In The

Supreme Court of Virginia

RECORD NO: 101844

FORREST WALPOLE,

Appellant,

v.

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

Appellees.

REPLY BRIEF OF APPELLANT

Sean C.E. McDonough (VSB No. 33137)
David D. Hudgins (VSB No. 20602)
Reese A. Pearson (VSB No. 75291)
HUDGINS LAW FIRM
515 King Street, Suite 400
Alexandria, VA 22314
(703) 739-3300 – Telephone
(703) 739-3700 – Facsimile
smcdonough@hudginslawfirm.com
dhudgins@hudginslawfirm.com
rpearson@hudginslawfirm.com

Counsel for Appellant

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES ii

REPLY BRIEF OF APPELLANT FORREST WALPOLE 1

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES 1

I. The trial court erred in applying hindsight rather than an objective view of the facts at the time the pleadings were filed (Assignment of Error No. 3). 1

II. The trial court erred in determining the terms of and quantum of sanctions against Walpole, NVRE and Kivlighan (Assignment of Error No. 4). 8

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 (Assignment of Error No. 5). 11

IV. The trial court lacked jurisdiction to award sanctions because it lacked authority under Rule 1:1 to suspend the finality of the nonsuit order (Assignment of Error No. 6). 12

CONCLUSION 15

CERTIFICATE 16

TABLE OF AUTHORITIES

Page(s):

Cases:

Allen Realty Corporation v. Holbert,
227 Va. 441 (1984) 3

Chawla v. BurgerBusters, Inc.,
255 Va. 616, 499 S.E.2d 829 (1998) 9

Commercial Business Systems, Inc. v. Bellsouth Services, Inc.,
249 Va. 39, 46 (1995) 3

Duggin v. Adams,
234 Va. 221, 360 S.E.2d at 832 (1987). 4, 5

Fleming v. Moore,
221 Va. 884, 275 S.E.2d 632 (1981) 4

Flippo v. CSC Associates III, LLC,
262 Va. 48, 547 S.E.2d 216 (2001) 2

Flora v. Shulmister,
262 Va. 215, 546 S.E.2d 427 (2001) 2

Ford Motor Co. v. Benitez,
273 Va. 242, 639 S.E.2d 203 (2007) 2, 7

Gilmore v. Finn,
259 Va. 448, 527 S.E.2d 426 (2000) 2

McNally v. Rey,
275 Va.475, 659 S.E.2d 279 (2008) 2

Oxenham v. Johnson,
241 Va. 281, 402 S.E.2d 1 (1991) 1, 11

Switzer v. Switzer,
273 Va. 326, 641 S.E.2d 80 (2007) 8

T. G. Slater & Son, Incorporated v.
The Donald P. & Patricia A. Brennan, LLC,
385 F.3d 836 (4th Cir. 2004) 3, 5

Virginia Vermiculite, Ltd. v. W.R. Grace & Co.--Conn.,
144 F. Supp. 2d 558 (W.D. Va. 2001) 3-4

Vinson v. Vinson,
41 Va. App. 675, 588 S.E.2d 392 (2003) 9

Statute:

Virginia Code § 8.01-271.1 ..... 1, 3, 8, 13

Rules:

Va. Sup. Ct. R. 1:1 ..... 12, 13

Va. Sup. Ct. R. 3:11 10

Va. Sup. Ct. R. 4:15(d) 11, 12

REPLY BRIEF OF APPELLANT FORREST WALPOLE

Notwithstanding the frantic nature of Appellees briefs in opposition to this appeal, *Northern Virginia Real Estate, Inc. et al. v. Karen Martins, et al., Fairfax County Circuit Court Case No. 2007-8717* should be reversed because (1) the trial court applied hindsight rather than the objective standard of reasonableness; (2) the trial court did not properly consider the defendants' failure to mitigate, the billing practices, the punitive effect of the award, and the ability of Walpole to pay; and (3) the trial court no longer had jurisdiction over the matter after Walpole's clients exercised their right to a voluntary nonsuit.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. The trial court erred in applying hindsight rather than an objective view of the facts at the time the pleadings were filed (Assignment of Error No. 3).

Despite articulating the appropriate standard in its letter opinion and rulings, the trial court failed to perform the proper legal and evidentiary analysis in ultimately deciding to award sanctions.

