IN THE

Supreme Court of Virginia

RECORD NO. 101844

FORREST WALPOLE,

Appellant,

v.

KAREN MARTINS, McENEARNEY ASSOCIATES, INC., DONNA and DAVID GAVIN, LAUREN KIVLIGHAN, and NORTHERN VIRGINIA REAL ESTATE INC.,

Appellees.

BRIEF OF APPELLEES DONNA GAVIN AND DAVID GAVIN

Michael W. Tompkins, VSB No. 31888
Rich Rosenthal Brincefield
Manitta Dzubin & Kroeger, LLP
201 North Union Street, Suite 140
Alexandria, Virginia 22314
(T) (703) 299-3440 x223
(F) (703) 299-3441
mwtompkins@rrbmdk.com
Counsel for Appellees
Donna Gavin and David Gavin

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES iii

BRIEF OF APPELLEES DAVID GAVIN AND DONNA GAVIN 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT 4

1. The Trial Court Properly Found that Walpole Violated Code § 8.01-271.1 by Filing the Complaint, Amended Complaint, Second Amended Complaint, and Bill of Particulars Based on a Proper, Objective Analysis of Each Pleading at the Time It Was Filed (Assignment of Error No. 3) 4

   A. Standard of Review 4

   B. Argument 5

      1. Walpole's Claims for Conspiracy Violated § 8.01-271.1 at the Time Each Pleading Was Filed 8

      2. Walpole's Claims for Tortious Interference Violated § 8.01-271.1 at the Time Each Pleading Was Filed 15

      3. Walpole's Claims for Defamation Violated § 8.01-271.1 at the Time Each Pleading Was Filed 20

      4. Walpole's Claims for Damages Violated § 8.01-271.1 at the Time Each Pleading Was Filed 23

5. Walpole Violated § 8.01-271.1 by Filing the Pleadings for an Improper Purpose 26

2. The Trial Court Properly Determined the Quantum of Sanctions (Assignment of Error No. 4) 27

A. Standard of Review 27

B. Argument 28

3. The Trial Court Properly Denied Walpole a Hearing on His Motion for a Suspending Order (Assignment of Error No. 5) 36

A. Standard of Review 36

B. Argument 36

4. The Trial Court Had Jurisdiction to Consider the Motions for Sanctions (Assignment of Error No. 6) 38

A. Standard of Review 38

B. Argument 38

CONCLUSION 44

CERTIFICATE 45

TABLE OF AUTHORITIES

CASES

Allen v. Lindstrom,
237 Va. 489, 379 S.E.2d 450 (1989).....17

Brown v. Commonwealth,
279 Va. 210, 688 S.E.2d 185,
cert. denied, 131 S. Ct. 217 (2010). 36, 38

Cardinal Holding Co. v. Deal,
258 Va. 623, 522 S.E.2d 614 (1999)..... 28, 34

Chaves v. Johnson,
230 Va. 112, 335 S.E.2d 97 (1985) 20

Cheatham v. Gregory,
227 Va. 1, 313 S.E.2d 368 (1984) 33

Commercial Bus. Sys., Inc. v. Bellsouth Svcs., Inc.,
249 Va. 39, 453 S.E.2d 261 (1995) 8

DAG Petroleum Suppliers L.L.C. v. BP P.L.C.,
452 F. Supp. 2d 641 (E.D. Va. 2006),
aff'd, 268 Fed. Appx. 236; 2008 U.S. App. Lexis 1293
(4th Cir. 2008).....12

Elder v. Holland,
208 Va. 15, 155 S.E.2d 369 (1967) 21, 22

Flippo v. C.S.C. Assocs. III, L.L.C.,
262 Va. 48, 547 S.E.2d 216 (2001). 5, 7

Flora v. Shulmister,
262 Va. 215, 546 S.E.2d 427 (2001).....6

Ford Motor Co. v. Benitez,
273 Va. 242, 639 S.E.2d 203 (2007).....4, 6

Gilmore v. Finn,
259 Va. 448, 527 S.E.2d 426 (2001).....6

Hechler Chevrolet, Inc. v. General Motors Corp.,
230 Va. 396, 337 S.E.2d 744 (1985).....8, 9

