 case and Walkers versus Boaz and others,
19 41 Va., an old case tried way back in the 1800's,
20 which stands for the proposition that the Court has
21 in its discretion the right to allow a nonsuit, a
22 voluntary nonsuit.

23 THE COURT: The only problem I have with
24 that, Mr. Stackhouse, and I would like you to
25 direct yourself to - suppose in a trial, goes through

1 a several day jury trial, things are going very
2 badly for the plaintiff and there is a motion to
3 strike and the Court under the case law must allow a
4 voluntary nonsuit. So the Court has to do it and
5 does it. The defendant (plaintiff) says, Judge, I
6 want a nonsuit. That ends the trial, you break the
7 jury panel, the jury goes home, they are gone. The
8 case is over and then the defendant (plaintiff) gets
9 back home and calls up and says, Judge, I changed
10 my mind, I don't think I want to take a nonsuit,
11 maybe he has decided, now that the Statute run
12 against him on the nonsuit. What posture does that
13 put the Court in? We have a jury here several days,
14 mandatory we dismiss them. That would give the
15 plaintiff an opportunity to get a new trial without
16 having the necessity of taking a nonsuit. If the
17 Court says okay, you withdraw, I will let you
18 withdraw, you come back, we'll get another jury and
19 another day and you have had an opportunity to see
20 what your suit is and so you took a nonsuit, the
21 Statute will not run against you. It seems to me
22 that he took advantage of something that was mandator
23 that the Court had to let him do. Wasn't any discret
24 on the Court if he could take a nonsuit, but to let
25 him come back and say I'm going to let you withdraw.

1 MR. STACKHOUSE: That's why it's in the
2 discretion of the Court. The Court does not have
3 to allow a reinstatement. It is purely a discretionary
4 act with the Court. In other words what was bothering
5 the Court, as I read the record in the past, did the
6 Court have the power to do that, did the Court have
7 the right to do that. I'm saying to you the Court
8 does have the power and it does have the right. It
9 doesn't have to do that. It will require an exercise
10 of discretion.

11 THE COURT: Let's get down to where we are
12 right now. Is it our contention that the Court did
13 not have the power and right to grant a discontinuance
14 when it did?

15 MR. STACKHOUSE: Is it my contention?

16 THE COURT: Yes, sir.

17 MR. STACKHOUSE: My contention, Your
18 Honor, is that the Court breached its discretion
19 when it did it, and I will tell you why if you let
20 me proceed with this motion.

21 THE COURT: All right.

22 MR. STACKHOUSE: At any rate, I think the
23 posture of the development of the case insofar as
24 the facts are concerned have been stated for the
25 record except this. I will say that there were

1 representations made, there was no evidence that
2 the defendant was prejudiced in any way other than
3 the statement of counsel. We don't know how he was
4 prejudiced. There were some general statements about
5 witnesses and the defendant and so on, and it's my
6 understanding that the defendant couldn't be found
7 at the front part of the case and that he was later
8 found.

9 It's hard for me to see how a delay would
10 hurt a defendant when the defendant wasn't available
11 to begin with. I would think a delay would help
12 rather than harm in a situation of that nature. The
13 Statute we have under consideration, 8.01-335, which
14 the Court is certainly familiar with and is set forth
15 in pertinent part on Page 2 of the Memorandum. And I
16 won't read this because I think everyone here is
17 certainly familiar with it.

18 Now the question, what are the authorities
19 on that statement, on that Statute? What are the
20 authorities? It's very difficult to find any
21 recorded cases, modern cases, on this two-year
22 Statute with the one-year right to reinstate. The
23 cases that we have found dealing with the Statute
24 and its predecessor, which was the five-year Statute
25 with a one-year right to reinstate, that was the old

1 one.

2 THE COURT: I don't know about the right
3 to reinstate. It says on motion may be reinstated.

4 MR. STACKHOUSE: Discretion.

5 THE COURT: I don't believe it says shall,
6 it says may.

7 MR. STACKHOUSE: You're right there, Your
8 Honor. I didn't mean to misquote the Statute.

9 Now the first case cited here in the
10 Memorandum, Payne versus Buena Vista Extract Company,
11 124 Va. 296, a 1919 case. That case seemed to stand
12 for the proposition that a discontinuance under the
13 Statute is in effect a nonsuit which would not
14 preclude the bringing again of the case. Admittedly
15 this was an old case under the rule days back in
16 1919.

17 THE COURT: Let me - one second. I don't
18 want to interrupt. I know it's disconcerting.

19 It seems to me we have to realize another
20 posture we are in. Rightly or wrongly I granted a
21 withdrawal of the nonsuit and an order was entered
22 over objection of the defendant and a long period of
23 time has passed since that order was entered. I
24 don't think I can come back and change that order.
25 Where we are now is, I think if this matter goes up

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1 on appeal the defendant could certainly argue that I
2 was wrong in granting the withdrawal of that
3 nonsuit, but that's been done.

4 MR. STACKHOUSE: Sure.

5 THE COURT: It has been done and there are
6 - I think the argument about whether that was right
7 or wrong is sort of moot.

8 MR. STACKHOUSE: I'm not making that
9 argument. I'm just developing how the case has
10 developed.

11 THE COURT: Where we are now is, although
12 the order hasn't been entered, I have ordered a
13 discontinuance in this case. Now we are here on a
14 motion to reinstate, that's where we are now.

15 MR. STACKHOUSE: That's correct.

16 THE COURT: I understand what you have
17 been doing, Mr. Stackhouse, is background and you are
18 citing cases about whether I am right to do that.
19 You understand.

