In The

Supreme Court of Virginia

RECORD NO: 101844

FORREST WALPOLE,

Appellant,

v.

KAREN MARTINS; McENEARNEY ASSOCIATES, INC.; DONNA GAVIN AND DAVID GAVIN,

Appellees.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT FORREST WALPOLE

Appellant Forrest Walpole seeks reversal of *Northern Virginia Real Estate, Inc. et al. v. Karen Martins, et al., Fairfax County Circuit Court Case No. 2007-8717.* The trial court erred when it awarded sanctions because it no longer had jurisdiction over the matter when Walpole's clients exercised their right to a voluntary nonsuit. Moreover, the trial court erred in awarding sanctions when it applied hindsight rather than the objective standard of reasonableness. To the best of Walpole's knowledge, information and belief, formed after reasonable inquiry, the claims were well grounded in fact and warranted by existing law. Additionally, the trial court erred in determining the terms of and quantum of sanctions because it did not properly consider the defendants' failure to mitigate, the billing practices of defendants' counselors, the punitive effect of the award, and the ability of Walpole to pay. These actions by the trial court constitute reversible error.

ASSIGNMENTS OF ERROR

1. [Not accepted for appellate review].

2. [Not accepted for appellate review].

3. The trial court erred in awarding sanctions under Va. Code § 8.01-271.1 against Walpole, NVRE, and Kivlighan because it abused its discretion by making its sanction determination based on post-filing factual

findings, evidentiary rulings, and other hindsight rather than an objective view of whether NVRE, Kivlighan, and Walpole, after reasonable inquiry, could have formed a reasonable belief that the Complaint, Amended Complaint, Second Amended Complaint and Bill of Particulars met the certification requirements of Va. Code § 8.01-271.1 at the time it was filed. The pages of the Joint Appendix where this error was preserved are as follows: JA 1268-1453, 1471-1532, 1794-2130, 2169-2173 and 2162-2165.

4. The trial court erred in determining the terms of and quantum of sanctions against Walpole, NVRE and Kivlighan because it did not properly consider the defendants' failure to mitigate, the billing practices of defendants' counselors, the punitive effect of the award, and ability to pay. The pages of the Joint Appendix where this error was preserved are as follows: JA 1268-1453, 1471-1532, 1794-2130, 2169-2173 and 2162-2165.

5. The trial court erred when it denied Walpole's motion for entry of a suspending order without giving Walpole the opportunity to present oral argument under Va. Sup. Ct. R. 4:15(d). The pages of the Joint Appendix where this error was preserved are as follows: JA 2169-2173.

6. The trial court erred in awarding sanctions under Va. Code § 8.01-271.1 against NVRE, Kivlighan and Walpole when the trial court lacked jurisdiction to do so because the motions for sanctions were made,

heard, and decided more than 21 days after entry of a nonsuit order, and the trial court lacked authority under Rule 1:1 of the Rules of the Supreme Court of Virginia to suspend the finality of the nonsuit order. The pages of the Joint Appendix where this error was preserved are as follows: JA 2169-2173. Also, because this assignment of error concerns a jurisdictional defect, it can be raised at any time, including on this appeal. Mackwitz v. Roy, 244 Va. 60, 63, 418 S.E.2d 861, 863 (1992).

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

Walpole seeks reversal of the rulings of the trial court that resulted in sanctions awarded against him and his former clients Northern Virginia Real Estate, Inc. ("NVRE") and NVRE's owner Lauren Kivlighan. The underlying case involved a real estate commission dispute with Donna Gavin (agent-in-fact/trustee for the seller of a residential property), her husband David Gavin, real estate agent Karen Martins and her employer McEnearney Associates, Inc. ("McEnearney"). The Gavins, Martins and McEnearney tortiously caused economic harm to NVRE and Kivlighan in the form of lost commissions and harm to their reputation. Therefore, NVRE and Kivlighan hired attorney Walpole to represent their interests in claims against the tortfeasors. A significant number of pleadings were then

filed by all of the parties and the following describes the material proceedings.

Attorney Walpole set forth NVRE's and Kivlighan's claims for conspiracy, interference with contract, interference with contract expectancy, and defamation in a Complaint that named Donna Gavin, David Gavin, Martins and McEnearney as defendants [JA 1-37]. The Gavins craved oyer, demurred, filed special pleas, and counterclaimed for declaratory judgment [JA 38-46]. Martins and McEnearney moved for a bill of particulars, moved to compel amendment of the Complaint and craved oyer [JA 47-51]. NVRE and Kivlighan demurred to the counterclaim [JA 52-56] and the demurrer was sustained in the court's order and opinion letters dated April 21, 2008 [JA 443 and pp. 444-446]. The parties then agreed to a Consent Order for the filing of an Amended Complaint [JA 57-59].

The Amended Complaint [JA 60-92] and Bill of Particulars [JA 93-228] were filed on October 5, 2007. The Amended Complaint set forth claims for conspiracy to harm business, interference with contract expectancy and defamation. In response, Martins and McEnearney demurred to all counts that named them as defendants [JA 229-247]. The Gavins answered, demurred and filed special pleas [JA 248-258 and 259-272].

By Order dated December 14, 2007, the court overruled Martins' and McEnearney's demurrer to the claims for conspiracy, tortious interference and punitive damages while sustaining with respect to the remainder counts [JA 279-280]. The court granted NVRE and Kivlighan leave to amend [JA 281-282]. By Order dated December 21, 2007, the court sustained the Gavins' plea to some of the defamation counts [JA 283-285].

On December 21, 2007, Walpole filed NVRE's and Kivlighan's Second Amended Complaint which set forth claims for conspiracy to harm business, interference with contract expectancy and defamation [JA 286-341]. In response, Martins and McEnearney demurred [JA 345-358]. Martins' and McEnearney's demurrer was overruled by court order dated January 25, 2008 [JA 359-360]. Subsequently, NVRE and Kivlighan filed a copy of the deed to the property at issue in the litigation [JA 361-365] and Martins and McEnearney filed an Answer [JA 376-380]. In the meantime, the Gavins demurred to the Second Amended Complaint [JA 366-375]. No ruling was made on the Gavins' demurrer prior to trial.

Trial was set to begin on April 28, 2008. Prior to trial, NVRE and Kivlighan filed a motion in limine as to the evidence to be admitted at trial [JA 381-382]. Specifically, NVRE and Kivlighan sought to block the introduction of a written response and drafts of the response to a complaint

filed at the Department of Professional Regulation [JA 381-382]. All defendants filed motions in limine [JA 386-397 and pp. 398-405] and filed oppositions to NVRE and Kivlighan's motion in limine [JA 406-409 and 410-442]. NVRE' and Kivlighan's motion in limine was denied by order dated April 25, 2008 [JA 463-464), thus permitting defendants to introduce the DPOR complaint and drafts.

Trial commenced on April 28, 2008. That day, the Gavins filed their Answer to the Second Amended Complaint [JA 465-471]. The pending claims as of the morning of April 28, 2008 were conspiracy to harm business against David Gavin, Martins and McEnearney, interference with contract expectancy against David Gavin, Martins and McEnearney, and defamation against David Gavin.