Kessler v. Friedman,
152 Va. 446, 147 S.E. 201 (1929) 36, 40

Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co.,
254 Va. 408, 493 S.E.2d 375 (1997).....16

Morris v. Mosby,
227 Va. 517, 317 S.E.2d 493 (1984).....33

Omohundro v. Arlington County,
194 Va. 773, 75 S.E.2d 496 (1953) 35

Oxenham v. Johnson,
241 Va. 281, 402 S.E.2d 1 (1991) 4, 5

Pettus v. Gottfried,
269 Va. 69, 606 S.E.2d 819 (2005) 34

Prince Seating Corp. v. Rabideau,
275 Va. 468, 659 S.E.2d 305 (2008).....35

Rainier's Dairies v. Raritan Valley Farms, Inc.,
117 A.2d 889 (N.J. 1955) 21

Rowe v. Commonwealth,
277 Va. 495, 675 S.E.2d 161 (2009)..... 36, 41

Switzer v. Switzer,
273 Va. 326, 641 S.E.2d 80 (2007) 27, 32

T.G. Slater & Son, Inc. v.
Donald P. & Patricia A. Brennan LLC,
385 F.3d 836 (4th Cir. 2004) 12

Taylor v. Shaw & Cannon Co.,
236 Va. 15, 372 S.E.2d 128 (1988) 43

Wackwitz v. Roy,
244 Va. 60, 418 S.E.2d 861 (1992) 41

Werth v. Fire Cos' Adjustment Bureau, Inc.,
160 Va. 845, 171 S.E. 255,
cert. denied, 290 U.S. 659 (1933) 9

Williamsburg Peking Corp. v. Kong,
270 Va. 350, 619 S.E.2d 100 (2005).....42

STATUTES

Va. Code Ann. § 8.01-38.1 15

Va. Code Ann. § 8.01-271.1 (Michie 2007). .....passim

Va. Code Ann. § 8.01-380 (2007).....42

Va. Code Ann. § 17.1-107 42

Va. Code Ann. § 17.1-513 ..... 40, 41

Va. Code Ann. § 11

Va. Code Ann. § 11

RULES

Fed. R. Civ. P. 12(b)(6).....12

Va. Sup. Ct. R. 1:1 ..... 38, 40, 41, 43

Va. Sup. Ct. R. 3:20 30

Va. Sup. Ct. R. 4:15(d) 37

Va. Sup. Ct. R. 5:11(a)(1).....34

Va. Sup. Ct. R. 5:25 ..... 36, 37, 39, 40

Va. Sup. Ct. R. 5:27(c) 39

TREATISES

Restatement (Second) of Torts § 768-772 ..... 19, 20

BRIEF OF APPELLEES DAVID GAVIN AND DONNA GAVIN

STATEMENT OF THE CASE

Walpole represented the Plaintiffs before withdrawing as counsel in light of the Motions for Sanctions. He and his clients were sanctioned jointly and severally under Code § 8.01-271.1 for making baseless claims to transform a $13,940 breach-of-contract case into a multi-million dollar conspiracy case. His clients were awarded an appeal in No. 101836.

Walpole asserted claims of conspiracy, interferences with contract and contract expectancy, and defamation. Most of the counts in the original Complaint (and all of the counts in the two Amended Complaints) sought punitive damages, and the total *ad damnum* at one point exceeded ten million dollars, plus attorneys' fees (though Walpole contended during the sanctions proceedings that many of the damages claims were duplicative, and he was really only seeking about two million dollars).

On day three of trial, facing two motions to strike, Walpole nonsuited the remaining claims. All Defendants told the trial court that they intended to seek sanctions, and for scheduling

purposes the court directed counsel to agree on language suspending the nonsuit order. With Walpole's consent, the order was suspended "until further order of [the trial] Court."