20 MR. STACKHOUSE: But now I'm getting to the
21 point where I'm beginning to develop the rationale
22 of the Supreme Court in its direction to the trial
23 court throughout the state as to what the discretion
24 of the Court should be when there is a motion to
25 dismiss for failure to prosecute or where there is a

1 discontinuance. It's developed - it's called by a
2 different name. In the old days it was called a
3 motion to dismiss for failure to prosecute. Now it
4 is called a motion for discontinuance. The
5 statutory provisions have changed somewhat over the
6 years, in the two years cited after the Buena Vista
7 case.

8 Snead versus Atkinson and Echols versus
9 Brennan. Those cases were tried in the early 1900's
10 under the Statute and hold for the proposition that
11 if you make the motion one year beyond the one-year
12 period that you are allowed to move the Court to
13 reinstate or consider the reinstatement of the case
14 then you are out of court. You have got to make the
15 motion within the one-year period, no question about
16 that. That's what those cases state.

17 I'm giving you all the cases in Virginia
18 that we are able to uncover, good, bad or indifferent.
19 These are two technical points that I want the Court
20 to consider with regard to this motion in addition to
21 what I consider the main thrust of our argument to
22 you today.

23 The first thing is, it says, the Statute
24 says "No order or proceeding." In other words there
25 can be other activities other than an order. That's

1 the verbiage of the Statute.

2 THE COURT: I understand. You take that
3 to mean that any action by the defendant by way of
4 discovery is a proceeding in this court?

5 MR. STACKHOUSE: Sure it's a proceeding.

6 THE COURT: In other words Interrogatories,
7 you think that is a proceeding?

8 MR. STACKHOUSE: Sure. A proceeding is
9 described over on Page 4.

10 "In a general sense, the form and
11 manner of conducting juridical business
12 before a Court or judicial officer;
13 regularly and orderly progress in form
14 of law; including all possible steps
15 in an action from its commencement to
16 the execution of judgment."

17
18 Now if the Court were to view this that -
19 if the Court accepts that - I mean you consider it,
20 if the Court accepts that there were proceedings
21 that were done in the two-year period from the date
22 of the motion backward, namely the praecipe was
23 filed, docket call was attended, the case was set
24 for trial. Bear in mind all through this, this case
25 was set for trial one month before the motion was

1 argued here.

2 Now in addition to that technical point
3 it also says in the Statute that "The Court shall
4 notify the parties in interest if known, or their
5 counsel of record at his last known address, at
6 lease fifteen days before the entry of such order of
7 discontinuance" - in order that they can have an
8 opportunity to argue it. That was not done.

9 THE COURT: Counsel appeared here and
10 raised no objection to that.

11 MR. STACKHOUSE: But I'm telling you what
12 the technicalities were.

13 THE COURT: I'm telling you what happened.

14 MR. STACKHOUSE: It may have been waived
15 and probably was, but this is the letter of the law.

16 The Statute - now I want to get into the
17 spirit of the Statute and what the Statute really
18 stands for. At any rate those are the two technical
19 arguments that I am making.

20 Now let's get right down to the gut point
21 of this case which is this: What is there - what
22 indication is there that the Court was wrong in
23 exercising its discretion and striking this case off
24 of the docket or discontinuing it and then ruling
25 that it should not be reinstated which is extraordinary

1 on the part of the Court, because it forever
2 precludes the plaintiff from going forward with her
3 case.

4 THE COURT: After the Statute of
5 Limitations run. If the Statute of Limitations had
6 not run then they can bring a new suit.

7 MR. STACKHOUSE: I understand that. We
8 all know that the Statute of Limitations has run
9 here.

10 MR. SMITH: If I may interject one word,
11 in every personal injury case the Statute will have
12 run.

13 MR. STACKHOUSE: Though I have not been
14 able, nor Mr. Smith been able to find any case right
15 smack on all fours with this case we have got here at
16 bar. There are just no recorded cases on it. Mr.
17 Norris has got one but we were not able to find it
18 so we have to go to the law as set forth in the
19 precedence that the Supreme Court has set down in
20 previous cases.

21 Now I'm getting to the thrust of my real
22 point in this. Those others were technical and we want
23 to rely - in the case of Carter versus Cooper, which
24 is on Page 5, 111 Va. 602. That was tried in 1911.
25 The Supreme Court was faced with an action of

1 ejectment. It was a case at law. A lot of
2 equity cases in here, but this was a case at law
3 instituted in 1878. This case had lain dormant on
4 the docket for a period of seventeen years. No order
5 or proceedings therein except orders of continuance
6 had been entered in that particular case. On the
7 defendant's motion to dismiss the action for want of
8 diligent prosecution, which is a similar motion as
9 under this Statute, the trial court dismissed the
10 action and the plaintiff appealed the case. The
11 Supreme Court reversed the decision and in the course
12 of its opinion stated as follows:

13 "This application of the purely
14 equitable doctrine of laches" -
15 a failure to go forward - "in common
16 law actions involving the question
17 here at issue has never been the
18 practice in Virginia. The practice,
19 and in our opinion the better practice,
20 has been that a rule against the
21 plaintiff to speed his cause should
22 precede any motions to dismiss an
23 action for failure to prosecute; and
24 the appearance of the plaintiff in
25 court ready for trial has always been

1 regarded as a conclusive answer to such
2 a rule. This practice prevails in many
3 of the states.

4 "In 14 Cyc., 448, citing a number of
5 authorities, it is said: 'It is the
6 general practice that the service of a
7 rule or notice to plaintiff to proceed
8 in the cause, or as it is sometimes
9 called a rule to speed the cause, must
10 precede the motion to dismiss for want
11 of prosecution.'"

12 Part of the problem here in this case was
13 there was no warning, there was nothing to indicate
14 to the plaintiff that the defendant did not
15 acquiesce until the very motion itself, and the
16 letter which came that he did not acquiesce. The
17 fact that the case was not set for trial, there was
18 no affirmative action.

