NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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October 4, 2018

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**Re:** ***Mee Sook Kim v. Giant of Maryland, LLC, et al.***
**Case No. CL–2018–3543**

# OPINION LETTER

Dear Counsel:

The issue before the Court is whether a plaintiff may nonsuit in circuit court a claim appealed from general district court where the general district court sustained a motion to strike and entered judgment in favor of a defendant. This Court holds a plaintiff may do so. However, in light of *Robert & Bertha Robinson Family, LLC v. Allen*, 295 Va. 130, 151–52 (2018), and the law of unintended consequences, Plaintiff oddly must wait for the trial *de novo* on the merits to commence before being able to nonsuit as a matter of right. Therefore, in this case, because the trial *de novo* has not yet commenced, this Court must deny Plaintiff's motion for nonsuit without prejudice.

## I. BACKGROUND

Plaintiff Mee Sook Kim ("Ms. Kim") brought a personal injury action in the Fairfax County General District Court. In the proceedings below, the general district court sustained Defendants' motion to strike and entered final judgment in their favor.[1] Thereafter, Plaintiff perfected her appeal to this Court. The parties scheduled a jury trial for September 17, 2018.

On September 7, 2018, Ms. Kim filed a motion for nonsuit. On September 14, 2018, a few days before trial, this Court heard her motion.[2] At the hearing, counsel for Union Mill Associates, LP objected to the nonsuit, contending the general district court sustained a motion to strike in the general district court trial, thereby barring a nonsuit in the circuit court per Virginia Code § 8.01–380(A). Ms. Kim responded that appeals from general district court are heard *de novo* and that the act of perfecting her appeal nullified the decisions in the general district court, including the final judgment and the motion to strike.

Succinctly stated, Defendant Union Mill reads the nonsuit statute so as to include pre-appeal general district court acts as counting towards statutory restrictions on when a party may nonsuit as a matter of right. Conversely, Ms. Kim reads Virginia Code § 8.01–380(A) in conjunction with Virginia Code § 16.1–106, which provides for *de novo* review of general district court appeals, so as to create an entirely blank slate for nonsuit purposes in circuit court proceedings on appeal from general district court.

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[1] In the general district court proceedings, Union Mill and Rappaport Management filed cross-claims. However, these parties nonsuited their cross-claims in general district court on November 6, 2017. The cross-claims were not appealed to this Court. Therefore, this Court has no jurisdiction over them. *See K-B Corp. v. Gallagher*, 218 Va. 381, 386–87 (1977); *Allen*, 295 Va. at 151–52.

[2] The matter was originally placed on the Court's docket for Defendant Giant of Maryland's motion for summary judgment. In lieu of hearing Giant of Maryland's motion, the Court heard argument on Plaintiff's motion to nonsuit.

## II. ANALYSIS

### A. A Nonsuit Is Powerful, but Is Subject to Limitations.

Nonsuits are powerful, but are subject to important limitations. Under the nonsuit statute, "[a] party shall not be allowed to suffer a nonsuit as to any cause of action or claim . . . unless he does so before a motion to strike the evidence has been sustained or . . . before the action has been submitted to the court for decision." VA. CODE § 8.01–380(A). Union Mill insists this Court must deny Ms. Kim's motion for nonsuit because the general district court sustained a motion to strike and entered final judgment in Defendants' favor.[3]

"The right to take a nonsuit is a powerful tactical weapon in the hands of a plaintiff." *Temple v. Mary Wash. Hosp.*, 288 Va. 134, 140 (2014). "A plaintiff's right to take a nonsuit, however, is not unlimited." *Ford Motor Co. v. Jones*, 266 Va. 404, 406 (2003) (citations omitted). "Manifestly, an action has been 'submitted to the court for decision' by the time the court decides the matter." *Bio-Med. Applications of Va., Inc. v. Coston*, 272 Va. 489, 494 (2006) (*quoting Khanna v. Dominion Bank*, 237 Va. 242, 245 (1989)). As for motions to strike, "the time bar fixed by . . . the nonsuit statute does not become effective until the trial court actually sustains a motion to strike the evidence." *Bio-Med.*, 272 Va. at 493.