All of the parties agree that Virginia Code § 8.01-271.1 and its subscribing case law require a pre-filing investigation regarding the factual and legal bases of claims. Va. Code § 8.01-271.1; Oxenham v. Johnson, 241 Va. 281, 287-88, 402 S.E.2d 1, 4-5 (1991). All of the parties also

agree that 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. 475, 481, 659 S.E.2d 279, 282-83 (2008); 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. v. Benitez, 273 Va. 242, 250, 639 S.E.2d 203, 206 (2007). 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).

Despite acknowledging the appropriate standard in its letter opinion [JA 2136], the trial court failed to employ that standard in this case. Instead, the trial court provided only conclusory statements to support its rulings while largely ignoring the facts and evidence known to Attorney Walpole at the time of the filing. In his opening brief, Attorney Walpole set forth a detailed recitation of the facts that were known at the time the pleadings were filed. The facts were gathered from NVRE, Kivlighan, additional witnesses and documents. Appellees' misplaced logic in their

opposing briefs is that NVRE and Kivlighan would not have ultimately prevailed on their claims but for the nonsuit. Whether or not the claims would have ultimately succeeded is not the standard for determining the issue of sanctions. The pivotal inquiry remains whether a reasonable attorney in circumstances similar to the case at hand *could believe that the allegations in the pleadings were legally and factually justified*. In this case, Attorney Walpole met the § 8.01-271.1 standard because each claim stated in the pleadings was well-grounded in fact and warranted by existing law.

The trial court failed to apply the objective standard of reasonableness. In the sanctions proceedings as well as his opening Appellant brief here, Attorney Walpole addressed each claim filed citing the applicable law and the facts known to him at the time the pleadings were signed by him. There is nothing unreasonable or sanctionable about his analysis of those facts as supporting claims for tortious interference with contract, conspiracy and defamation in light of the existing case law. *See, e.g.,* 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); Virginia Vermiculite, Ltd. v. W.R. Grace & Co.--Conn., 144 F. Supp. 2d 558, 601 (W.D. Va.

2001) and Duggin v. Adams, 234 Va. 221, 227, 360 S.E.2d at 832, 836-837 (1987).

Because the facts known to Attorney Walpole through his pre-filing investigation supported each claim, the conduct was not sanctionable. The Listing, as recognized by the trial court, was a valid contract [JA 1629]. NVRE reasonably expected to be paid a commission. For all of the claims, there were sufficient facts provided to Attorney Walpole to demonstrate that David Gavin and Karen Martins worked in concert to injure NVRE in its expectation of earning a commission. Gavin and Martins prevented NVRE from collecting its listing commission and prevented NVRE from collecting a commission from the sale. In the process, Martins (with the encouragement of her employer McEnearney) violated her ethical obligations.

With respect to the defamation claims, the defamation claims were actionable *per se* because the statements by defendants (1) imputed to NVRE and Kivlighan unfitness to perform their employment and a lack of integrity and (2) prejudiced NVRE and Kivlighan in their profession. Fleming v. Moore, 221 Va. 884, 889, 275 S.E.2d 632, 635 (1981). David Gavin attempts to hide behind the skirts of Donna Gavin and Karen Martins

in claiming his innocence, yet he was the moving force for much of the tortious conduct which harmed NVRE and Kivlighan.

With respect to the conspiracy and tortious interference claims, essentially identical facts were addressed in T. G. Slater & Son, *supra*. T.G. Slater was asked to assist in the purchase of a farm. As a consequence, Slater showed the farm to Brennan, secured sales comparables and discussed the steps for making an offer. Brennan then cut Slater from the deal by directly negotiating and buying the farm. TG Slater then sued for, among other claims, conspiracy and tortious interference.

The facts underlying T. G. Slater & Son so closely mirror those presented to Attorney Walpole by NVRE and Kivlighan that it was reasonable for Attorney Walpole to file the claims for conspiracy and tortious interference. The fact that realtor Karen Martins engaged in unethical conduct further supported the claims. *See*, Duggin v. Adams, 234 Va. 221, 227, 360 S.E.2d at 832, 836-837 (1987) (types of conduct considered improper methods include violation of common law, violation of statute, unethical conduct and sharp and overreaching actions).[1]

[1] Please note that on multiple occasions Defendants/Appellees have disingenuously argued that NVRE and Kivlighan were seeking to state an independent cause of action based solely on Martins' unethical conduct.