19 What does the Court further say? It says.
20 referring to the same case, Carter versus Cooper:

21 "There is nothing in the record of
22 either of the cases now before us to
23 take it out of the general rule of
24 practice mentioned" - above, which I
25 said there should be some notice, some

1 motion made. "The evidence does not
2 tend to show any abandonment of the
3 right to prosecute either action. On
4 the contrary, it satisfactorily appears
5 that there was never any purpose to
6 abandon such right. The actions have
7 been kept on the docket; the plaintiff's
8 counsel has appeared and answered to the
9 calling at every term." In the old
10 days, in the rule days, you had to be
11 there on the rule days to keep your
12 case alive.

13 "There have been trials in some cases,
14 two having been brought to this court;
15 some have been compromised and settled,
16 while other defendants have bought their
17 way out of the suit from the plaintiffs;
18 and, so far as the record shows, the
19 defendants are now ready and able to try
20 with as complete justice to themselves
21 as when these suits were brought. They
22 have had it in their power at any time
23 to have secured a trial by asking for a
24 rule to speed the cause. They have,
25 however, chosen to pursue a course of

1 inaction, thereby tacitly consenting
2 to the delay, and now appear, for the
3 first time, in court and demand a
4 dismissal of the case upon the ground
5 that the plaintiff has been guilty of
6 laches in not forcing them to a trial.
7 Under the circumstances disclosed by
8 these records, the plaintiff, having
9 announced their readiness, should have
10 been allowed to proceed with the trial
11 in each case."

12 There is the cite, that's the position
13 of Carter versus Cooper in which the Supreme Court
14 says that if the defendant does nothing and if at the
15 time the motion is made to dismiss the plaintiff is,
16 in fact, ready to go to trial - and the case was set
17 in this case in August - then they should be allowed
18 to go to trial.

19 Now further in the case of Carter versus
20 Cooper which I have just cited, the rationale is again
21 approved in the case of Brinkley versus Parker 190
22 Va. 380, tried in 1950, a case in which Louis Fine
23 took it to the Supreme Court, Judge Jacob rendering
24 the decision. It was a matter under the rule days,
25 again in the early 1950's, went out sometime in '51

1 or '52 as I recall. But for some reason the
2 plaintiff in that case was not entitled to a decree
3 of reference and the Court held - refused the decree
4 of reference and then the defendant moved to dismiss
5 the case because he said no evidence could be taken
6 in this equity case. But that isn't the important
7 thing. The important thing is the rationale of the
8 Supreme Court in dealing with the case. And here is
9 what it states on Pages 380, 387 and 388:

10 "Upon the filing of the answers,
11 replication was made as a matter of
12 course. Code, 1942 (Michie), Section
13 6138. The parties being thus at issue,
14 the bill should not have been dismissed
15 until the complainant had been given an
16 opportunity to take evidence. 30 C.J.S.,
17 supra, Section 566, Page 959. The bill
18 may, of course, be dismissed for want
19 of diligence in its prosecution. Idem" -
20 the same page - "960. But that penalty
21 should be imposed only where there has
22 been unreasonable delay, and usually
23 after proper warning."

24 Now if the case - if the Court said to
25 us, look, you're going to try this case, there is

1 not going to be any more continuances, you are going
2 to try this case within the sixty days or ninety
3 days or thirty days, we wouldn't even be here arguing.
4 This case would be over and done with. What does
5 the Court say further?

6 "While a complainant may take his
7 depositions as soon as his bill is
8 filed, Code, 1942 (Michie), Section
9 6225, he may and usually does await the
10 filing of the answer, after which he
11 should have a reasonable time to present
12 his evidence. 'The Court has the power,'
13 says Mr. Lile, 'to rule either party
14 to greater diligence, and to fix a
15 limit of time beyond which no further
16 testimony may be taken; but counsel in
17 Virginia who would resort to such harsh
18 and unaccustomed measures in a chancery
19 suit, except under very unusual
20 circumstances, would be regarded by his
21 professional brethern as a disturber of
22 ancient traditions and as encroaching
23 upon one of the cherished privileges of
24 the profession.'"

25 That's Mr. Lile.

1 Now we are here on the second part of the
2 Statute - in other words the second part of A under
3 the Statute. The Court has ruled they will
4 discontinue this case. We are now here arguing
5 before you asking that it be reinstated. There are
6 two parts, two different considerations. One does
7 not necessarily follow the ruling of the other. In
8 other words the Court could say I will discontinue
9 it but I will allow you to reinstate it and I will
10 put you on terms, you must file this case, you must
11 try this case and dispose of it within a reasonable
12 period of time.

13 Now what is the real message of these
14 earlier cases? It seems to me the message is this,
15 and the Statute - why was the Statute in its - in the
16 wisdom of the legislature passed? And Your Honor
17 has been up there. It was passed so that the Court
18 could move the dockets along, so that the Court
19 could mandate the orderly trial of cases and where
20 cases had been abandoned the Court could get them
21 off of the docket. That was the reason for it.
22 It's not a new Statute of Limitations, Judge. It's
23 a mechanism that is given the Courts by the
24 legislature to move the dockets on.

25 Now why did the legislature give a full

1 year to allow you to reinstate the case. Why,
2 because they didn't want a misjustice or an
3 injustice to occur when the Court discontinued the
4 case. The Court - the legislature could have said
5 you have got to reinstate it and try it within sixty
6 days. They didn't do that. They gave one full year
7 in which a motion could be made to reinstate it.

8 Now it's true that reinstatement lies
9 within the sound discretion of the Court, no
10 question about that, no shall. It's a may situation.
11 But the earlier cases seem to say that if the
12 plaintiff was ready to go to trial, which he was in
13 this case, or if he had no warning that this
14 extraordinary ruling would take place, then he
15 should be given an opportunity - the plaintiff
16 should be given an opportunity to have the trial
17 tried on its merits.