The parties herein do not dispute that the general district court sustained the motion to strike and issued judgment in favor of Defendants. Thus, the circumstances before the Court appear to be the exact circumstances contemplated by Virginia Code § 8.01–380(A), which proscribes a court from granting a nonsuit after a motion to strike has been sustained or a final judgment entered. However, if perfecting her appeal from the general district court annulled the general district court's judgment, Ms. Kim would not be barred from nonsuiting. Therefore, before ruling on Ms. Kim's motion for nonsuit, the Court must determine the effect of an appeal from general district court to circuit court on a party's right to nonsuit.

### B. A *De Novo* Appeal Is Not an Instantaneous Annulment of the General District Court Judgment.

The jurisprudence applicable to civil appeals from general district court to circuit court evolved quite dramatically in recent years. Many assume that perfecting an appeal to the circuit court annuls the lower court judgment; providing a blank slate, a chance to start all over again in

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[3] The record transmitted to the Court pursuant to Virginia Code § 16.1–112 is devoid of any reference to a motion to strike being sustained in the general district court proceedings. Yet, counsel for Union Mill handed this Court a copy of a transcript from the September 14, 2018 hearing, without any objection from the other parties, all of whom were represented by counsel at the hearing. The general district court transcript clearly reflects that the general district court judge sustained Defendants' motion to strike on Plaintiff's claim. A circuit court retains "full power to . . . direct proceedings to correct . . . omissions, to promote substantial justice to all the parties. . ." VA. CODE § 16.1–114.1. For the limited purpose of ruling on Plaintiff's motion for nonsuit, this Court will assume, without deciding, that the transcript is properly before the Court for consideration.

a court of record. This "blank slate, annulment" theory is well-founded. In 1934, the Supreme Court of Virginia stated:

> The right of the plaintiff to take a nonsuit or a dismissal of his suit extends to the appellate court on appeal from a decision of a [court not of record] and trial *de novo*. . . . When the effect of an appeal is to transfer the entire record to the appellate court, and to cause the action to be retried in that court as if originally brought therein . . . the judgment appealed from is completely annulled.

*Thomas Gemmell, Inc. v. Svea Fire & Life Ins.*, 166 Va. 95, 99–100 (1936) (citations omitted).

More recently, this Circuit broadly restated this blank state, annulment theory. *Joseph v. Giant Food, Inc.*, 61 Va. Cir. 143 (Fairfax Cir. Ct. 2003) presented a fact pattern nearly identical to the present case. In *Joseph*, the plaintiff filed a warrant in debt in the general district court for personal injuries. *Id.* at 143. The general district court entered a final judgment in favor of the defendant. *Id.* After perfecting her appeal to circuit court and one week before trial, the plaintiff moved for a nonsuit. *Id.* at 143–44. This Circuit held Virginia Code § 8.01–380(A) did not bar the plaintiff from nonsuiting as a matter of right "even if the case was in fact 'submitted to the [general district court] for decision.'" *Id.* at 146.

Specifically, the court held, "[h]aving timely *perfected her appeal* from the judgment entered against her in the GDC . . . *all rulings and judgments rendered by the GDC are completely null and void* and of no legal consequence." *Id.* (emphasis added). In *Joseph*, this Circuit relied on *Ragan v. Woodcroft Village Apts.*, 255 Va. 322 (1998), where the Supreme Court concluded that a party's right to appeal from general district court under Virginia Code § 16.1–106 "is in effect a statutory grant of a new trial, in which *the perfected appeal annuls the judgment of the district court* as completely as if there had been no previous trial." 255 Va. at 327 (emphasis added) (*citing Gaskill v. Commonwealth*, 206 Va. 486, 490 (1965)).

Seemingly, *Thomas Gemmell*, *Ragan*, and *Joseph* are dispositive of the issue before this Court. Like in *Joseph*, here, Ms. Kim seeks to nonsuit after perfecting her appeal. 61 Va. Cir. at 143. *Thomas Gemmell* and *Ragan* instruct that Ms. Kim's perfecting of her appeal annulled the rulings and judgments of the general district court, providing her with a blank slate in the circuit court proceedings. *Ragan*, 255 Va. at 327; *Thomas Gemmell*, 166 Va. at 100. Collectively, these cases direct the conclusion that this Court must grant Ms. Kim's motion for nonsuit. However, these cases no longer reflect how Virginia jurisprudence perceives the effect of an appeal from general district court to circuit court. Consequently, further analysis is warranted.