After selecting a jury, the trial court heard argument on the pending motions *in limine* and a motion for a deemed admission under Va. Sup. Ct. Rule 3:11 [JA 515-55]. NVRE and Kivlighan intended to offer into evidence the National Association of Realtors Code of Ethics to prove an element of the claims [JA 515, 519-523 and 2202-2209]. The trial court sustained the defendants' motion in limine precluding the introduction of the Code of Ethics into evidence [JA 527-528 and 544]. NVRE and Kivlighan further intended to offer into evidence written statements made by Martins in

relation to a complaint filed with the National Association of Realtors [JA 96-101, 528-543 and 2191-2196]. The trial court sustained the defendants' motion in limine blocking that evidence [JA 543]. Finally, Martins and McEnearney sought the deemed admission of an affirmative defense under Va. Sup. Ct. Rule 3:11 [JA 546-550]. The trial court ruled that there was an admission and, therefore, for purposes of trial, NVRE and Kivlighan were precluded from offering any evidence that there was a contract with the owner of the property or a reasonable contractual expectancy [JA 550]. The trial court's rulings were challenged by Petition for Appeal but those two assignments of error were not accepted by this Court. Even so, the trial court acknowledged that the listing agreement was a valid contract [JA 1629].

Trial went forward against three defendants: David Gavin, Martins and McEnearney. At the close of NVRE's and Kivlighan's case, they took a voluntary nonsuit as of right against Martins and McEnearney pursuant to Va. Code § 8:01-380 [JA 1068]. The trial court did not immediately grant the nonsuit. NVRE and Kivlighan again asked for a nonsuit as to Martins and McEnearney and counsel to Martins and McEnearney agreed that it was their right to a nonsuit [JA 1137-1138]. NVRE and Kivlighan then moved for a voluntary nonsuit as to David Gavin as well [JA 1179]. The

Gavins did not have a motion for sanctions pending at the time. The trial court granted the motions for voluntary nonsuit [JA 1192] and entered an order granting the nonsuit [JA 1197]. The order also purported to suspend the nonsuit order indefinitely [JA 1197].

More than two months after the entry of the nonsuit order, Martins and McEnearney and Donna and David Gavin moved for sanctions against Walpole, NVRE and Kivlighan [JA 1121-1244 and 1245-1267]. Walpole, NVRE and Kivlighan opposed the motions [JA 1268-1454]. The motions were argued on August 29, 2008 and taken under advisement [JA 1471-1532]. On November 20, 2008, the trial court informed defendants that they failed to submit sufficient evidence as to the amount of sanctions if sanctions were going to be awarded, but the trial court invited defendants to submit additional information to support the motions [JA 1533 and 1616]. In a March 17, 2009 letter opinion, almost a year after the entry of the order on the voluntary nonsuit, the trial court granted sanctions but left the matter open for further proceedings to determine the amount of sanctions and as to whom the sanctions should be levied or apportioned [JA 1625-1633] and entered an order incorporating the letter opinion on May 14, 2009 [JA 1659-1674]. On October 13, 2009, the trial court held an evidentiary hearing on the damages and apportionment issues and again took the matter under

advisement [JA 1794-2130]. On June 29, 2010, more than two years after the entry of the order for a voluntary nonsuit, the trial court issued a letter opinion and Order jointly and severally sanctioning Walpole, NVRE and Kivlighan for $272,096.46 [JA 2131-2132 and 2133-2145].

On July 8, 2010, Walpole moved to suspend the order [JA 2151-2156]. The trial court denied the motion [JA 2161]. On July 12, 2010, Walpole moved for reconsideration and for suspension of the order [JA 2162-2165]. Without holding a hearing, the trial court denied Walpole's motions [JA 2174]. On July 14, 2010, Walpole filed his exceptions and objections to the June 29, 2010 Order [JA 2169-2173]. Walpole filed his exhibits that were excluded at trial [JA 2188-2209]. Walpole then filed his Notice of Appeal on July 28, 2010 [JA 2218-2221].

STATEMENT OF FACTS

In 2007, Donna Gavin ("Gavin") had power of attorney to act as attorney-in-fact for her mother Bernadette Kennedy, the owner of the Property [JA 1290]. Kennedy's daughter, Valerie Corey, lived at the Property and, in early 2007, real estate agent Karen Martins of McEnearney Associates, Inc. introduced herself to Corey and learned of the potential sale of the Property. Martins dropped by periodically to find out when it was going to be sold or when it was going to be listed [JA

1294]. Martins gave Corey her business card which was passed onto Donna Gavin, the decision maker [JA 1294-1295].

Donna Gavin called Kivlighan in early March 2007 for her assistance in selling the Property [JA 1296-1304]. Pursuant to that request, Kivlighan showed the Property to two potential buyers including Osman Alnifaidy who was very interested [JA 1320 and 1325].

On March 31, 2007, Kivlighan went over the terms of a written listing agreement and associated documents with Donna Gavin [JA 144-151]. A listing price of $729,900 was established and a 6% commission suggested [JA 144 and 146]. Kivlighan then showed Gavin on a net sheet what Kennedy would realize if the house sold for the list price of $729,900 subtracting a 6% commission and paying off the existing mortgage [JA 151]. Gavin, as attorney-in-fact for Kennedy, orally agreed to engage NVRE to list and sell the Property. "When I left … they had agreed with me on this property" [JA 1310-1311].

The written listing agreement was finally signed on April 27, 2007 between NVRE and Kennedy, by Donna Gavin, her attorney-in-fact (the "Listing") [JA 147]. A check of the tax records that same day confirmed that the Property was still listed as owned by Kennedy [JA 1307].

Unbeknownst to NVRE, sometime between NVRE's engagement on March 31, 2007 and the execution of the Listing on April 27, 2007, Kennedy conveyed the property to the Bernadette A. Kennedy Living Trust, of which Donna Gavin was a Trustee. [JA 362-64]. Gavin failed to inform NVRE of the change in title [JA 1291]. Even so, Gavin had actual and apparent legal authority and power to bind Kennedy individually as well as the Trust as evidenced by multiple legal documents executed in the exact same way i.e. "Donna Gavin Power of Attorney for Bernadette Kennedy" including the For Sale By Owner Agreement with McEnearney [JA 309); the Regional Sales Contract with the Wheelers for the sale of the Property [JA 311-320); Virginia Jurisdictional Addendum [JA 322-326); NVAR Contingencies/Clauses Addendum to Contract [JA 327-329); Lead paint disclosure [JA 330); Sales Contract Addendum [JA 331); Residential Property Disclaimer [JA 332); Sales Contract Addendum 2 [JA 334); and Sales Contract Addendum 3 [JA 335].

NVRE and Kivlighan had a contract and contract expectancy based upon the oral engagement and confirmed by the Listing Agreement that was executed by Donna Gavin. NVRE also had a reasonable expectation that upon producing a buyer, the Seller would have an obligation to pay a

commission. The trial court acknowledged as much in its sanctions order [JA 1629].

In the meantime, although she had failed to get the listing, Martins still hoped to earn a buyers commission. On April 26, 2007, she viewed the property with her clients Peter and Barbara Wheeler [JA 1334-1339 and 1349]. While at the Property, Barbara Wheeler had a telephone conversation with David Gavin about the Property. The Wheelers then authorized Martins to explore a purchase price of $680,000 [JA 1345-1348].

Martins knew from David Gavin that NVRE had an exclusive listing and, on April 27, 2008, called Kivlighan to discuss the Wheeler's interest at a $680,000 purchase price [JA 1335: 27 April 2007-- "This morning, I called the listing agent, Lauren Kivlighan, to inquire on the home for my clients"]. Kivlighan told Martins to submit a written offer, and suggested she inquire whether the Wheelers would go higher because another offer was pending [JA 1312]. The Wheelers' instructed Martins not to submit an offer, because there was another potential bidder in the picture. They were "not interested in getting into a bidding war" [JA 1387-1388].