18 Now I'm not going to prolong my argument.
19 It's all set forth in the brief. I think in fairness
20 that Mr. Norris ought to have full opportunity to
21 respond both orally and in writing.

22 That's our position, Judge, and I don't
23 know how I can state it any more succinctly.

24 THE COURT: You've done a good job of
25 stating it, Mr. Stackhouse, as far as that goes. I

1 think your position is plain.

2 Mr. Norris, are you prepared to argue this
3 day? You were handed a memorandum today, I think
4 you are entitled --

5 MR. NORRIS: Judge, let me ask you this:
6 Does the Court need a response from the defendant?

7 THE COURT: I think under the circumstances,
8 this case has bounced around, along, and the Court
9 does not like to be in the position of jumping from
10 one position to another.

11
12 (Whereupon, there was an off-
13 the-record discussion.)

14
15 THE COURT: Mr. Stackhouse concluded his
16 argument. Do you want to argue now or do you want
17 time? In other words, because I feel that this is a
18 matter that ultimately is going to have to be
19 decided by another Court besides myself, I think
20 at the very least I ought to write a memorandum
21 letter expressing my views and why I do what I do.
22 Therefore to give you full opportunity - they filed
23 a memorandum, if you want to file a memorandum - and
24 I will even give you time to argue again because I
25 don't think it's totally fair for them to present a

1 memorandum today and not give you a chance to come
2 in with the authorities you want to argue about.

3 MR. NORRIS: Let me do this. I would
4 like at this time to respond orally with leave of
5 the Court for seven days to file any supplementation
6 in writing after I read this memorandum of law.

7 THE COURT: All right, I think to get the
8 case in the right posture the discontinuance order
9 has to be entered.

10 MR. NORRIS: That is the first thing I
11 want to do. I sent - drafted an order encompassing
12 your ruling on April the 10th and I have not gotten
13 that order back yet asking if they are going to
14 endorse that order. So that order has been sitting
15 with plaintiff since April the 10th.

16 MR. STACKHOUSE: Of course.

17 THE COURT: It has to be entered. How can
18 I entertain a motion to reinstate until the order is
19 entered? The order to discontinue has to be
20 entered now.

21 I will hear from you as far as arguments
22 and allow you seven days to file a memorandum.

23 MR. NORRIS: Thank you, Judge.

24 One thing I want to make clear to the
25 procedural posture of this case, if the Court will

29

1 recall on my motion to dismiss and motion to
2 discontinue that the Court ruled on when we were last
3 here, after the Court ruled saying that he was going
4 to grant the motion to discontinue, counsel for the
5 parties left chambers and returned a few moments
6 later at the request of counsel for the plaintiff.
7 And at that time counsel for the plaintiff asked the
8 Court to reinstate this case pursuant to the
9 reinstatement section 8.01-335. And at that time
10 the Court ruled that it would not reinstate the case.
11 I think the record should be clear that this Court
12 has already ruled not only to discontinue but not to
13 reinstate. But counsel for the plaintiff --

14 THE COURT: I don't recall it that way and
15 there was no formal motion to reinstate as far as I
16 am concerned.

17 MR. NORRIS: It was oral but it was made.

18 THE COURT: I understand you say that, but
19 it's not the Court's recollection. I just don't
20 recall it, nothing in my files to indicate that.

21 MR. NORRIS: Because the order has been
22 sitting with Mr. Rowe for two and a half weeks and
23 I think if the Court asks Mr. Rowe he will tell you
24 that is the case.

25 MR. STACKHOUSE: We have already said.

1 MR. NORRIS: I didn't interrupt Mr.
2 Stackhouse during his argument, I would appreciate
3 the same courtesy.

4 Now as far as the posture of this case
5 right now, if this is being considered a motion
6 to reinstate, this cause has been discontinued. The
7 order has not been entered but the Court has ruled
8 that it's discontinued.

9 THE COURT: I have ruled that it be
10 discontinued, no question about that, and I will
11 enter an order.

12 MR. NORRIS: The case law that an order
13 of discontinuance has the same effect as a nonsuit.
14 Now if this case is thereby nonsuited - if it has
15 the same effect as the nonsuit the Supreme Court
16 of Virginia has ruled that if it's nonsuited the
17 Statute of Limitations tolled for a cause of action
18 that occurred in 1975.

19 THE COURT: How about the reinstatement
20 of that provision?

21 MR. NORRIS: The case law says for
22 reinstatement you should construe the discontinuance
23 as a nonsuit.

24 THE COURT: But a special Statute says
25 that at any time within one year the Court may

1 reinstate a discontinued case.

2 MR. NORRIS: Yes, Judge, it may if it can -
3 it may in its discretion.

4 THE COURT: How could it ever do it in
5 personal injury cases? It's a two-year rule and the
6 Statute of Limitations - how could the Court ever
7 reinstate a personal injury case that has discontinued?

8 MR. NORRIS: Under the old nonsuit
9 Statute which has been changed where this Statute
10 has not been changed, nonsuits tolled the Statute
11 of Limitations. The Supreme Court has now ruled
12 that is no longer a course for a cause of action
13 before 1977.

14 THE COURT: How about the one here?

15 MR. NORRIS: That Statute existed before
16 the nonsuit Statute was changed. All I'm saying,
17 perhaps the legislature ought to change this Statute,
18 also, but it hadn't.

19 THE COURT: I don't think much of that
20 argument, but go on.

21 MR. NORRIS: Secondly, it's still within
22 the discretion of the Court as to reinstating.
23 Nothing stated today by counsel has changed anything.
24 This Court has already heard about whether or not
25 this is a case that should or should not be

1 reinstated. I think some misrepresentations have
2 been made about what did or did not happen in order
3 to effect action under the discontinuance law.