### C. The Demise of *Thomas Gemmell* and the Rise of the "Modern Perspective" of a Circuit Court's Jurisdiction Over a Claim Appealed from General District Court.

The holding of *Thomas Gemmell* presupposed two now outdated principles concerning the nature of an appeal from a court not of record to a court of record. The first was that "[a]

court which hears a case *de novo* . . . acts not as a court of appeals but as one exercising *original jurisdiction*." 166 Va. at 98 (emphasis added).

The second was that: "[w]here the effect of an appeal is to transfer the entire record to the appellate court for a retrial as though originally brought therein, *the judgment appealed from is completely annulled*." *Id.* at 99 (emphasis added) (citation omitted). More specifically, "*[b]y perfecting the appeal* from the justice's court . . . [t]he judgment in the justice's court was not merely suspended, but by the removal of the record [the judgment] was vacated and set aside . . . [and] *the judgment appealed from is completely annulled*." *Id.* at 100 (emphasis added) (citations omitted). Notably, this second presupposition mirrors the rationale of the Supreme Court elucidated in *Ragan* and crucial to the holding in *Joseph*. *See Ragan*, 255 Va. at 327; *Joseph*, 61 Va. Cir. at 146 (quoting *Ragan*, 255 Va. at 327; citing *Thomas Gemmell*, 166 Va. at 99).

As aforementioned, however, the foundational legal principles underlying *Thomas Gemmell* and its progeny (*e.g.*, *Ragan* and *Joseph)* are no longer followed in this Commonwealth. Three decisions handed down this past decade are demonstrative of the Supreme Court of Virginia's departure from the "traditional view" of *Thomas Gemmell* and the court's transition to a more "modern perspective." The recent transition effectively redefined the implications and nature of an appeal from general district court to circuit court.

*1.* *The Tip of the Iceberg:* Davis v. County of Fairfax.

The first case, *Davis v. County of Fairfax*, 282 Va. 23 (2011), was the only one of the three "modern perspective" cases to specifically discuss nonsuiting in circuit court following an appeal from general district court. There, the Supreme Court held that where a party appeals from general district court and nonsuits in circuit court, the party must refile the case—if it chooses to do so—in circuit court, not in general district court. *Id.* at 30–31.

As pertinent to this Court's analysis, in *Davis*, the Supreme Court reversed the underlying *en banc* decision from the Court of Appeals of Virginia, which relied upon *Lewis v. Culpeper County Department of Social Services*, 50 Va. App. 160 (2007). In *Lewis*, the Court of Appeals (after discussing *Thomas Gemmell*) held, "where a plaintiff who prevailed in the district court takes a nonsuit in the defendant's *de novo* appeal in circuit court, the combined effect of principles applicable to nonsuits and *de novo* appeals is to nullify the entire suit as if it had never existed in either court." 50 Va. App. at 167. The Supreme Court quoted this exact language in its opinion in *Davis*. 282 Va. at 27.

Thereafter in the *Davis* opinion, the court ruled, "[t]o the extent that *Lewis* . . . is inconsistent with this opinion, it is expressly overruled." 282 Va. at 31. More precisely, *Davis* expressly overruled the conclusion in *Lewis* that "the combined effect of principles applicable to nonsuits and *de novo* appeals is to nullify the entire suit as if it had never existed in either court." Instead, the court in *Davis* concluded circuit courts "do not lose appellate jurisdiction over an appeal of right taken from a lower court simply by granting a nonsuit in that particular case." 282 Va. at 30 (citing VA. CODE §§ 16.1–106; 17.1–513). By expressly overruling *Lewis*, the Supreme

Court of Virginia implicitly recognized that the combined effect of an appeal from general district court and a subsequent nonsuit in circuit court cannot be to nullify the entire judicial proceedings as if they never existed.

Unfortunately, *Davis* did not go so far as to define the true "combined effect of the principles applicable to nonsuits and *de novo* appeals." 282 Va. at 27 (citations omitted). Indeed, the court in *Davis* took for granted the notion that a party who appeals a final judgment from general district court may in fact nonsuit as a matter of right in the circuit court proceedings on appeal. Consequently, *Davis* did not address the more rudimental questions of *whether* a party may in fact take a nonsuit as a matter of right in circuit court on appeal from general district court; and, if so, *when* the general district court judgment is annulled so as to permit the party to nonsuit as a matter of right.

2. *The Trojan Horse:* Parrish v. Fannie Mae.