Moreover, Defendants/Appellees completely ignore the fact that, before the claims were ever filed by Attorney Walpole, NVRE and Kivlighan were advised by other respected counsel that they had similar claims, including a claim for punitive damages [JA 140-141]. It was not unreasonable for Attorney Walpole to file the claims on behalf of NVRE and Kivlighan given the facts of this case. Therefore, the trial court abused its discretion in awarding sanctions against Walpole, NVRE and Kivlighan.

The reversible error was worsened when the trial court applied hindsight. As a result of evidentiary rulings, Attorney Walpole was precluded from offering evidence of (1) a contract or expectancy because of a technical default in the pleadings[2]; (2) Martins' ethical violations; and (3) Martins' written statements to the National Association of Realtors [JA 528-543]. All of the barred evidence supported the claims for conspiracy, interference and defamation. While the case may have become difficult to win at trial, it does not follow that the original pleadings were sanctionable. The fact remains that all of the Appellees engaged in tortious conduct and NVRE and Kivlighan were harmed as a result. NVRE and Kivlighan took a

---

This misstates the facts – NVRE and Kivlighan rightly relied on the unethical conduct to prove ***one element of the claim***.

[2] This ruling ran counter to the trial court's acknowledgment that the listing was a contract [JA 1629].

nonsuit. We will never know what the ultimate outcome of the claims would have been, but each claim had factual and legal support when filed.[3]

The trial court exacerbated its error in making a conclusory ruling that the lawsuit was interposed for an improper purpose. There is absolutely no support for that statement. NVRE and Kivlighan were harmed by the actions of the Appellees and were entitled to seek redress. The trial court was angry that the trial went for two days before the plaintiff rested. The real issue for the trial court appears to be the timing of the nonsuit. The trial court gutted the plaintiffs' case by its evidentiary rulings, but that has nothing to do with the propriety of the pleadings at the time they were filed. There was no testimony or other evidence to support the trial court's conclusory statement that the case was filed "out of a vindictive and malevolent desire to injure each of the Defendants and to intimidate a business competitor" [JA 2138]. Therefore, the finding of an improper purpose had no foundation and constituted reversible error.

---

[3] This is a stark contrast to Ford v. Benitez, when this very same trial court and judge went through 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". In the present case, 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]. Walpole concurred with that assessment and filed the claims.

II. The trial court erred in determining the terms of and quantum of sanctions against Walpole, NVRE and Kivlighan (Assignment of Error No. 4).

Even if the trial court finds a violation of Va. Code § 8.01-271.1, that does not end the inquiry. The trial court must then analyze the circumstances and impose an "appropriate sanction". Here the trial court did not perform the required analysis to address the appropriateness of the sanction. Instead, the trial court made the following conclusory statement:

> Both Mr. Walpole and the Plaintiffs violated the Statute during this litigation. As a result, the Court finds that the appropriate sanction is to hold both Mr. Walpole and his clients jointly and severally liable for the reasonable attorney's fees and costs of Defendants.

[JA 2139].

The trial court was required to, but failed, to narrowly tailor the sanction to correct the problem presented to the trial court. *See,* Switzer v. Switzer, 273 Va. 326, 641 S.E.2d 80 (2007). The point of the sanction is to "deter such practices when they have occurred." 273 Va. at 331, 641 S.E.2d at 83. Here, the sanction was not narrowly tailored.

The trial court failed to consider whether a lesser sanction would have been sufficient to deter Attorney Walpole, NVRE and Kivlighan. As mentioned in the previous section, the trial court's anger at Attorney Walpole, NVRE and Kivlighan derived from the case continuing for trial for

two days after the "devastating" evidentiary ruling that caused "any legitimate prospect of success" to vanish [JA 1633]. The trial court stated that it was "shocked that it [the trial] went forward" after the devastating rulings [JA 2121 lines 14-20]. This is confirmed by the trial court's statement that

> Counsel's decision to pursue a three day jury trial in the fact of devastating discovery sanctions, including the admission that no contract existed between the parties, further increased the cost to the defendants, without any possible chance of success.