4 What did happen was --

5 THE COURT: Excuse me for one minute,
6 because I interrupted Mr. Stackhouse quite a bit,
7 I have to interrupt you.

8 Unfortunately counsel came to court
9 without a court reporter when all these things were
10 being done and the Court has to rely on the Court's
11 memory. I will be glad to hear from counsel.

12 MR. SMITH: This is the fourth hearing on
13 the motion to dismiss. Only one hearing there was
14 no reporter.

15 THE COURT: The first hearing there was no
16 reporter. And, of course, I have to rely on my
17 memory as to what was stated and what was represented
18 by counsel and what was stipulated by counsel
19 in fact. I have to rely on my memory on that and all
20 I can say is that after having heard it I gave my
21 ruling based on my opinion of what the equities were
22 involved in the case.

23 All right, Mr. Norris.

24 MR. NORRIS: Judge, I don't know whether
25 the Court is troubled, and I won't address the issue

1 if it doesn't trouble the Court, with whether or
2 not there was any order or proceeding within the
3 two-year rule, because some argument has been made
4 that certain irregularities occurred with respect
5 to the praecipe and docket.

6 THE COURT: As I said, I'm going to enter
7 an order on the two-year rule. As far as I am
8 concerned this record shows me for a period of two
9 years nothing was done in this case as a proceeding
10 in this court. The setting of the docket was after
11 two years. As far as I am concerned there was a two-
12 year period there was nothing done and that is what
13 I have ruled.

14 MR. NORRIS: Then I will limit myself
15 solely to the issue of reinstatement. I think the
16 case law in the short time I have had to take a look
17 at it, it's inapplicable. First of all the case
18 law of the Carter case and the Brinkley case appear
19 to me to be chancery matters. I think everybody
20 here would agree that chancery has much more liberal
21 rules with respect to this type of thing than a
22 court of law.

23 But looking at the language that has been
24 cited from the Carter case, it's distinguishable
25 on its facts when you look at the body of the opinion.

1 I can look at three facts that the Court relied
2 on to allow that cause of action to continue.

3 First the Court says, "There have been
4 trials in some of the cases." That doesn't exist
5 in our case. Secondly, the Court says, "The
6 defendants are now ready and able to try." No
7 evidence of that in this case. Thirdly, it claims
8 that counsel for the defendants have, "Chosen to
9 pursue a course inaction."

10 I think the Court can testify to the fact
11 that I have not chosen a course of inaction. I
12 have been over here repeatedly trying to get this
13 case discontinued within one or two months of the
14 expiration of the two-year rule. Secondly, I think
15 as a matter of whether the Court should use
16 discretion, I'm going to cite from one of the cases
17 by the plaintiff. That is Wickham - Wickham says:

18 "It is always to be regretted when a
19 case has to be disposed of on other
20 grounds than those that go to the very
21 right and merits of the cause. Court
22 cannot, however, permit considerations
23 of hardship in particular cases to cause
24 them to disregard and set at naught the
25 plain provisions of a positive Statute."

1 I suppose I'm saying to you, Judge, that
2 this Statute is clear. If a plaintiff chooses not
3 to pursue her cause of action she is subject to
4 discontinuance. If the Court doesn't exercise its
5 discretion in this case what good is this Statute
6 doing us? I don't know.

7 I will represent to the Court right now,
8 although I have heard in the past from this defendant,
9 I, today, have no idea where this defendant is. This
10 is an accident, a cause of action that accrued in
11 December of 1975, five-and-a-half years ago. And I
12 think this is a perfect case for the Court to
13 exercise its discretion and to discontinue this and
14 to tell this plaintiff that she should not have
15 waited so long to bring her merits to this court.

16 Now, Judge, I would like that extra seven
17 days to be able to review the case law.

18 THE COURT: I will give you seven days to
19 file a memorandum at which time, gentlemen, there
20 will be no further need for argument. I will write
21 you a letter. But I want the order entered as far as
22 his discontinuance so we have the right posture of
23 the matter.

24 MR. SMITH: We have an order --

25 THE COURT: Since he is the prevailing

1 party he should present his draft.

2 MR. NORRIS: This is the order that I
3 submitted to counsel the day after the Court ruled.

4 THE COURT: Everything about this order
5 seems in good shape to me except the last paragraph.

6 MR. STACKHOUSE: I'm going to let Pete
7 take over from this point. We had an objection to
8 it, I did not get into the drafting of it.

9 MR. SMITH: What Mr. Norris has said, in
10 all candor my coming back after the hearing and
11 asking the Court to reinstate it and the Court
12 indicated it would not do so, that is correct, that
13 is true. That's why we couched our motion in this
14 instance to rehear that motion.

15 MR. STACKHOUSE: It was never fully argued.

16 THE COURT: Sit down, gentlemen. That
17 puts us in another situation.

18 MR. STACKHOUSE: This is a motion to
19 rehear and reconsider. Certainly we have a right
20 to file a motion and reconsider.

21 THE COURT: It will be in that posture
22 that I have ruled against the motion to reinstate
23 and it's now a motion to rehear on that motion to
24 reinstate. I will enter this order like it is.

25 MR. SMITH: That is, in fact, true.

1 THE COURT: I'm going to date this thing
2 today because I don't know any other date to put
3 on it. It's a matter that no matter how it turns
4 it looks to me like the Supreme Court is ultimately
5 going to have to decide this matter. You all both
6 endorse it.

7 MR. STACKHOUSE: Now we'll need another
8 order, Judge, when the Court rules on the motion.

9 THE COURT: It will have to be either
10 I sustain your motion or I overrule your motion to
11 rehear it.

12 MR. STACKHOUSE: Right, but we want
13 included in that order that all transcripts of the
14 hearing should be made a part of the record and
15 filed in the Clerk's Office pursuant to the rule
16 5.9.