The second of the "modern perspective" cases is *Parrish v. Fannie Mae*, 292 Va. 44 (2016). There, the court concluded a circuit court is "*exercising its appellate jurisdiction*" on appeal from general district court. *Id.* at 49 (emphasis added) (citing *Addison v. Salyer*, 185 Va. 644, 651 (1946)). The court reasoned, "although *de novo*, an appeal in the circuit court is a *continuation* of the original case." *Id.* at 54 (emphasis added) (*citing Stacy v. Mullins*, 185 Va. 837, 840 (1946)).

This conclusion comports with the Code of Virginia: "The circuit courts . . . shall have appellate jurisdiction in all cases, civil and criminal, in which an appeal may, as provided by law, be taken from the judgment or proceedings of any inferior tribunal." VA. CODE § 17.1–513. Yet, this conclusion is antithetical to the first presupposition of *Thomas Gemmell* that "[a] court which hears a case *de novo* . . . acts not as a court of appeals but as one *exercising original jurisdiction*." 166 Va. at 98 (emphasis added).

The differing perception explained in *Parrish* is subtle. However, the implications are in fact substantial. The nature of a circuit court's proceedings in exercise of its appellate jurisdiction are wholly different than the nature of proceedings when exercising original jurisdiction. For example, if Ms. Kim initially filed her complaint in this Court, invoking its original jurisdiction, there would be no question that, at this stage of the proceedings, she could suffer a nonsuit as a matter of right, as there would be no previous judgments or rulings from general district court. But, this Court is not exercising its original jurisdiction, it is exercising its appellate jurisdiction; a jurisdiction derivative from, and a continuation of, the jurisdiction of the general district court. *Parrish*, 292 Va. at 50.

The fact that a circuit court exercises appellate, and not original, jurisdiction on appeal from general district court is highlighted by the numerous, differing aspects of civil procedure when a circuit court presides over an appeal from general district court as opposed to when a

circuit court exercises its original jurisdiction.[4] Although not exhaustive, the differences set forth in Footnote 4 accentuate the appellate nature of a circuit court's jurisdiction when presiding over appeals from general district court.

These distinctions illuminate the conclusion that circuit court proceedings following an appeal from general district court are not "blank slates." Consequently, following an appeal from general district court, this Court cannot grant a nonsuit as a matter of course as it would if the Court were exercising original jurisdiction; regard must be ascribed to the decisions of the general district court.

3. *The Straw that Broke the Camel's Back:* Robert & Bertha Robinson Family, LLC v. Allen.

The most recent of the "modern perspective" cases is *Robert & Bertha Robinson Family, LLC v. Allen*, 295 Va. 130 (2018). In *Allen*, the court concluded, "*[t]he 'event' that triggers the 'annulment of the district court judgment' is the trial de novo* . . . not the notice of appeal." 295 Va. at 150 (emphasis added) (quoting *Commonwealth v. Diaz*, 266 Va. 260, 266 (2003)). In other words, "'an appeal to a circuit court from a district court judgment annuls that prior judgment only after 'a trial *de novo* has commenced on the merits of the case.'" *Id.* The court rationalized, "*[d]e novo* defines the nature of review, not the scope of review. . . These are two very different concepts." *Id.* Put differently, "[t]he scope of appellate review is not determined by the standard of review." *Id.*

*Allen* clarifies that the fact a circuit court hears an appeal from general district court entirely *de novo* does not divest it of its appellate jurisdiction. As the court noted, "[a]ppellate

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[4] For example, it constitutes a reversible error to permit a party "to amend [its] original claims to increase the damages sought to amounts in excess of the jurisdictional limits of the general district court." *Afify v. Simmons*, 254 Va. 315, 319 (1997). Likewise, the appealing party cannot amend his warrant of debt or complaint in circuit court to add claims over which the general district court would have had no jurisdiction over. *Hoffman v. Stuart*, 188 Va. 785, 794 (1949).

On appeal from general district court, "[n]o appeal shall be allowed unless and until the party applying for the same . . . shall give bond." VA. CODE § 16.1–107. Similarly, a circuit court can "require the appellant to give new and additional security, and if such security be not given . . . the appeal shall be dismissed." VA. CODE § 16.1–109. There are no similar bars to prosecuting a case in circuit court when its original jurisdiction is invoked.