Walpole then indicated a possible conflict with his clients, and the Gavin Defendants requested a briefing schedule in light of the fact that Walpole had his own counsel, no new counsel had appeared for Walpole's clients, yet Walpole remained counsel of record. With the consent of all parties, the trial court established a briefing schedule, and all Defendants timely filed their Motions for Sanctions and Reply briefs. The trial court heard the Motions on August 29, 2008 and took them under advisement. At that time, neither Walpole nor his clients challenged the reasonableness of the Defendants' attorneys' fees. The trial court later directed all Defendants to submit unredacted copies of their attorneys' invoices, which they promptly did; and on March 17, 2009 the trial court issued a letter opinion granting the Motions for Sanctions and directing further evidence on the proper sanction to be awarded. J.A. 1625-33. An order was later entered reflecting the letter opinion. J.A. 1659-72. At a second

hearing on October 13, 2009, the trial court heard additional evidence regarding the reasonableness of Defendants' fees and took the matter under advisement.

On June 29, 2010, the trial court issued a second letter opinion and order, awarding sanctions against Walpole and his clients jointly and severally, and ending the suspension of the nonsuit order. J.A. 2131-45. Motions for reconsideration were denied. This appeal followed.

STATEMENT OF FACTS

Under the terms of NVRE's exclusive listing agreement, "anyone" could produce a buyer to buy the property, not just NVRE. J.A. 16 (listing agreement ¶ 7).

McEnearney Associates affirmatively informed NVRE on May 14, 2007 that it was placing an offer on the property directly with the Gavins, noting a conflict between NVRE (which contended that it had not been fired) and the Gavins (who contended that it had). J.A. 205 (McEnearney letter to NVRE), 718-19 (trial testimony of L. Kivlighan). That was the same date on which the Wheelers (Martins' and McEnearney's clients) signed

the proposed contract to buy the Gavin home. J.A. 114-123 (copy of the Wheeler contract as finally executed), 801 (trial testimony of P. Wheeler).

Before Walpole filed the Complaint, he knew that David Gavin had received legal advice from a Virginia attorney to the effect that the Gavins were entitled to ignore the listing agreement with NVRE based on NVRE's unilateral breach of that contract. J.A. 142-43 (letter of D. Goodwin).

ARGUMENT

1. The Trial Court Properly Found that Walpole Violated Code § 8.01-271.1 by Filing the Complaint, Amended Complaint, Second Amended Complaint, and Bill of Particulars Based on a Proper, Objective Analysis of Each Pleading at the Time It Was Filed (Assignment of Error No. 3).

A. Standard of Review

This Court reviews the trial court's rulings with respect to violations of Code § 8.01-271.1 under an abuse-of-discretion standard. *Ford Motor Co. v. Benitez*, 273 Va. 242, 249-50, 639 S.E.2d 203, 206 (2007); *Oxenham v. Johnson*, 241 Va. 281, 287, 402 S.E.2d 1, 4 (1991). "In applying that standard, we use an objective standard of reasonableness in determining whether a

litigant and his attorney, after reasonable inquiry, could have formed a reasonable belief that the pleading was well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for an improper purpose." *Flippo v. C.S.C. Assocs. III, L.L.C.*, 262 Va. 48, 65-66, 547 S.E.2d 216, 227 (2001).

B. Argument

The parties are in agreement that § 8.01-271.1 requires a good-faith investigation as to both the factual and legal bases of the litigant's claims before filing each motion, pleading, or other paper. *Oxenham v. Johnson*, 241 Va. 281, 287-88, 402 S.E.2d 1, 4-5 (1991). Furthermore, when the trial court reviews the offending pleadings, it applies

> an objective standard of reasonableness in order to determine whether, after reasonable inquiry, [the signer or represented party] could have formed a reasonable belief that the [paper] was well grounded in fact, and warranted under existing law or by a good faith argument for the extension, modification, or reversal of existing law.

Flora v. Shulmister, 262 Va. 215, 220, 546 S.E.2d 427, 429-30 (2001).

The trial court explicitly acknowledged this standard and followed it below. J.A. 2136-37 ("An objective standard of reasonableness is used to determine whether litigants and attorneys, after reasonable inquiry, could have formed a reasonable belief that their pleadings were well grounded in fact" (citing *Benitez*)).