17 THE COURT: No question.

18 MR. NORRIS: I have only one problem.
19 Most of my argument was not recorded. That being the
20 case I would like another two or three minutes to
21 summarize my oral statements about what transpired.

22 MR. SMITH: Do you know where it starts?
23 Have you seen the transcript?

24 MR. NORRIS: All I would like to put on
25 the record at this point was that at our last hearing

1 my motion to discontinue, I represented to the
2 Court - I summarized for the Court my position of
3 what took place in this file. And that was: An
4 accident occurred on December 2nd, 1975; that suit
5 was filed on December 1, 1977; that grounds of
6 defense was filed on April the 11th, 1978; that I
7 wrote a letter to counsel for the plaintiff on
8 May 6, 1978 requesting counsel for the plaintiff
9 to get in touch with me to discuss settlement.

10 THE COURT: All these transcripts will
11 have to be submitted to the Clerk. You understand
12 they will become a part of the record in the case.

13 MR. STACKHOUSE: Of course.

14 MR. NORRIS: None of my argument is in
15 here about the nonsuit, our position on the nonsuit.

16 THE COURT: I have ruled with you on the
17 nonsuit - no, I have ruled against you on the
18 nonsuit.

19 MR. NORRIS: I can say very briefly.

20 THE COURT: Just put it in the written
21 memorandum.

22 MR. NORRIS: I will put in my written
23 memorandum.

24 (Whereupon, the hearing was
25 dismissed.)

-----o0o-----

C E R T I F I C A T E


COMMONWEALTH OF VIRGINIA:

CITY OF PORTSMOUTH, to-wit:

I, Audrey Johnson Grizzle a Court
Reporter, certify that the foregoing is a correct transcript
of the testimony adduced and proceedings had in the case of
ESSIE MAE NASH versus LESLIE CURTIS JEWELL, tried in said
Court on April 28, 1981.

I further certify that I am not a relative
or employee or attorney or counsel of any of the parties,
or a relative or employee of such attorney or counsel, or
financially interested in the action.

Given under my hand this 13th day of
May, 1981.


Court Reporter

CSR NO. 2492, RPR

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May 1, 1981

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RECEIVED
MAY 1 1981

The Honorable Lester E. Schlitz
Judge
Circuit Court of the
City of Portsmouth
Portsmouth, Virginia 23704

STACKHOUSE, ROWE & SMITH

Re: Essie Mae Nash v. Leslie Curtis Jewell
Docket No. 77-926

Dear Judge Schlitz:

This letter is in supplementation to my April 28 oral argument to deny the motion to reconsider plaintiff's request for reinstatement. The sole issue before the Court is whether the Court abused its discretion by denying plaintiff's Motion to Reinstate this cause of action on the Court's docket after it had been discontinued pursuant to Virginia Code 8.01-335 A.

This cause of action was discontinued pursuant to Virginia Code § 8.01-335 A and plaintiff's Motion to Reinstate pursuant to that section was denied by the April 28, 1981 order of this Court. As set out in the statutes, questions of discontinuance and reinstatement are within the discretion of the Court. It is defendant's contention that this Court has acted well within its discretion by refusing to reinstate a cause of action that arose on December 2, 1975, five years and five months ago, and for which no order or other proceeding took place for a period in excess of two years.

The two year period under the statute expired on April 11, 1980. Prior to that time, counsel for the defendant wrote counsel for the plaintiff on two occasions, May 6, 1978 and August 28, 1978 (copies of these letter are attached and labeled Exhibits 1 and 2 respectively), requesting that counsel for the plaintiff contact counsel for the defendant to discuss the plaintiff's intentions regarding her claim. No response was made to either letter and, on May 21, 1980, more than 3 weeks after the two year period had expired, defendant requested the clerk to initiate procedures set forth in Virginia Code § 8.01-335 A to have the cause of action discontinued. Six days after this letter to the Clerk, plaintiff filed a praecipe

requesting that the matter be set for trial at the Court's next docket call. Counsel for defendant appeared at the docket call and objected to the setting of the case for trial on the grounds that he had requested the clerk to issue a notice of discontinuance. Over objection of the defendant, the Court instructed counsel to agree on a trial date but advised the defendant that he would not be prejudiced from pursuing remedies available to him under the two year rule. Accordingly, defendant filed a Motion to Discontinue as well as Interrogatories on July 7, 1980. The motion was heard by this Court on July 28, 1980 at which time plaintiff nonsuited her case, as a matter of right, in accordance with Virginia Code § 8.01-380. Subsequently, plaintiff moved the Court for leave to withdraw her nonsuit which motion the Court granted, over objection of the defendant, by order entered September 1, 1980. Thereafter, defendant renewed his Motion to Discontinue and, after hearing argument of counsel, the Court sustained the Motion and discontinued this cause of action on April 9, 1980. After the Court's ruling, and with consent of counsel for the defendant, plaintiff moved the Court for leave to reinstate the case in accordance with the reinstatement provisions of Virginia Code § 8.01-335-A. The Motion to Reinstate was also denied by the Court and an order sustaining the Motion to Discontinue and denying the Motion to Reinstate was entered on April 28, 1981.

The statute providing for discontinuance of cases that remain "dormant" for a period of two years was "designed to speed litigation, and should, in general, be obeyed." Lowry v. Noell, 177 Va. 238 (1941). The case at bar is an example of an abysmal failure on the part of a plaintiff to prosecute a claim in a diligent fashion. Plaintiff ignored two different requests by defendant to discuss her claim and to determine the likelihood of settlement. Now, nearly five and one half years after the accident giving rise to her cause of action, she wants to place the defendant in the untenable position of mustering witnesses and preparing for trial. The same standard of discretion which applies to the decision to discontinue a case should apply as well to the decision of whether a discontinued case should be reinstated. Perhaps the plaintiff would be in a different position on her Motion to Reinstate if she had put on evidence at any of the aforementioned hearings as to why, within a two year period, she failed to take any action to pursue her litigation; she

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has not presented any evidence to the Court justifying her failure in that time to file Interrogatories, take depositions or otherwise pursue any method of bringing the merits of her case before the Court.