Moreover, a circuit court "may refuse to suspend the execution of a judgment [concerning] an injunction brought pursuant to . . . the Virginia Freedom of Information Act." VA. CODE § 16.1–106. Likewise, a circuit court can suspend a protective order issued in general district court. VA. CODE § 16.1–106. A circuit court exercising original jurisdiction cannot otherwise suspend the execution of a general district court judgment.

When an action is initiated pursuant to a circuit court's original jurisdiction, a party is in default for failure to file responsive pleadings within twenty-one days of being served with notice of the complaint. Va. Sup. Ct. R. 3:19(a). However, where a defendant fails to file responsive pleadings after being served with notice of appeal from general district court, the defendant is not similarly in default. *See Overnite Transp. Co. v. Barnett's, Inc.*, 217 Va. 222, 225 (1976).

Finally, a circuit court may review the record from general district court, *Parrish*, 292 Va. at 54, an exercise necessarily reserved to only appellate courts as there is no "record" of a lower tribunal without proceedings in the lower tribunal.

courts employ the *de novo* standard of review when analyzing a host of issues, such as statutory interpretation, the plain meaning of contracts, resolution of constitutional questions, and the proper use of demurrers." *Id.* at 149. The only distinction being that, on appeal from general district court, circuit courts review the entire case *de novo*, whereas a traditional appellate court only reviews questions of law *de novo*. *Cf. id.* at 148 n.21; *see also Tyson v. Scott*, 116 Va. 243, 251–52 (1914) (concluding that regardless of whether the form of appeal is a "*de novo* appeal" or a "writ of error appeal" "[t]he decisions are to the same effect").

Unquestionably, *Allen* is inharmonious with the second presupposition of *Thomas Gemmell* that "[w]hen the effect of an appeal is to transfer the entire record to the appellate court, and to cause the action to be retried in that court as if originally brought therein . . . the judgment appealed from is completely annulled." *Id.* at 100 (citations omitted); *see also Ragan*, 255 Va. at 327; *Joseph*, 61 Va. Cir. at 146. Irreconcilably, *Allen* unequivocally concludes that the commencement of a *trial de novo* annuls the general district court judgment, not the *perfection* of appeal. 295 Va. at 150.

4. *Effect of Appeals from General District Court on A Party's Right to Nonsuit in Circuit Court.*

In short, *Allen* holds that perfecting an appeal does not annul the underlying general district court judgment; the annulment occurs only once the *de novo* trial on the merits commences. 295 Va. at 150. *Parrish* holds that an appeal from the general district court is a continuation of the original case and the circuit court exercises appellate jurisdiction over the proceedings. 292 Va. at 54. *Thomas Gemmell* holds that a party who appeals from a court not of record (*i.e.*, general district court) to a court of record (*i.e.*, circuit court) may nonsuit in the circuit court. 166 Va. at 100–01. Virginia Code § 8.01–380(A), however, prohibits a party from suffering a nonsuit after a motion to strike the evidence has been sustained or after the case has been submitted to the court for decision.

In the present case, the general district court sustained a motion to strike against Ms. Kim and entered a final judgment in favor of Defendants. Upon Ms. Kim's appeal, those same proceedings now continue in this Court. It is axiomatic that "[a] judgment on the merits . . . is conclusive on the parties . . . until reversed or set aside in a direct proceeding for that purpose." *Storm v. Nationwide Mut. Ins.*, 199 Va. 130, 133 (1957) (citation omitted). At this moment in the case, Ms. Kim cannot nonsuit her claim, as the general district court's rulings are not yet annulled, and therefore those rulings remain conclusive on the parties.

Nonetheless, the commencement of the trial *de novo* in circuit court is the triggering act that will annul the general district court judgment and rulings. *Allen*, 295 Va. at 150. Once the trial *de novo* commences, suddenly the facts on the ground will change. The general district court

judgment and rulings will become a legal nullity and, under Virginia Code § 8.01–380(A) and *Thomas Gemmell*, Ms. Kim may then suffer a nonsuit as a matter of right.[5]

Only a judge who previously toiled as a lawyer could write the following conclusion: Ms. Kim wants to suffer a nonsuit right now. However, she must wait until her trial begins before doing so—forcing everyone to wastefully prepare for trial in the interim, in the event she changes her mind and decides to litigate her claim.