On May 1, 2007, Osman Alnifaidy signed a contract along with related documents offering to buy the Property for $730,000 [JA 152-71].

Alnifaidy intended to improve the Property and ultimately resell it [JA 1308]. Kivlighan had reason to believe that if Alnifaidy was successful in buying the Property he would list the improved Property with NVRE. Kivlighan tried unsuccessfully to get an appointment with Gavin to present the Alnifaidy contract. She spoke with David Gavin twice about the contract on May 3 [JA 1409 and 1410-1417]. Phone records prove that, after speaking with Kivlighan, David Gavin spoke with Martins twice on May 3rd, and Martins communicated with the Wheelers twice on May 3rd [JA 1409 and 1410-1417]. On May 4, 2007, Kivlighan sent the Alnifaidy $730,000 contract to Gavin by facsimile [JA 1424].

Throughout this entire period David Gavin exhibited a hostile, mean spirited attitude toward Kivlighan [JA 1313, 1322 and 1324]. Given his conversation with Barbara Wheeler on April 26, 2007, David Gavin expected a contract offer from the Wheelers [JA 1296-1304]. David Gavin called Martins himself to find out where the Wheeler offer was. He spoke with Martins twice on May 3, 2007 [JA 1409-1417]. Instead of deferring a conversation with David Gavin until she spoke with Kivlighan, Martins carried on a dialogue with David Gavin about the Property. When he demanded to know what had happened with the Wheeler's interest, Martins

falsely told him that a $680,000 offer had been made [JA 1296-1304 and 1316].

On May 5, 2007, David Gavin called Kivlighan and had two lengthy hostile conversations [JA 1409-1417]. During these conversations he demanded to know why the Wheeler offer had not been presented. Kivlighan explained that Martins never submitted a written offer from the Wheelers. David Gavin refused to believe her, was extremely hostile about the commission payable under the contract, and complained that the contract provided for a home inspection. Kivlighan pled with David Gavin for an opportunity to sit down with Donna Gavin who had the power of attorney. She was sure everything could be worked out [JA 1314-1319 and 1323].

Rather than work with Kivlighan, David Gavin decided to take things into his own hands and he immediately placed a call to Martins [JA 1409-1417]. This was at least the second time Martins had a call from David Gavin after having actual knowledge that the Property was subject to an exclusive Listing Agreement with NVRE. Again, instead of calling Kivlighan to alert her that David Gavin was going around her, Martins chose to carry on a dialogue with David Gavin. In an e-mail, Martins stated that on May 8

she spoke with David Gavin “three days ago”, which puts the conversation on May 5, 2007 [JA 1425].

Martins and David Gavin spoke again on Sunday afternoon, May 6, 2007, for fifteen minutes about the listed Property, **two full days before an attempted “termination” of the Listing** [JA 1409-1417]. David Gavin falsely stated to Martins that he had caught Kivlighan in a few lies [JA 1334-1339]. Martins falsely stated to David Gavin that Kivlighan was not working in the Gavins’ best interest but instead only working in the interest of her own contract [JA 1296-1304]. Further, Martins falsely stated that Kivlighan had dissuaded her from submitting a written offer from the Wheelers [JA 1296-1304]. Martins’ false and unethical statements destroyed NVRE’s and Kivlighan’s credibility with her client because they no longer trusted her [JA 1334-1339].

David Gavin wanted to sell the Property on his own to save having to pay the listing commission and he wanted Martins to duplicate the existing $700,000 offer by getting the Wheelers to submit a $700,000 offer but at a reduced commission [JA 1427]. Martins and her firm McEnearney would then get the buyers’ commission and the Seller would save the listing commission. Martins knew the Wheelers would not attempt to buy the Property if another buyer was in the picture [JA 1354]. The only way that it

could happen was to get rid of NVRE and the Alnifaidy offer. Between them they developed a scheme to tell the Wheelers that NVRE had been fired and that there was no other buyer to bid against [JA 1387-1388, 1347-1348, 1350-1351 and 1354]. Therefore, Martins called the Wheelers the afternoon of Sunday, May 6, 2007 and falsely told them NVRE had been "fired" [JA 1387-1388, that "the house was not listed by an agent" [JA 1347-1348], that there was no other buyer in the picture to be bidding against, and that the way was clear for them to work directly with the seller to be able to buy the property without having to get into a bidding war. According to Peter Wheeler: "The offer we were told was on the house was never conveyed to [David] and if we were still interested in the house he would entertain an offer from us" and that was what led Wheeler to "making an actual offer." [JA 1351-1355]. Again, this was two days **before** the attempted "termination" of the Listing [JA 1409-1417].

Barbara Wheeler was enticed, but wanted to view the Property again before actually submitting a contract. Martins said she would arrange for them to see it the next day [JA 1429]. Martins called David Gavin Monday, May 7 at 9:02 a.m., to set up the appointment for the Wheelers to again view the Property [JA 1409-1417]. Martins confirmed the appointment with

the Wheelers with a telephone call back to them at 9:05 a.m. [JA 1409-1417].

The Wheelers met Martins and David Gavin at the Property Monday May 7, 2007 and walked through the house. Peter Wheeler was asked in his March 12, 2007 deposition the following question: “Before May 8 you had this second walkaround of the Hector Road Property with Mr. Gavin and so it was after that you got together with Karen and said that we want to make an offer for $700,000?” He answered: “Right” [JA 1358-1359]. Martins then made a sales pitch to convince the Wheelers to make a written offer for $700,000, the condition required by David Gavin. Martins worked hard on Monday May 7th to get them up to $700,000 [JA 1427]. The Wheelers finally gave authority for Martins to submit a contract offer on the Property for $700,000 [JA 1430].

While Martins was working hard to get the Wheelers up to $700,000, David Gavin was not yet prepared to disregard the Alnifaidy contract until he knew he had an equivalent offer in its place. On Monday, May 7th, he prepared for his wife’s signature a counter-proposal to the Alnifaidy offer that was faxed to Kivlighan at 7:39 p.m. In economic terms the counter-proposal sought to increase the net sales price under the Alnifaidy contract

from $700,800 to $715,400. At that point David Gavin was working two offers: the Wheeler $700,000 offer and the Alnifaidy offer [JA 1432].

Tuesday morning May 8, at 9:29 a.m., Martins reported to David Gavin that she had succeeded in getting the Wheelers to offer $700,000. Martins prepared the Wheeler contract. Martins spoke to her McEnearney broker about the NVRE situation, and he had her put in language about the "former agent" [JA 1427]. This was before the attempted termination of the NVRE Listing [JA 1409-1417]. Martins again defamed Kivlighan by making false statements to the Gavins about Kivlighan's integrity and honesty [JA 1427].

Later that evening, Tuesday, May 8, 2007, the Wheelers received the $700,000 contract from Martins, signed it, and sent it back to Martins, who in turn submitted it to David Gavin [JA 1334-1339, 1348-1349 and 1359-1361]. Having obtained the Wheeler contract, David Gavin prepared for his wife's signature a notice that purported to fire NVRE and Kivlighan, and he faxed it to her [JA 1434 and 1435].

Although the Wheeler contract had been sent back to Martins, after speaking with an attorney on May 9, 2007, David Howell, the manager of the McLean McEnearney office, decided to hold it for three days. After three days passed, the Gavins decided it was too low and asked for an

increased offer [JA 1349-1350]. Martins then prepared a contract for $707,000 approximately one week after they submitted the $700,000 offer [JA 1360-1361]. The original $700,000 offer was destroyed [JA 1431]. The fact that the $700,000 offer was destroyed strongly supports the inference that the parties knew they had engaged in wrong-doing [JA 1431].