The parties are further in agreement that the trial court is to avoid "the wisdom of hindsight" in reviewing a party's pleadings under § 8.01-271.1. *Shulmister,* 262 Va. at 220, 546 S.E.2d at 430; *Gilmore v. Finn*, 259 Va. 448, 467, 527 S.E.2d 426, 436 (2001). Again, the trial court explicitly acknowledged and followed this standard. J.A. 1632 ("The Court feels a particular obligation to avoid the 'wisdom of hindsight,' and objectively evaluate[s] the actions of the parties taking into account only the information available to them at that time").

The proper question before this Court, therefore, is whether the trial court abused its discretion in holding that Walpole and

his clients, after reasonable inquiry, could not have formed a reasonable belief that each pleading at issue pleading was well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for an improper purpose under § 8.01-271.1, at the time each pleading was filed. *Flippo*, 262 Va. at 65-66, 547 S.E.2d at 227. As is shown below, the trial court did not abuse its discretion in making its rulings.

Note that the Gavins do ***not*** claim that Walpole is liable for § 8.01-271.1 sanctions because of what he failed to prove at trial. Losing a case (or realizing belatedly that one ought to nonsuit) is not ordinarily sanctionable and is not the reason Walpole was sanctioned in this case. Rather, Walpole was sanctioned because – as testimony and evidence later showed – he lacked a good-faith basis for filing the Complaint when he filed it, and it was filed for an improper purpose. The same is true for the Amended Complaint, the Second Amended Complaint, and the Bill of Particulars: based on a full and fair hearing of all sides after the Motions for Sanctions were filed, Walpole lacked a good-

faith basis for filing each of the referenced pleadings, and he filed them for an improper purpose.

1. Walpole's Claims for Conspiracy Violated § 8.01-271.1 at the Time Each Pleading Was Filed.

"A common law conspiracy consists of two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means." *Commercial Bus. Sys., Inc. v. Bellsouth Svcs., Inc.*, 249 Va. 39, 48, 453 S.E.2d 261, 267 (1995). Criminal or unlawful conduct (or lawful conduct committed for a criminal or unlawful purpose) is a necessary element of any conspiracy claim. *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985) ("A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means"). *See also Werth v. Fire Cos' Adjustment Bureau, Inc.*, 160 Va. 845, 855, 171 S.E. 255, 259, *cert. denied*, 290 U.S. 659 (1933) (in statutory conspiracy

case, “a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means”).

When he filed the original Complaint, Walpole knew that “anyone” had the right to present a ready, willing, and able buyer on the property. J.A. 16 (listing agreement ¶ 7). He also knew that McEnearney Associates had done so, because McEnearney Associates had so informed NVRE. J.A. 205 (McEnearney letter to NVRE), 718-19 (trial testimony of L. Kivlighan). He knew that David Gavin, Donna Gavin’s husband and agent, had obtained legal advice supporting Donna Gavin’s right to fire NVRE. J.A. 142-43 (letter of D. Goodwin).

None of the above facts is a crime, and none of the above facts constitutes criminal or unlawful means. “There can be no conspiracy to do an act which the law allows.” *Hechler Chevrolet*, 230 Va. at 402, 337 S.E.2d at 748 (citing *Werth v. Fire Adjust. Bureau*, 160 Va. 845, 855, 171 S.E. 255, 259, *cert. denied*, 290 U.S. 659 (1933)). At the time Walpole filed the original

Complaint, he knew that he was missing an essential element of his conspiracy cause of action: an unlawful act or an unlawful purpose.

Walpole's brief is bereft of any suggestion that David Gavin or Karen Martins committed a criminal act or a lawful act with a criminal purpose. Despite the trial court's willingness to hear Walpole out – allowing him multiple hearings over quite some time – Walpole was never able to articulate what crime David Gavin or Karen Martins allegedly committed or what criminal purpose they served with their alleged actions.[1]

It became abundantly clear over the course of this case that Walpole never had any evidence of a conspiratorial combination between David Gavin and Karen Martins. A perusal of his opening brief reveals that, even now, Walpole has no evidence

---

[1] Only once has Walpole even bothered to allege that David Gavin and Karen Martins committed an illegal act: "David Gavin and Martins in concert . . . (d) in violation of law, failed to work through plaintiff Northern Virginia Real Estate in connection with all offers to purchase the Property . . . ." J.A. 93-94 (Bill of Particulars ¶ 1). He never identified what law was supposedly violated by that alleged conduct, citing nothing more than the National Association of Realtors® ethics code.

supporting his claim of an agreement between Gavin and Martins other than the fact that they exchanged telephone calls.