Truly, it is not intuitive why a party appealing from the general district court may not nonsuit his or her case until a trial *de novo* on the merits has commenced in circuit court. Presumably, this state of Virginia jurisprudence is an unintended consequence of the "modern perspective" cases.[6] Yet, as *stare decisis* from the highest court in this Commonwealth, this Court is bound to follow the principles elucidated in the "modern perspective" cases. *See e.g., Powell v. Commonwealth*, 267 Va. 107, 128 (2004) ("It is self-evident that [] the opinion of an appellate court, under the doctrine of *stare decisis*, applies to all future cases in the trial courts.").

## III. CONCLUSION

For the reasons stated herein, this Court holds that a party who appeals a claim from general district court, after losing a motion to strike and/or the entry of a final judgment, may nonsuit her claim in circuit court but must wait until the rulings of the general district court are annulled. That is, a party may not nonsuit in circuit court a claim appealed from general district court until the trial *de novo* on the merits commences. Here, because a trial *de novo* has not yet commenced, Ms. Kim may not suffer a nonsuit as a matter of right and this Court must deny her motion for nonsuit at this time, without prejudice.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

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[5] For sake of clarity, this conclusion presumes that no motion to strike would have been sustained in the circuit court proceedings and further presumes that Ms. Kim's claim will not otherwise be submitted to the circuit court for decision before Ms. Kim moves to nonsuit.

[6] Of course, the *Allen* court may have recognized this enigma and chose to tolerate it for legal correctness and logical consistency with the larger issue addressed by the court's holding in that case: that a party cannot piggyback an unperfected appeal on an opponent's perfected appeal. 295 Va. at 151.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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| MEE SOOK KIM, | ) | |
| | ) | |
| *Plaintiff*, | ) | |
| v. | ) | CL–2018–3543 |
| | ) | |
| GIANT OF MARYLAND, LLC, *et al.*, | ) | |
| | ) | |
| | ) | |
| *Defendants*. | ) | |

**ORDER**

THIS MATTER came before the Court on the September 14, 2018 on Plaintiff's Motion for Nonsuit and Defendant Giant of Maryland's Motion for Summary Judgment;

UPON HEARING oral argument by counsel on a Motion for Nonsuit on September 14, 2018; it was

DECREED that Defendant Giant of Maryland's Motion for Summary Judgment shall REMAIN PENDING for a hearing on the merits pending resolution of the Court's ruling on Plaintiff's Motion for Nonsuit;

FURTHER DECREED that Defendants shall have until September 21, 2018 to submit legal memoranda of five (5) pages or less concerning Plaintiff's Motion for Nonsuit;

FURTHER DECREED that Plaintiff shall have until September 28, 2018 to submit a reply brief of five (5) pages or less concerning Plaintiff's Motion for Nonsuit;

FURTHER DECREED that the Court took Plaintiff's Motion for Nonsuit UNDER ADVISEMENT until the parties submitted the aforementioned legal briefs; and

UPON CONSIDERATION of oral argument on September 14, 2018; and

UPON CONSIDERATION of Plaintiff's Motion for Nonsuit, Defendant Giant of Maryland, LLC's Memorandum in Opposition, Union Mill Associates LP's Brief in Opposition, and Plaintiff's Reply Brief; it is now hereby

ADJUDGED that a party may nonsuit a claim on appeal from general district court once the general district court judgment and rulings are annulled;

FURTHER ADJUDGED that the general district court proceedings are not annulled until a trial *de novo* on the merits commences in circuit court;

FURTHER ADJUDGED that because a trial *de novo* on the merits has not commenced in this matter, Plaintiff is not entitled to suffer a nonsuit as a matter of right pursuant to Virginia § 8.01–380 at this stage of the litigation;

ORDERED that Plaintiff's Motion for Nonsuit is DENIED without prejudice;

DECREED that the Opinion Letter from this judge dated October 4, 2018 is hereby adopted by reference into this order as though it were fully restated herein;

FURTHER DECREED the trial is continued to a later date which shall be set and agreed upon by all the parties and presented to this Court's calendar control;

FURTHER DECREED that Defendant Giant of Maryland, LLC may reschedule its Motion for Summary Judgment for a hearing on the merits, if it is so inclined; and

FURTHER DECREED that this Amended Order shall replace the Order dated September 14, 2018, which is hereby vacated.

[redacted]

OCT 04 2018 [redacted] Judge David A. Oblon

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