The revised offer was dated May 14, 2007, six days after the original $700,000 offer. This offer was accepted and executed on May 16, 2007 [JA 1365-1386]. On the same day as Gavin accepted the Wheelers' $707,000 offer, Kivlighan faxed to Gavin a revised $750,000 contract offer from Alnifaidy. In economic terms this represented an offer for a net sales price of $720,000. Gavin rejected the offer [JA 1436]. Therefore, Kivlighan was out the Listing Commission, the Buyers Commission and a potential future commission with Mr. Alnifaidy.

Based on advice from her co-broker, Kivlighan filed a grievance against Martins, something she has never done in over twenty years as a realtor [JA 1296-1304]. Martins' response revealed the extent to which she worked with David Gavin behind NVRE's and Kivlighan's back [JA 1334-1339]. The Gavins then filed a complaint with the Virginia Department of Professional and Occupational Regulation seeking to have Kivlighan's license revoked. In their complaint, the Gavins defamed NVRE and

Kivlighan several times including falsely stating that (a) Kivlighan "was trying to do what is called a pocket listing, where the agent represents the buyer and seller, thereby earning multiple commissions and does not let any offers reach the seller"; (b) Kivlighan is "an untrustworthy agent" and (c) "keep Ms. Kivlighan from misrepresenting clients" [JA 1437-1441].

NVRE and Kivlighan then sought legal counsel and were advised that they had claims against defendants [JA 140-141]. They then hired attorney Walpole to represent their interests and pursue the claims. Mr. Walpole filed a Complaint, a First Amended Complaint, a Bill of Particulars and a Second Amended Complaint based on these facts. Walpole set forth NVRE's and Kivlighan's claims for conspiracy, interference with contract, interference with contract expectancy and defamation against Donna Gavin, David Gavin, Martins and McEnearney as defendants.

SUMMARY OF ARGUMENT

Appellant Forrest Walpole seeks reversal of the trial court's award of sanctions against him and his former clients NVRE and Kivlighan. The trial court committed reversible error when it awarded sanctions. First, the trial court applied hindsight rather than the objective standard of reasonableness in awarding sanctions. The trial court failed to consider only the facts known to Walpole based on his knowledge, information and

belief, formed after reasonable inquiry. Instead, the court considered the impact of its rulings on the motions in limine and matters that occurred during the trial rather than what was known at the time of the signing of the pleadings. Second, the trial court erred in determining the terms of and quantum of sanctions because it did not properly consider the defendants' failure to mitigate, the billing practices of defendants' attorneys, the punitive effect of the award, and the ability of Walpole to pay. Third, the trial court failed to allow Walpole the opportunity to present oral argument on his motion for reconsideration under Va. Sup. Ct. R. 4:15(d). Fourth, and dispositive regardless of the other three assignments of error, at the time the sanctions motions were filed, heard and later granted, the trial court no longer had jurisdiction, authorization or power to award sanctions after Walpole's clients exercised their right to a voluntary nonsuit. For each and every one of these reasons, the trial court should be reversed and judgment entered in favor of Walpole.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

STANDARDS OF REVIEW

Standard of Review for Assignments of Error Nos. 3 and 4

A trial court's decision to admit or exclude evidence is reviewed using an abuse of discretion standard and, on appeal, a trial court's decision to

admit evidence will not be disturbed absent a finding of abuse of that discretion. See, e.g., Norfolk & Portsmouth Belt Line R. Co. v. Wilson, 276 Va. 739, 743, 667 S.E.2d 735, 737 (2008).

Likewise, the Court "must apply an abuse of discretion standard when reviewing a circuit court's determination to impose sanctions pursuant to Code § 8.01-271.1." McNally v. Rey, 275 Va. 475, 481, 659 S.E.2d 279, 282-83 (2008), citing Williams & Connolly, LLP v. People for the Ethical Treatment of Animals, 273 Va. 498, 509, 643 S.E.2d 136, 140 (2007); Ford Motor Co. v. Benitez, 273 Va. 242, 249, 639 S.E.2d 203, 206 (2007). The Court will not reverse the imposition of sanctions "unless the court abused its discretion in (1) its decision to sanction the litigant, or (2) in the court's choice of the particular sanction employed." Switzer v. Switzer, 273 Va. 326, 331, 641 S.E.2d 80, 83 (2007).

Standard of Review for Assignments of Error Nos. 5 and 6

Statutory interpretation presents a pure question of law and is accordingly subject to *de novo* review. Ainslie v. Inman, 265 Va. 347, 352, 577 S.E.2d 246, 248 (2003). In interpreting court-adopted rules, courts should apply the same principles that govern statutory construction. Hanson v. Commonwealth, 29 Va. App. 69, 77, 509 S.E.2d 543, 546 (1999). It is the Supreme Court's responsibility to interpret its own Rules

regarding pretrial procedures for the parties in the courts of this Commonwealth. Brown v. Black, 260 Va. 305, 311, 534 S.E.2d 727, 730 (2000).

I. The trial court erred in awarding sanctions under Va. Code § 8.01-271.1 against Walpole, NVRE, and Kivlighan because it abused its discretion by making its sanction determination based on post-filing factual findings, evidentiary rulings, and other hindsight rather than an objective view of whether NVRE, Kivlighan, and Walpole, after reasonable inquiry, could have formed a reasonable belief that the Complaint, Amended Complaint, Second Amended Complaint and Bill of Particulars met the certification requirements of Va. Code § 8.01-271.1 at the time each pleading was filed. (Assignment of Error No. 3).

The trial court abused its discretion and committed reversible error in awarding sanctions against Walpole, NVRE and Kivlighan. The trial court failed to apply the proper standard and failed to correctly analyze the pleadings filed by plaintiffs because the claims were not frivolous and were not brought for an improper purpose.

When filing pleadings, attorneys and parties certify that the allegations contained therein have factual support and are warranted under existing law. Virginia Code § 8.01-271.1 provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the

> extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

The statute and its subscribing case law require a pre-filing investigation regarding the factual and legal bases of the claims. See Oxenham v. Johnson, 241 Va. 281, 287-88, 402 S.E.2d 1, 4-5 (1991). Trial courts are to employ an objective standard of reasonableness in determining whether the attorney and party could have formed a reasonable belief that the pleadings were well-grounded in fact, warranted by existing law and not interposed for an improper purpose. See McNally v. Rey, 275 Va. at 481, 659 S.E.2d at 282-83; Flippo v. CSC Associates III, LLC, 262 Va. 48, 547 S.E.2d 216 (2001); Flora v. Shulmister, 262 Va. 215, 220, 546 S.E.2d 427, 429 (2001); Gilmore v. Finn, 259 Va. 448, 467, 527 S.E.2d 426, 435-36 (2000); Ford Motor Co., 273 Va. at 250, 639 S.E.2d at 206. But, "'the wisdom of hindsight should be avoided' in applying the appropriate objectively reasonable standard of review." Gilmore, 259 Va. at 467, 527 S.E.2d at 436 (2000). The trial court must determine whether a reasonable attorney in circumstances similar to case at hand could believe that the allegations in the pleadings were legally and factually justified. Moreover, "any fact that may be proved by direct evidence may be proved

by circumstantial evidence; that is you may draw all reasonable and legitimate inferences and deductions from the evidence." Virginia Model Jury Instructions, Civil, Instruction I-33.