Indeed, almost a year before Walpole filed his suit, the United States District Court for the Eastern District of Virginia contemplated the sufficiency under Code § 18.2-499 and -500 of a plaintiff's proposed inference of conspiracy when no evidence supports the existence of either an agreement between the defendants or an intent on their part to injury the plaintiff:

> Specifically, Plaintiff wishes this Court to infer that BPPNA's provision of helpful information to Eastern represents evidence that a sufficient jury could find that (1) BPPNA entered into an agreement with Eastern and (2) that agreement's purpose was to injure DAG during the bidding process. Such an inference is completely unreasonable and lacks any evidentiary support.
>
> At worst, the record may potentially support an inference that BPPNA had a preference for Eastern through the bidding process, but Plaintiff still must forecast at least some shred of evidence of an agreement between the two parties; and that such agreement was made with the willful and malicious intent to injure DAG. Plaintiff DAG has provided no evidence of any such agreement between Eastern or BPPNA, nor have they provided any evidence an intent to injure DAG, whether by actual or legal

> malice. This Court finds no evidence that Eastern nor BPPNA had any intent other than to make a profit. This intent, in a capitalistic society, can hardly be considered a malicious intent to injure any member with whom it competed. To find otherwise would stifle market competition that rests at the core of capitalism.

DAG Petroleum Suppliers L.L.C. v. BP P.L.C., 452 F. Supp. 2d 641, 650 (E.D. Va. 2006), *aff'd*, 268 Fed. Appx. 236; 2008 U.S. App. Lexis 1293 (4th Cir. 2008) (unpublished).

Walpole's assertion that a conspiracy claim can be supported by a breach of fiduciary duty, Walpole Brief at 29, is bizarre. Neither Donna Gavin, David Gavin, Karen Martins, McEnearney Associates, nor any other person threatened by Walpole throughout this litigation had any sort of fiduciary duty toward NVRE or Kivlighan. Moreover, Walpole himself never alleged a cause of action for breach of fiduciary duty.

Walpole's reliance on *T.G. Slater & Son, Inc. v. Donald P. & Patricia A. Brennan LLC*, 385 F.3d 836 (4th Cir. 2004), is misplaced. *Slater* merely stands for the proposition that properly alleging a conspiracy will survive a motion to dismiss. *Id.* at 845 (reversing Fed. R. Civ. P. 12(b)(6) dismissal because the plaintiff

had stated a claim upon which relief could be granted). Neither the Gavins nor the McEnearney Defendants have accused Walpole of inventing fictitious causes of action. The focus throughout this case has been the fact that Walpole never had a good-faith basis for alleging that the tort had been committed in this case.

Finally, Walpole never advanced a colorable claim for damages throughout the entire case. If NVRE had not been fired for cause, it would have been entitled to two percent of the Wheeler sale (because the Wheelers had an agent, their agent would get three of the five percent commission). J.A. 17 (listing agreement ¶ 7(C)). That commission works out to $13,940.00. J.A. 607-08 (Gavin opening statement). But Walpole never – not once – sought that commission as damages. Instead, he sought five percent of the second Alnifaidy ***offer*** (not contract) of $750,000, which works out to $37,500.00. J.A. 93 (Bill of Particulars ¶ 3).[2]

---

[2] The Bill of Particulars setting forth the calculation of the first commission at $37,500 instead of $13,940 is also the only document showing a sales price for Alnifaidy's mythical future mansion at $2,175,000. J.A. 95. Walpole appears to have invented the number out of whole cloth.

NVRE was never entitled to a commission on either of the Alnifaidy offers because neither of them gelled into a contract. As Walpole himself confessed during his opening statement at trial, the second (higher) Alnifaidy offer of $750,000 resulted in an actual sales price of $720,000, J.A. 588, which is less than the $729,900 list price set forth in the NVRE listing agreement. J.A. 15 (listing agreement ¶ 1). So NVRE never produced a full-price offer to Donna Gavin.