[JA 1633].

To the extent the trial court believed that the case should not have continued for two days to the close of plaintiffs' evidence, an award of the defendants' attorneys' fees and costs for the two days of trial would have been a narrowly tailored sanction to address the problem presented. That option was presented to the trial court [JA 2095-2096]. The trial court then committed reversible error when it failed to conduct the necessary analysis and awarded fees dating back to the outset of the case.

Moreover, the trial court failed to fully analyze the reasonableness of the attorney's fees sought. Vinson v.Vinson, 41 Va. App. 675, 688-89, 588 S.E.2d 392, 399 (2003). The party seeking to recover attorney's fees must establish the reasonableness of the fees. Chawla v. BurgerBusters, Inc., 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998). Those fees were not

established at the original sanctions hearing as was Defendants/Appellees burden.

These Appellees failed to meet their burden as to the amount and reasonableness of the attorneys' fees at the time they filed their motions, at the time of the oral argument of the sanctions motion, 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/Appellees all of these opportunities to carry their burden, yet the burden was never met. The trial court then ordered a further evidentiary hearing to allow them one more opportunity to meet their burden.

Even then, the trial court abused its discretion by imposing sanctions which are unreasonable. Martins and McEnearney retained two different law firms duplicating work with multiple attorneys present for depositions, hearing and trial. The trial court did not explain how doubling up on counsel and "working behind the scenes" [JA 2142-2143] provided any reasonable or meaningful value. Moreover, Martins and McEnearney chose to sandbag Appellants with the Rule 3:11 issue on the morning of trial. They failed to mitigate their expense and were rewarded for that strategy when the trial court shifted all of the expense of this litigation strategy onto Walpole, NVRE and Kivlighan.

Additionally, the Gavins' counsel egregiously overstaffed and overbilled and sought fees associated with their own failed counterclaim. Their legal bills are exemplars of gross billing and churning. Double- and triple-staffing, outrageous amounts billed for research and simple jury instructions and block-billing. The trial court erred in awarding any of Brincefield's fees given their inherent unreliability and total lack of reasonableness. Finally, the trial court failed to discount the fees for the portion of the claim that it acknowledged "was reasonably grounded in fact" [JA 1633]. *See* Oxenham v. Johnson, 241 Va. 281, 402 S.E.2d 1 (1991).

The trial court committed reversible error when it failed to consider whether the sanction was an "appropriate sanction" and when it calculated the amount of the sanction.

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 (Assignment of Error No. 5).

Walpole, NVRE and Kivlighan moved to suspend the June 29, 2010, order [JA 2146-2156] but the motions were denied without a hearing [JA 2161]. Walpole moved for reconsideration and for suspension of the order [JA 2162-2168] but, again, the trial court denied the motions without a hearing, [JA 2174]. The trial court erred in denying the motions without hearing oral argument. 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.

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 trial court committed reversible error when it denied the motions without allowing the chance to present oral argument as provided in Rule 4:15(d).

IV. The trial court lacked jurisdiction to award sanctions because it lacked authority under Rule 1:1 to suspend the finality of the nonsuit order (Assignment of Error No. 6).

Appellees concede, as they must, that NVRE and Kivlighan were entitled to take a voluntary nonsuit (*See, e.g.,* Brief of Appellees Karen Martins *et al*., p. 2).

Moreover, Appellees further concede that there were no pending motions for sanctions at the time of the nonsuit; instead, the Appellees were ***intending to pursue*** sanctions (See, e.g., Brief of Appellees Karen Martins et al., p. 2 and Brief of Appellees Donna Gavin et al., p. 1).

The trial court then purported to suspend the Order to allow defendants to move, brief and argue for sanctions. Can the trial court 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? The answer is, and should be, "No".

Rule 1:1 governs the finality of orders and the trial court's jurisdiction over a matter and it permits suspending an order under limited circumstances (pending disposition of a motion for a new trial, a petition for rehearing, or a like pleading. . . .).

As conceded by the Gavins, there was no motion for sanctions pending at the time of the nonsuit, merely the intent to pursue sanctions post-trial. Understanding that to concede this fact is fatal to their argument, Martins and McEnearney disingenuously argue that their offer to preview a future motion for sanctions met the threshold, but it strains belief that any court would agree that the mere mention of intent ***to move*** for sanctions is the same as actually doing so. Until the court is formally moved to consider some argument, there is no pending motion. The Gavins, Martins and McEnearney cannot circumvent the pivotal fact that, at the time the nonsuit was taken, there were no pending motions.