In this case, Walpole and his clients complied with the statute. At the time the pleadings were filed, Walpole was provided most of the facts set forth in the Statement of Facts. Had the trial court applied an objective standard of reasonableness, it would have had to find that the pleadings were well-grounded in fact and warranted by existing law and that the claims were not interposed for an improper purpose when they were filed. The defendants engaged in tortious conduct . . . conspiracy, tortious interference and defamation . . . that sabotaged NVRE's expectancy of earning commissions from the listing and sale of the Property. In Ford v. Benitez, the trial court went through the affirmative defenses, asking defense counsel to state what factual basis the defendants had for asserting them. Counsel responded: "Presently we don't have sufficient information". Unlike that case, in the present case there was sufficient information and belief to support each claim as set forth in the Statement of Facts. Indeed, NVRE and Kivlighan were advised by other counsel that they had valid claims and that punitive damages were available based on the conduct [JA 140-141].

Instead, the trial court incorrectly relied on hindsight in holding that Walpole and his clients lacked any basis for the claims and brought them for an improper purpose. The trial court based its sanctions decision in part on evidentiary rulings it made just prior to and on the morning of the first day of trial (months after the pleadings were filed). Three weeks before trial, NVRE and Kivlighan filed a motion in limine seeking to block the introduction of a draft of a written response to a complaint filed at the Department of Professional Regulation [JA 381-382]. The motion in limine was denied [JA 463-464), thus permitting defendants to introduce the DPOR complaint and drafts. On the first day of trial, the trial court heard argument on the pending motions *in limine* and a motion for a deemed admission under Va. Sup. Ct. Rule 3:11 [JA 515-55]. NVRE and Kivlighan intended to offer into evidence the National Association of Realtors Code of Ethics to prove an element of each of their claims [JA 515 and 519-523]. The trial court sustained the defendants' motion in limine precluding the introduction of the Code of Ethics into evidence [JA 527-528 and p. 544]. NVRE and Kivlighan further intended to offer into evidence written statements made by Karen Martins in relation to a complaint filed with the National Association of Realtors [JA 528-543]. Those statements supported the claims for conspiracy, interference and defamation. The trial

court sustained the motion in limine, thus precluding NVRE and Kivlighan from putting on this evidence of the claims [JA 543]. All of these rulings detrimentally affected the case.

Of even greater impact on the claims, the trial court ruled that NVRE and Kivlighan could not put on evidence of a contract or expectancy because of a technical default in the pleadings. The Fifth Affirmative Defense in Martins' and McEnearney's Answer to the Second Amended Complaint states:

> Neither Plaintiff ever had a contract with the owner of the Subject Property, nor did either Plaintiff have a reasonable contractual or business expectancy which could support a claim of tortious interference. A reply is requested pursuant to rules 3.11 and 1.4E.
>
> [JA 377].

No reply was filed because NVRE and Kivlighan affirmatively pled the existence of an "exclusive listing agreement" between plaintiffs and the owner of the property [JA 287-289]. Martins and McEnearney argued that the failure to reply to the Fifth Affirmative Defense was tantamount to an admission that there was no contract or expectancy. The trial court agreed and ruled that a reply was required and granted the motion *in limine* to strike any evidence of the existence of a contract or business expectancy [JA 551, line 13-16]. This ruling was a technical admission based on

procedure, not on facts. The error of this ruling was raised as an assignment of error but not accepted by this Court for review. Even so, the trial court then committed reversible error by relying on hindsight from that evidentiary ruling in arriving at its sanctions decision rather than on what was known or knowable by Walpole at the time the pleadings were filed [JA 1633 and 1671].

Whether Walpole satisfied the requirements of Va. Code § 8.01-271.1 should have been judged on the facts known or knowable as set forth in the Statement of Facts. Each claim is addressed individually below.

A. Conspiracy.

The elements of a business conspiracy under Va. Code § 18.2-499 and §18.2-500 are a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in its business resulting in damage to plaintiff. Allen Realty Corporation v. Holbert, 227 Va. 441, 449 (1984); Commercial Business Systems, Inc. v. Bellsouth Services, Inc., 249 Va. 39, 46, 47 (1995); T.G. Slater & Son, Incorporated v. The Donald P. & Patricia A. Brennan, LLC, 385 F.3d 836, 845 (4th Cir. 2004). Malice can be demonstrated if the concerted action was undertaken to injure plaintiff intentionally, purposefully and without legal justification. Simmons v. Miller, 261 Va. 561, 577 (2001); Tazewell Oil Company v. United Virginia

Bank/Crestar Bank, 243 Va. 94, 109 (1992). Without legal justification may include a breach of fiduciary duty or assisting someone else to breach a fiduciary duty. Feddeman & Co., C.P.A., P.C. v. Langan Associates, P.C., 530 S.E.2d 668, 260 Va. 35 (2000). The statute "does not require that the co-conspirator act with legal malice; rather, the statute simply requires that **one** party, acting with legal malice, conspire with another to injure the plaintiff." Virginia Vermiculite, Ltd. v. W.R. Grace & Co.--Conn., 144 F. Supp. 2d 558, 601 (W.D. Va. 2001), quoting Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 108 F.3d 522, 527 (4th Cir.1997).

At the time the pleadings were filed, the evidence showed that David Gavin and Martins (and McEnearney as the principal of the agent) worked in concert to injure NVRE in its business. Martins hoped to earn a buyers commission by taking the Wheelers to view the Property. While the Alnifaidy contract written by NVRE was pending, David Gavin went around NVRE and spoke directly to Martins about procuring an offer from the Wheelers. David Gavin wanted to sell the Property on his own and wanted Martins to duplicate the existing $700,000 Alnifaidy offer by getting the Wheelers to submit a $700,000 offer but at a reduced commission. Martins knew the Wheelers would not attempt to buy the Property if another buyer

was in the picture thus they had to cut NVRE from the transaction. Martins engaged in this dialogue with David Gavin despite her actual knowledge that NVRE had an exclusive listing. The legitimacy of the NVRE listing was never challenged until this litigation – the fact that Donna Gavin believed it necessary to send a letter terminating the listing proves her belief that it was in force and effect [JA 2200]. To further the scheme, David Gavin and Martins met the Wheelers at the Property Monday May 7, 2007 (again before the attempted termination of the NVRE listing). Later that day, the Wheelers agreed to make an offer. Afterwards, knowing that he would be cutting NVRE out of a commission, David Gavin created the letter attempting to terminate NVRE's listing. McEnearney's manager David Howell also advised Martins as to language to use in the contract to try and insulate them from liability.

In T.G. Slater & Son, *supra,* the Fourth Circuit analyzed statutory business conspiracy claims in almost identical circumstances. Brennan retained T.G. Slater to assist in purchasing a farm that was not yet listed for sale. Slater showed the farm to Brennan twice and secured sales comparables. They discussed the steps for making an offer to purchase the farm but, thereafter, Brennan entered into direct negotiations with the owner which resulted in the purchase by an entity owned by Brennan's

parents. The court held that Slater was cut out of the transaction, and thus damaged, by conduct that constituted a business conspiracy. These facts are essentially the same as those in the case before this Court in this case.

In the same way, the conduct of David Gavin and Martins was intentional, purposeful and without legal justification demonstrating malice. David Gavin and Martins acted without legal justification when they had actual knowledge of the exclusive listing agreement. They knew that NVRE was entitled to commissions under that agreement. The fact that they later tried to terminate the agreement is proof that they acknowledged and believed that the listing agreement was valid and enforceable up to the time of the letter of termination.