All of the above analysis applies equally well to the Amended Complaint, Bill of Particulars, and Second Amended Complaint: Walpole never had a good-faith basis for claiming that David Gavin and Karen Martins formed an agreement to harm NVRE's business, and he never had a good-faith basis for claiming that David Gavin or Karen Martins committed a crime or committed a lawful act with a criminal purpose. He knew (or should have known) that these voids were fatal to a conspiracy claim, and he never should have filed any pleading – let alone four of them, plus the associated motions papers and discovery documents –

accusing David Gavin of conspiracy. He was properly sanctioned under Code § 8.01-271.1.

2. Walpole's Claims for Tortious Interference Violated § 8.01-271.1 at the Time Each Pleading Was Filed.

In his original Complaint, Walpole asserted one claim of interference with contract and another claim of interference with contract expectancy against all defendants (even Donna Gavin). J.A. 1-9. In the Amended Complaint, he asserted a claim of interference with contract expectancy, either directly or (in the case of McEnearney Associates) through *respondeat superior* against all defendants except Donna Gavin – but he changed the damage claim from $100,000 compensatory damages and $500,000 punitive damages in the Complaint to $168,000 compensatory damages and $350,000[3] in the Amended Complaint. J.A. 60-70. The Bill of Particulars, filed the same day as the Amended Complaint, reiterated the compensatory damage

[3] In between filing the original Complaint and the first Amended Complaint, Walpole learned from McEnearney's first pleading that Virginia prohibits punitive damages of greater than $350,000.00. J.A. 49 (McEnearney Associates' Motion for Bill of Particulars ¶ 10) (citing Va. Code Ann. § 8.01-38.1).

claim, explaining the "first commission" and "second commission" claims for the first time. J.A. 93-95. The Second Amended Complaint repeated a claim of interference with contract expectancy against all defendants, retaining a $168,000 compensatory damage claim and $350,000 punitive damage claim. J.A. 286-299.

At the time Walpole filed the original Complaint, he knew (or should have known) that NVRE never had any factual basis for bringing the tortious interference claim. Tortious interference with a business expectancy requires "improper methods" by the defendant. *Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co.*, 254 Va. 408, 414, 493 S.E.2d 375, 378 (1997). There was never any factual support suggesting any such "improper methods" used by David Gavin.

Throughout this entire case, Walpole's only argument with respect to improper methods was that the various Defendants acted "improperly" by allegedly violating the National Association of Realtors® code of ethics (by communicating "behind the back" or "behind the sign" of NVRE) and that David Gavin acted

"improperly" by defaming Plaintiff Kivlighan to Martins (but never that David Gavin defamed Kivlighan to Donna Gavin, the decision-maker under the listing agreement).

As to the first argument, David Gavin is not (and never was) a member of the National Association of Realtors.® Ergo, its code of ethics does not apply to him. Moreover, the code of ethics of a voluntary trade association cannot form the basis of a private right of action. *Allen v. Lindstrom*, 237 Va. 489, 498-500, 379 S.E.2d 450, 455-57 (1989) (even a violation of the binding Virginia Administrative Code governing real estate agents would not form the basis of a private cause of action).

As to the second argument, that the defamation claim somehow supported a tortious interference claim against David Gavin, Walpole never even approached lucidity with his allegations. He alleged that David Gavin defamed Kivlighan ***to Martins***. J.A. 11 (Complaint ¶ 101), 81 (Amended Complaint ¶ 96), 305 (Second Amended Complaint ¶ 96).[4] But defaming

[4] The allegations concerning allegedly defamatory statements made to the Real Estate Board, J.A. 76-80 (Amended Complaint ¶¶ 72, 80, 88), 299-304 (Second Amended Complaint

Kivlighan ***to Martins*** had no causal relationship with the alleged tortious interference, as Walpole's tortious interference claim was founded on the premise that David Gavin somehow caused Donna Gavin to fire NVRE. J.A. 93-94 (Bill of Particulars ¶ 1). Note that Walpole has never alleged that Martins repeated the alleged defamation to Donna Gavin (or anyone else, for that matter).