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).[4]

While the trial court can suspend its orders in limited circumstances, a prospective motion for sanctions is not one of permitted circumstances. The nonsuit order in this case was suspended without any reference to the "pending disposition" of any pleading because there were none pending. NVRE and Kivlighan had an absolute right to one nonsuit.

To protect the absolute right to nonsuit a case, trial courts must be prohibited from generally suspending nonsuit orders to allow *prospective* motions for sanctions to be filed, heard, and decided more than 21 days after the nonsuit is taken. Therefore, 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) and the subsequent sanctions orders are a nullity.

---

[4] The Order was signed by counsel but none signed the Order as "Agreed". In fact, there was no agreement to the order as demonstrated by Martins and McEnearney objecting to the nonsuit even though they conceded at trial (JA 1139-1140) and in their Brief (Brief of Martins *et al.*, p.2) that NVRE and Kivlighan were entitled to the nonsuit.

CONCLUSION

The trial court committed reversible error and 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.

Respectfully submitted,

/s/ Sean C.E. McDonough

Sean C.E. McDonough (VSB # 33137)
David D. Hudgins (VSB # 20602)
Reese A. Pearson (VSB #75291)
HUDGINS LAW FIRM
515 King Street, Suite 400
Alexandria, Virginia 22314
(703) 739-3300 (Telephone)
(703) 739-3700 (Facsimile)
smcdonough@hudginslawfirm.com
dhudgins@hudinslawfirm.com
rpearson@hudginslawfirm.com

CERTIFICATE

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

Appellant's Name: Forrest Walpole

Appellant's Counsel:

Sean C.E. McDonough (VSB # 33137)
David D. Hudgins (VSB # 20602)
Reese A. Pearson (VSB #75291)
HUDGINS LAW FIRM
515 King Street, Suite 400
Alexandria, VA 22314
(703) 739-3300 (telephone)
(703) 739-3700 (facsimile)
smcdonough@hudginslawfirm.com
dhudgins@hudginslawfirm.com
rpearson@hudginslawfirm.com

Appellee's Names: Karen Martins and
McEnearney Associates, Inc.

Appellee's Counsel:

Mikhael D. Charnoff (VSB #43929)
Sands Anderson
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
(703) 893-3600 (telephone)
(703) 893-8484 (facsimile)
MCharnoff@SandsAnderson.com
and
Barbara P. Beach (VSB #19665)
614 South Royal Street
Alexandria, VA 22314
(703) 683-3434 (telephone)
(703) 683-3434 (facsimile)
BPBEACH@aol.com

Appellee's Name:	Donna Gavin and David Gavin
Appellee's Counsel:	James C. Brincefield (VSB# 6400) Michael W. Tompkins (VSB# 31888) Rich, Rosenthal, Brincefield, et al. 201 North Union Street, Suite 140 Alexandria, VA 22314 (703) 299-3440 (telephone) (703) 299-3441(facsimile) mwtompkins@rrbmdk.com
Amicus Curiae's Name:	The Virginia Trial Lawyers Association
Amicus Curiae's Counsel:	Robert C. Creager, Esq. (VSB # 21906) The Creager Law Firm, PLLC 2800 Northern Parham Road, Suite 205 Richmond, Virginia 23294 (804) 747-6444 (telephone) (804) 747-6477 (facsimile) rcreager@creagerlawfirm.com Mary Lynn Tate (VSB # 16085) Tate Law PC 16006 Porterfield Highway Abingdon, Virginia 24211 (276) 628-5185 (telephone) (276) 628-5045 (facsimile) mltate@tatelaw.com

2. I do hereby certify that fifteen (15) copies of the foregoing Reply Brief of Appellant along with an electronic copy have been hand filed with the Clerk of their Court, and that three (3) copies of the Reply Brief of Appellant along with an electronic copy have been mailed, via U.S. Mail postage prepaid, to opposing counsel, this 7th day of March, 2011.

/s/ Sean C.E. McDonough

Sean C.E. McDonough