Martins and Gavin defamed NVRE and Kivlighan as described in the Statement of Facts. Moreover, Martins is subject to the *Realtors Code of Ethics and Standards of Practice of the National Association of Realtors (“Code”)*. Martins violated the Code by recklessly making false statements or misleading statements about Kivlighan pertaining to the Wheeler interest in the property (for example, falsely stating that there was a contract when there was not). Martins further violated the Code by working directly with David Gavin behind the back of NVRE while the house was listed. While these actions by Martins do not give rise to an independent cause of action,

they are direct evidence of the malice element of the conspiracy claim. The trial court did not allow use of the Code at trial. Even so, the fact is that Martins violated the Code.

As a direct consequence of Martins' and Gavin's conduct, NVRE and Kivlighan were denied compensation. For purposes of the sanctions analysis, these actions support each element of a conspiracy claim. The claim was well-grounded in fact and warranted by existing law when the pleadings were filed. Therefore, the trial court abused its discretion in sanctioning Walpole and his former clients for pursuing the claims.

B. Tortious Interference.

The elements of the claim are: (1) the existence of a contract expectancy; (2) knowledge of the expectancy, (3) intentional interference with the expectancy, (4) improper means or methods to interfere with the expectancy, and (5) damages as a result of the disruption of the contract expectancy. Maximus, Inc. v. Lockheed Information Management Systems Company, Inc., 254 Va. 408, 413-414, 493 S.E.2d at 375, 378 (1997).

As set forth in the Statement of Facts, there was a reasonable basis for plaintiff to assert a contract or contract expectancy. On March 31, 2007, Kivlighan went over the terms of a written listing agreement with Donna Gavin including a listing price and commission rate [JA 144-151]. Gavin,

as attorney-in-fact for Kennedy, orally agreed to engage NVRE to list and sell the Property. "When I left … they had agreed with me on this property" [JA 1310-1311]. The written listing agreement was then executed on April 27, 2007 between NVRE and Kennedy, by Donna Gavin, her attorney-in-fact (the "Listing") [JA147]. Although unbeknownst to NVRE, Kennedy conveyed the property to a Trust, Donna Gavin still had actual and apparent legal authority and power to bind Kennedy as well as the Trust. There is no dispute that Gavin intended and did hire NVRE. The Listing was a contract expectancy and NVRE had a reasonable business expectation that, upon producing a buyer, the Seller would pay a commission for the listing and for the sale. The trial court acknowledged that the listing agreement was a valid contract [JA 1629]. The Gavins, Martins and McEnearney all knew that NVRE had that business expectancy but all chose to intentionally interfere with it by the use of improper methods.

A claim for tortious interference with contract expectancy also requires plaintiff to, *inter alia*, provide proof that defendant used improper means or methods to interfere with a contract expectancy. Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., Inc., 254 Va. 408, 414, 493 S.E.2d 375, 378 (1997). "'Tortious interference' means that the interference was

intentional and improper under the circumstances, not that the 'improper methods' used were inherently illegal or tortious." Id. at 414, 493 S.E.2d at 379. Improper methods include (1) illegal or independently tortious conduct such as violations of recognized common law rules (*e.g.,* defamation) or statutes; (2) methods that violate an established standard of a trade or profession; (3) methods that involve unethical conduct; (4) sharp dealing or overreaching actions. Duggin v. Adams, 234 Va. 221, 227, 360 S.E.2d at 832, 836-837 (1987).

In this case, multiple improper methods were employed including the violation of common law (by defaming Kivlighan), violation of statute (the business conspiracy claims), unethical conduct (Martins' multiple violations of the NAR Code) and the sharp and overreaching actions of Gavin and Martins to interfere with NVRE from earning a commission on the transaction. These facts support a reasonable belief that the claim for tortious interference with contract expectancy was well-grounded in law and fact. In fact, NVRE and Kivlighan were told the same thing by another attorney with whom they consulted [JA 140-141]. Therefore, the trial court abused its discretion in awarding sanctions against Walpole NVRE and Kivlighan for pursuing this claim.

C. Defamation.

Defamatory words which are actionable *per se* include (1) "those which impute to a person unfitness to perform the duties of an office or employment of profit or want of integrity in discharge of the duties of such an office or employment" and (2) "those which prejudice [a] person in his or her profession or trade." Fleming v. Moore, 221 Va. 884, 889, 275 S.E.2d 632, 635 (1981). "A defamatory statement may be made 'by inference, implication or insinuation.'" Fuste v. Riverside Healthcare Ass'n, Inc., 265 Va. 127, 132, 575 S.E.2d 858, 861 (2003), quoting Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 7, 82 S.E.2d 588, 592 (1954).

As set forth in the Statement of Facts, Martins falsely told the Gavins that (1) the Wheelers had made an offer thus implying that NVRE was dishonestly withholding a contract; (2) Kivlighan was not working in the Gavins' best interest but instead only working in NVRE's interests which were at odds with that of the Seller (a false accusation that Kivlighan was violating the NAR Code); (3) Kivlighan had dissuaded her from submitting a written offer from the Wheelers; and (4) Kivlighan lacked integrity and honesty. David Gavin told Martins that Kivlighan had lied to him thus falsely asserting that Kivlighan was dishonest. Also, the Gavins made false statements about NVRE and Kivlighan in their complaint to DPOR.

Dishonesty means "disposed to lie, cheat, defraud, or deceive." *American Heritage Dictionary of the English Language.* The false statements made by defendants go to the core values upon which the profession depends to maintain public confidence and are among the worst possible statements that could be made about a realtor. The statements were published and severely prejudiced plaintiffs in their profession, imputed unfitness to perform duties as a realtor, and imputed a lack of integrity. The false statements were published by defendants to destroy the economic relationship between Donna Gavin and NVRE. The statements did, in fact, destroy the relationship. The defamation claims were well-grounded in fact and warranted by existing law. Therefore, the trial court abused its discretion in awarding sanctions against Walpole and plaintiffs for pursuing this claim.

D. <u>Damages Theories</u>.

The trial court also sanctioned Walpole, NVRE and Kivlighan for pursuing a damages theory that did not win out at trial. However, as just discussed, the conspiracy, tortious interference, and defamation claims were all well-grounded in fact and warranted by existing law. Walpole and plaintiffs should not have been sanctioned for damages theories relating to those claims. Although one or more of the damages theories might

ultimately not succeed, plaintiffs have a right to put their theories and damages calculations to a trier of fact. If the trial court rules a particular theory too speculative, it may limit the evidence but it should not result in sanctions. Cases are litigated for the very reason that both sides disagree as to the causes of action, causation, injuries, and damages. Under the court's ruling in this case, every case that resulted in an award below the *ad damnum* would be considered sanctionable and would invite a flood of post-trial sanctions motions.

In this case, NVRE and Kivlighan sought damages for the listing commission and the commission they expected to earn from the Alnifaidy contract offer because, had Martins not colluded with Gavin to cut NVRE out of the deal, it is not unreasonable to assert that the Alnifaidy contract would have been accepted by the Seller such that NVRE would have earned both commissions. Also, had the Alnifaidy contract been accepted, NVRE had a future expectation that Alnifaidy would use NVRE again for re-selling the property. That is what Walpole reasonably believed at the time the pleadings were filed. While the trier of fact may ultimately decide that the future commission was uncertain, plaintiffs should not be sanctioned for having included that theory – that is the application of hindsight rather than an objective standard of reasonableness. Therefore, the trial court abused

its discretion in awarding sanctions against Walpole, NVRE and Kivlighan for pursuing their theories of damages.