Plaintiff has cited no case in which a trial court has been reversed for having abused its discretion by refusing to reinstate a discontinued case. In fact, the cases dealing with the issue of reinstatement support the decision this Court made in its ruling of April 9, 1980. The first case to address the issue of reinstatement under the statute was Echols v. Brennan, 99 Va. 150 (1901). The statute at that time provided for discontinuance/dismissal when no order or proceeding had taken place during a five year period. Reinstatement was allowed within one year thereafter. In the Echols case, the Court ruled that reinstatement would not be allowed since the Motion to Reinstate was not made within the one year period. Regardless, the Court ruled that:

The decree striking the cause from the docket was 'an adjudication that everything had been done in the cause that the court intended to do.' The decree may be erroneous, but the error does not render it less final. The court, by its order, put the cause beyond its control, and it cannot, upon discovery of the error, recall it in a summary way and resume a jurisdiction which has been exhausted.

99 Va. at 152. Similarly, in the case at bar, this Court has already ruled that the cause may not be reinstated. Therefore, this Court no longer has jurisdiction over the case, regardless of the correctness of its ruling.

The Echols decision was upheld in Snead v. Atkinson, 121 Va. 182 (1917). In Snead the Court noted that reinstatement would not be appropriate for a discontinued case when all parties familiar with the facts are unavailable, save the party seeking reinstatement. The Snead Court also pointed out that the party seeking reinstatement did not provide an adequate explanation for his failure to prosecute his claim. In denying his request for reinstatement the Court noted:

One who has been silent when he should have spoken will not be permitted to speak when he should be silent.

121 Va. at 188.

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In summary, defendant contends that the foregoing cases demonstrate that this court has not abused its discretion by refusing to reinstate the plaintiff's cause of action. Furthermore, because the Court has so ruled, it no longer has jurisdiction over the case and cannot honor plaintiff's request for a reversal of its earlier decision.

Defendant contends the Court cannot reinstate this case for yet another reason. The discontinuance under the statute in question is, in effect, a nonsuit. Payne v. Buena Vista Extract Co., 124 Va. 296 (1919). In Payne, the Court noted that:

The effect of a non-suit is simply to put an end to the present action, but it is no bar to a subsequent action for the same cause.
(Emphasis supplied)

124 Va. at 11. As can be seen from this language, an attempt on the part of the plaintiff in this case to reinstate this cause of action, now that it has been discontinued (or nonsuited) is an attempt to bring a new action. It is not a renewal, or continuation of the original action. However, the new action is subject to the appropriate statute of limitations, as is the case for any other cause of action. In the case at bar, the statute of limitations for a personal injury cause of action has expired and the plaintiff's claim would be barred even if the Court decided to exercise its discretion to allow reinstatement.

Plaintiff argues that if this is the rule, no personal injury action could be reinstated after an Order of Discontinuance. While this may seem an inequitable interpretation of the statute, this Court is without power to apply the reinstatement provisions of the statute as a tolling provision without statutory authority or unless there is express legislative intent supporting such a construction of the statute. Defendant contends the reinstatement provision, as presently drafted, allows only causes of action which have statutes of limitation of more than two years to be reinstated after discontinuance. However, because discontinuance requires, under the holding in Payne, the filing of a new action, personal injury causes of action, or other actions which have statutes of limitation of two years or less, cannot be reinstated.

The Honorable Lester E. Schlitz
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May 1, 1981

In conclusion this Court has not abused its discretion not to reinstate plaintiff's stale cause of action. Furthermore, precedent suggests this Court no longer has jurisdiction to reinstate this case. Finally, defendant argues the case, even if reinstated, is barred by the statute of limitations.

In Wickham v. Green, 111 Va. 199 (1910), the Court expounded the following principle to be applied in deciding whether a suit may be reinstated:

It is not to be reinstated merely upon showing that the plaintiff would suffer inconvenience or loss by reason of its dismissal, as that would as effectually repeal the statute as though its enforcement were left to the arbitrary discretion of the court. In brief, the plaintiff on moving to reinstate his suit should be required to show good cause for his motion

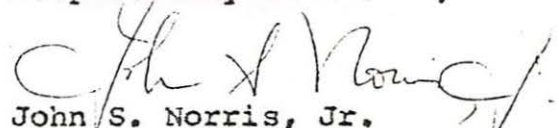
[C]ourts will not relieve against mere neglect of parties in such case

It is always to be regretted when a case has to be disposed of on other grounds than those that go to the very right and merits of the cause. Courts cannot, however, permit considerations of hardship in particular cases to cause them to disregard and set at naught the plain provisions of a positive statute. To do so would be to assert legislative functions, and would operate a judicial repeal of the statute.

111 Va. at 203-204.

For the foregoing reasons, defendant respectfully urges this Court to deny plaintiff's Motion to Reconsider the Court order not to reinstate the case at bar to the Court's docket.

Respectfully submitted,


John S. Norris, Jr.
Of Counsel for Leslie Curtis Jewell

JSN:pd

The Honorable Lester E. Schlitz

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CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing

was mailed to all counsel of record this 1st day of May,

1981.

John S. Norris

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WILLIAM C. WORTHINGTON 1917-1973
LAWSON WORRELL, JR. - RETIRED

May 6, 1978

Mr. Peter W. Smith, Esquire
P.O. Box 3333
Norfolk, Virginia 23514

Re: Essie Mae Nash v. Leslie Curtis Jewell

Dear Mr. Smith:

As you may know, John Franklin is leaving this firm and I am assuming responsibility for the above referenced file. Please direct any further correspondence pertaining to this matter to my attention.