E. <u>No Improper Purpose</u>.

Finally, the record is bereft of any support for a finding of an improper purpose. On the contrary, Walpole reasonably believed that his clients had sufficient facts and law to support each claim set forth in their pleadings as set forth in the preceding sections. These parties had a real live dispute arising from the conduct of Martins and the Gavins in the sale of the Property. NVRE was deprived of a rightful commission and rightfully resorted to litigation to adjudicate its rights.

The effect of this ruling is to adopt the "English Rule" for the imposition of attorneys' fees and costs incurred during litigation. The court should be reversed because hindsight is to be avoided and there is no evidence in the record to support a finding of an improper purpose.

II. The trial court erred in determining the terms of and quantum of sanctions against Walpole, NVRE and Kivlighan because it did not properly consider the defendants' failure to mitigate, the billing practices of defendants' counselors, the punitive effect of the award and ability to pay. (Assignment of Error No. 4).

After defendants thrice failed to prove the amount of sanctions, the court gave them a fourth opportunity by conducting an evidentiary hearing. The amount sought by the defendants was not reasonable for many

reasons including (1) failure to mitigate damages, (2) block billing practices, and (3) unreasonable overbilling. The trial court then abused its discretion in calculating the sanctions amount.

Va. Code § 8.01-271.1 allows for the imposition of sanctions in "the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee." In determining the reasonableness of attorney's fees, the trial court may consider such things as the time and effort expended by counsel, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees are consistent with those generally charged for similar services, and whether the services were necessary and appropriate. Tazewell Oil Co., Inc. v. United Virginia Bank/Crestar Bank, 243 Va. 94, 111-12, 413 S.E.2d 611, 620-21 (1992); Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship, 253 Va. 93, 96, 480 S.E.2d 471, 473 (1997); Chawla v. BurgerBusters, Inc., 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998).

Sanctions imposed under Va. Code § 8.01-271.1 must be reasonable. Vinson v. Vinson, 41 Va. App. 675, 688-89, 588 S.E.2d 392, 399 (2003) citing Cardinal Holding Co. v. Deal, 258 Va. 623, 632-33, 522

S.E.2d 614, 620 (1999). The key to a proper award of counsel fees is reasonableness under all the circumstances. McGinnis v. McGinnis, 1 Va. App. 272, 277, 338 S.E.2d 159, 162 (1985). The party seeking to recover attorney's fees must establish the reasonableness of the fees. Chawla, 255 Va. at 623, 499 S.E.2d at 833.

In NRHA v. C and C Real Estate, Inc., 72 Va. Cir. 464, 2007 WL 6002104 (Norfolk Cir. Ct. 2007), the trial court made reductions to an attorney's fee award based on duplicative services that were provided by the law firm representing C and C Real Estate. Id. at *2. For example, the court determined services were "duplicative and unnecessary when depositions were attended by more than one attorney and multiple attorneys prepared for and attended a motion hearing. Id. at *2-3. The court also reduced the billable hourly rate of one attorney, finding that her hourly rate was unreasonable based on her experience. Id. at *4. Further reductions were made because the law firm billed in quarter-hour increments rather than in tenth-of-an-hour increments. Id. at *3. The Court reduced each quarter-hour entry to one-tenth of an hour. Id.

In Holmes v. LG Marion Corp., the defendant objected to plaintiff's request for attorney's fees, totaling over $18,000, on grounds that numerous items requested were excessive, redundant or unnecessary.

258 Va. 473, 480, 521 S.E.2d 528, 533 (1999). Among the challenges was time spent on attempts to disqualify defendant's counsel, alleged lack of preparation, and time spent on claims where plaintiff did not prevail. Id. Although plaintiff's counsel submitted expert opinion evidence as to the reasonableness of the fees, the court was not bound by that testimony. Id. The Supreme Court affirmed the trial court's decision, which concluded that the amount requested by plaintiff in attorney's fees was unreasonable. Id.

In the present case, defendants failed to carry their burden of proof as to the amount and reasonableness of the attorneys' fees at the time they filed their motions, at the time they argued the motions for sanctions, at the time the trial court sought additional information in November 2008 and at the time the trial court ruled on the motion. The court gave defendants all of these chances to correct their failure and then ordered a further evidentiary hearing to allow them an additional opportunity to meet their burden. Even then, the trial court abused its discretion by imposing sanctions which are unreasonable because: (1) Martins and McEnearney retained two different law firms duplicating work all the way through trial; (2) Martins and McEnearney chose not to raise the matter of the Rule 3:11 reply until the morning of trial or to timely move for summary judgment, thereby failing to mitigate their expenses; (3) counsel for the Gavins grossly

overstaffed and overbilled; and (4) the Gavins pursued legal fees associated with their own counterclaim which was dismissed on demurrer.

Martins and McEnearney retained two firms to represent them throughout. One firm merely attended depositions, hearings, and trial but authored no pleadings. Despite the lack of meaningful participation, the trial court awarded all of its fees based on a conclusory statement that the attorney was "working behind the scenes" [JA 2142-2143]. Such "behind the scenes" work, was not explained or sufficiently proven.

Additionally, counsel for Martins and McEnearney failed to mitigate any fees associated with the reply erroneously deemed necessary under Rule 3:11. Instead of bringing the matter before the court in a timely manner prior to trial, defendants elected to continue with preparation for trial, incurring tens of thousands of dollars in attorney's fees and costs. Tellingly, throughout the course of the litigation, defendants argued that plaintiffs' claims were frivolous, yet defendants never filed a motion for summary judgment on any ground including the lack of a reply to the Rule 3:11 statement. To the extent that defendants thought the claims were frivolous or unwarranted, they should have taken timely action to eliminate the claims and mitigate their fees prior to trial rather than "sandbagging" plaintiffs on the first day of trial. The trial court unreasonably shifted all of

the expense of this litigation strategy onto Walpole, NVRE and Kivlighan when most of the fees sought by Martins and McEnearney would have been mitigated if they had acted in a timely manner.

As for the Gavins, the bills put forth by Brincefield Harnett, P.C. are best described as grossly inflated and contemptible. Their only expert was Mr. Beau Brincefield who could hardly be considered an independent evaluator of his own firm's billing practices. Brincefield double- and triple-staffed hearings and depositions, billed an inordinate amount of time researching and drafting jury instructions and other pleadings, block-billed and presented an overall unconscionable amount of billed hours. The trial court abused its discretion in awarding any of Brincefield's fees as part of the sanction for their failure to prove the reasonableness of the fees sought.

The court also failed to consider Walpole's ability to pay the sanctions. By analogy to a Federal Rule 11 case, "a monetary sanction imposed without any consideration of ability to pay is an abuse of discretion." Brubaker v. City of Richmond, 943 F.2d 1363, 1387-88 (4th Cir. 1991). Therefore, the trial court should be reversed because it erred in awarding sanctions and in calculating the amount of sanctions. Moreover, the trial court's final order is ambiguous as to whether it is a personal order

or a judgment order [JA 2131-2132]. If Walpole and plaintiffs are unable to pay in accordance with the order, will the trial court hold them in contempt and order them to be jailed? Would that constitute a constitutional violation by the court? The trial court's order should be vacated for these deficiencies.

III. The trial court erred when it denied Walpole's motion for entry of a suspending order without giving Walpole the opportunity to present oral argument under Va. Sup. Ct. R. 4:15(d) (Assignment of Error No. 5).

On June 29, 2010, more than two years after the entry of the order for a voluntary nonsuit, the trial court issued a letter opinion and Order jointly and severally sanctioning Walpole, NVRE and Kivlighan for $272,096.46 [JA 2131-2132 and 2133-2145].

On July 8, 2010, Walpole moved to suspend the order [JA 2151-2156]. Likewise, NVRE and Kivlighan filed a motion for entry of a suspending order and noticed the motion for July 16, 2010 [JA 2146-2150]. The trial court denied the motions without a hearing [JA 2161]. On July 12, 2010, Walpole moved for reconsideration and for suspension of the order [JA 2162-2168]. Again without holding a hearing, the trial court denied Walpole's motions [JA 2174]. On July 14, 2010, Walpole filed his exceptions and objections to the June 29, 2010 Order [JA 2169-2173]. On July 15, 2010, Walpole requested an expedited hearing on his motion but

that same day, the court denied Walpole's motion for reconsideration and renewed motion for entry of a suspending order [JA 2174].

The trial court erred in denying the motions without hearing oral argument. The error is subject to *de novo* review. Ainslie, Hanson, and Brown, *supra*.

Va. Sup. Ct. R. 4:15(d) states that:

> Except as otherwise provided in this subparagraph, upon request of counsel of record for any party, or at the court's request, the court shall hear oral argument on a motion. Oral argument on a motion for reconsideration or any motion in any case where a pro se incarcerated person is counsel of record shall be heard orally only at the request of the court.

Other than in very narrow circumstances, Va. Sup. Ct. Rule 4:15 requires trial courts to hear oral argument on motions if a request for oral argument is made. Walpole, NVRE and Kivlighan requested oral argument on their motions seeking entry of a suspending order. Walpole reiterated this request by filing a motion for an expedited hearing. The court erred by denying the motions without allowing Walpole the chance to present oral argument as provided in Rule 4:15(d). The trial court committed reversible error.

IV. The trial court erred in awarding sanctions under Va. Code § 8.01-271.1 against NVRE, Kivlighan and Walpole when the court lacked jurisdiction to do so because the motions for sanctions were made, heard, and decided more than 21 days after entry of a nonsuit order, and the trial court lacked authority under Rule 1:1 of the Rules of the Supreme Court of Virginia to suspend the finality of the nonsuit order (Assignment of Error No. 6).

On day three of trial, Walpole, on behalf of NVRE and Kivlighan, took a voluntary nonsuit. The trial court then purported to suspend the Order to allow defendants to move, brief and argue for sanctions. More than two years after the voluntary nonsuit was taken, the court sanctioned Walpole, NVRE and Kivlighan. The error is subject to *de novo* review. Ainslie, Hanson, and Brown, *supra*.

Walpole joins the argument of NVRE and Kivlighan in Record No. 101836. By purporting to suspend a nonsuit order, the trial court sought to circumvent the finality of judgments under Va. Sup. Ct. Rule 1:1. At issue is whether a trial court can suspend a nonsuit order for an unstated purpose and for an indefinite time period so as to allow motions for sanctions under Va. Code § 8.01-271.1 to be filed, heard, and decided more than 21 days after entry of the nonsuit order. Rule 1:1 states in part:

> All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. . . .

In regards to the purpose of the language allowing the finality of an order to be suspended, the Comment to the rule states:

> The first sentence is changed [under the 1976 amendment] to add authority for the trial court to suspend, by order entered within twenty-one days, a final judgment pending disposition of a motion for a new trial, a petition for rehearing, or a like pleading. . . .

In this case, there were ***no motions pending*** at the time of the nonsuit. Thus, the issue presented is whether a trial court can suspend a nonsuit order for an unstated purpose and indefinite time, and, if so, whether a motion for sanctions is a "like pleading" for purposes of Rule 1:1. Such a broad interpretation of Rule 1:1 would diminish the absolute right to a nonsuit. The nonsuit order in question states in pertinent part as follows:

> The Motions to Nonsuit is [sic] granted, and this case is dismissed as to all counts and all parties; and it is further
> ADJUDGED, ORDERED and DECREED that this Order is SUSPENDED until further order of this Court.

[JA 1197] (all capitals in original).

A motion for sanctions is not a "like pleading" for purposes of Rule 1:1. The nonsuit order in this case was suspended without any reference to the "pending disposition" of any pleading because there were none pending at the time.

A party has an absolute right to one nonsuit and neither the trial court nor opposing counsel can prevent a party from taking a nonsuit that complies with the statute. City of Suffolk v. Lummis Gin Co., 278 Va. 270, 275, 683 S.E.2d 549, 551-52 (2009). In Williamsburg Peking Corp., v. Kong, 270 Va. 350, 619 S.E.2d 100 (2005), this Court held that a trial court may enter a nonsuit order and consider a ***pending*** motion for sanctions provided it does so before the entry of the nonsuit order or within 21 days after entry of the nonsuit order. Id. at 354, 619 S.E.2d 102-03. However, this Court did not rule that the trial court could have simply suspended the nonsuit order to circumvent its holding.

In Lummis Gin Company, this Court took the opportunity to address the finality of a nonsuit order by quoting language from Super Fresh Food Markets v. Ruffin, 263 Va. 555, at 564-64, 561 S.E.2d 734 at 739 (2002):

> [T]he provisions of Rule 1:1 are mandatory in order to assure the certainty and stability that the finality of judgments brings. Once a final judgment has been entered and the twenty-one day time period of Rule 1:1 has expired, the trial court is thereafter without jurisdiction in the case. Thus, only an order within the twenty-one day time period that clearly and expressly modifies, vacates, or suspends the final judgment will interrupt or extend the running of that time period so as to permit the trial court to retain jurisdiction in the case.

Again, left unanswered is whether a trial court can suspend a nonsuit order to allow motions for sanctions to be filed, heard and determined more than 21 days after the nonsuit is taken. Based on the prior decisions of this Court, Walpole contends that the answer is, or should be, "no" in order for Rule 1:1 and Va. Code § 8.01-380(B) to harmoniously co-exist.

If a party truly has an absolute right to nonsuit a case, then Rule 1:1 must be interpreted to prohibit trial courts from generally suspending nonsuit orders to allow motions for sanctions to be filed, heard, and decided more than 21 days after the nonsuit is taken as a matter of right. Under such an interpretation, the language in the nonsuit order in this case that purported to suspend the finality of the nonsuit order had no effect. Accordingly, the trial court lost jurisdiction of this case 21 days after the nonsuit was taken on April 30, 2008 (the order is incorrectly dated April 29, 2008). Therefore, the trial court's May 14, 2009 and June 29, 2010 orders are a nullity, and they should be reversed, and final judgment entered in favor of Walpole, NVRE and Kivlighan on the motion for nonsuit.

CONCLUSION

The trial court committed reversible error for the reasons stated above and stated in the Brief of Appellants NVRE and Kivlighan. Accordingly, Appellant Walpole respectfully requests this Court reverse the trial courts' May 14, 2009 order and June 29, 2010 final order, and enter final judgment in favor of Walpole dismissing this case. Appellant requests to present oral argument on the appeal in person.

Respectfully submitted,

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CERTIFICATE

Pursuant to Rule 5:26, I hereby certify that:

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2. I do, hereby certify that Rules 5:26(e) and (h) of the Supreme Court of Virginia has been complied with and, that on this 26th day of January, 2011 fifteen (15) copies of this Brief of Appellants and ten (10) copies of the Appendix have been filed via hand delivery with the Clerk of the Supreme Court of Virginia, with one (1) electronic disk copy of the Brief and ten (10) electronic disk copies of the Appendix, and three (3) copies of the Brief of Appellants and one (1) copy of the Appendix have been mailed (with an electronic disk copy of the Brief and Appendix) to all opposing counsel.

/s/ Sean C.E. McDonough
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