If it meets with your approval, I would like to meet with you and your client so that we may discuss the merits of your claim and determine whether this matter can be resolved without the necessity of litigation. If convenient with your schedule, I suggest an afternoon during the week beginning Monday, May 15, 1978. I shall await hearing from you in this regard.

Very truly yours,

John S. Norris, Jr.

JSN:als

cc: Mr. E. S. Ducker

LAW OFFICES

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W. R. C. COCKE (1884-1967)
WILLIAM C. WORTHINGTON (1917-1973)
LAWSON WORRELL, JR. - RETIRED

August 28, 1978

Mr. Peter W. Smith, Esquire
P. O. Box 3333
Norfolk, Virginia 23514

Re: Essie Mae Nash v. Leslie Curtis Jewell

Dear Mr. Smith:

My file for the above referenced matter does not show that I received a response to my letter dated May 6, 1978, a copy of which is enclosed. Can you please advise whether you are prepared to make a settlement offer on behalf of Ms. Nash.

Very truly yours,

John S. Norris, Jr.

JSN:rg

Enclosure

NOTICE OF APPEAL


Plaintiff in the above-styled action, ESSIE MAE NASH, by counsel, hereby gives Notice of Appeal from the Order entered in this action on April 28, 1981, to the Supreme Court of Virginia.

This Notice of Appeal is filed pursuant to and in accordance with Rule 5:6 of the Rules of the Supreme Court of Virginia.

Transcripts of hearings held in this action on August 12, 1980, April 9, 1981, and April 28, 1981, shall be hereafter filed.

ESSIE MAE NASH

By


Of Counsel

Peter W. Smith, Esquire
STACKHOUSE, ROWE & SMITH
1400 Virginia National Bank Building
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was hand delivered to John S. Norris, counsel of record for Defendant this 27th day of May, 1981.

CIRCUIT COURT

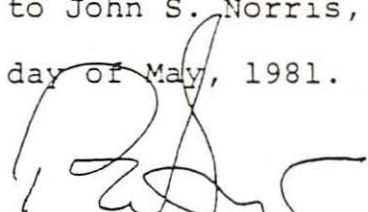
PORTSMOUTH, VA

FILED

1781
May 27

WALTER AL. EDMONDS, CLERK

 D.C.


Peter W. Smith

ON THE 12TH DAY OF JUNE, 1981.

DISMISSAL ORDER

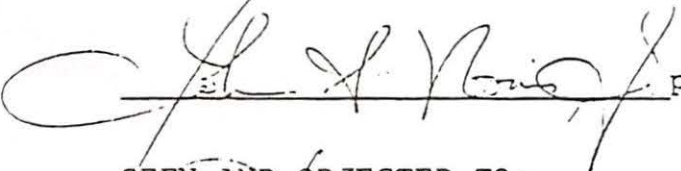
THIS DAY came the parties, by counsel, on the motion of the plaintiff to rehear argument on plaintiff's Motion to Reinstate this cause which was discontinued pursuant to Virginia Code Section 8.01-335, and;

After hearing argument of counsel, and after considering the legal memoranda submitted, the Court is of the opinion that it should not exercise its discretion to reinstate this cause of action. It is therefore ORDERED that this action shall remain discontinued in accordance with the Order of this Court entered April 28, 1981 and the Clerk shall remove this case from the Court's docket.

ENTER:

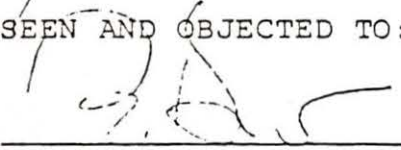
Judge

I ASK FOR THIS:

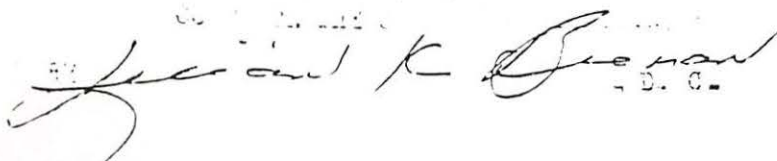


p.d.

SEEN AND OBJECTED TO:



p.q.


D.C.

ASSIGNMENTS OF ERROR

1. The Court erred in applying §8.01-335 of the Code of Virginia, 1950, as amended, to this action.

2. The Court abused its discretion in discontinuing this action pursuant to §8.01-335 of the Code of Virginia, 1950, as amended.

3. The Court abused its discretion in refusing to reinstate this action on the docket of the Court.

CROSS APPEAL

ASSIGNMENTS OF CROSS ERROR

1. The trial court erred by allowing Nash to withdraw the nonsuit which she took on July 28, 1980.

MOTION TO DISMISS

Jewell respectfully requests the Court to dismiss the Petition for Appeal due to noncompliance by Nash with Rule 5:6 of the Rules of the Supreme Court of Virginia. Under Rule 5:6, the Appellant is required to file a Notice of Appeal within 30 days after entry of "final judgment or other appealable order or decree. . ." (emphasis added). The final order in the case at bar was entered by the court on June 12, 1981. No Notice of Appeal from this order has been filed. The Notice of Appeal dated May 27, 1981 is ineffectual since it predates the final order.

Rule 5:6 is mandatory. Vaughn v. Vaughn, 215 Va. 328, 210 S.E.2d 140 (1974). The time for which the Notice of Appeal must be filed begins to run from the date final judgment is entered. Peyton v. Ellyson, 207 Va. 423, 150 S. E. 2d 104, (1966).

Accordingly, Nash has failed to comply with Rule 5:6 of the Rules of the Supreme Court of Virginia and her appeal should be dismissed.