Walpole's allegation that the conspiracy claim supported the tortious interference claim, Walpole Brief at 34,[5] is similarly specious. First, Walpole never had any factual basis for alleging a

---

¶¶ 72, 80, 88) could not form the basis of the tortious interference claim, because Walpole never alleged that the Gavins' statements to the Real Estate Board caused Donna Gavin to fire NVRE. Moreover, since he also accused Donna Gavin of making those statements, there could be no causal relationship sufficient to establish tortious liability as to David Gavin.

[5] Note the bootstrapping Walpole employs to this day: the tortious interference claim is well-grounded and justified because of the conspiracy and defamation claims, which in turn are well-grounded and justified because of the tortious interference claim, and the NAR Code of Ethics proves everything. Walpole Brief at 29 (conspiracy is proven by David Gavin violating the NAR code of ethics when he "went around NVRE"), 31 (conspiracy is proven by defamation and by Martins violating the code of ethics), 34 (tortious interference is proven by defamation, conspiracy, NAR code of ethics, and "sharp and overreaching actions"), 35-36 (defamation is proven by David Gavin's and Martins' attempt to destroy NVRE's relationship with Donna Gavin).

conspiracy. Second, the tortious interference claim was itself part of Walpole's attempted justification for alleging conspiracy, and circular reasoning – it's a tortious interference because it's an illegal conspiracy because it's a tortious interference – does not constitute a good-faith basis for bringing a multi-million dollar lawsuit.

In any event, Walpole knew before he filed the original Complaint that David Gavin was acting on behalf of Donna Gavin with respect to the transaction involving NVRE, and that he had sought legal advice relating to whether NVRE could be fired based on its misconduct. J.A. 142 (June 18, 2007 letter of Daniel Goodwin reciting his advice to the Gavins that they had the right to fire NVRE). Accordingly, if Walpole had performed a good-faith investigation before filing the original Complaint, he would have known that David Gavin was protected by the governing case law because he was giving requested advice to his wife. It is well-established in Virginia that the giving of requested advice is not tortious interference with a contract or business expectancy. Restatement (Second) of Torts § 772, *adopted by reference in*

Chaves v. Johnson, 230 Va. 112, 121, 335 S.E.2d 97, 103 (1985) ("Specific grounds for the defense, discussed *seriatim* in Restatement, *supra*, §§ 768-772 are: legitimate business competition, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice"). David Gavin, husband to the decision-maker Donna Gavin, merely gave her advice about the decision she had to make; and he did so in response to her explicit request. Walpole knew all along that his tortious interference claim was barred because David Gavin fell squarely within an exception expressly affirmed by the Supreme Court in this area of law.

3. Walpole's Claims for Defamation Violated § 8.01-271.1 at the Time Each Pleading Was Filed.

In the original Complaint, Walpole alleged that David and Donna Gavin defamed Kivlighan by making a complaint about her to the DPOR's Real Estate Board. J.A. 12 (Compl. ¶¶ 107, 113). He repeated these allegations, with some editing, later in the case. J.A. 76-81 (Amended Compl. ¶¶ 72, 80, 88), 299-304

(Second Amended Compl. ¶¶ 72, 80, 88). Indeed, he attached the DPOR complaint form to the Amended Complaint. J.A. 86-91.

If Walpole had performed a good-faith investigation, he would have discovered that Kivlighan's defamation claims were clearly barred by the absolute privilege attaching to complaints made to a quasi-judicial agency. See *Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369 (1967), citing *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 117 A.2d 889 (N.J. 1955) (the absolute privilege in defamation cases extends to administrative proceedings that are conducted in a manner and with safeguards similar to a judicial proceeding and deal with issues of significant public concern).

Walpole specifically alleged in the Complaint, Amended Complaint, and Second Amended Complaint that the allegedly defamatory statements were made to the DPOR. J.A. 12 (Complaint ¶ 107), 76-81 (Amended Compl. ¶¶ 72, 80, 88), 299-304 (Second Amended Compl. ¶¶ 72, 80, 88). Thus, at the time he filed this suit, and specifically at the time he filed the Amended Complaint and Second Amended Complaint, Walpole

clearly knew that the statements about which he was suing were made to DPOR – a state agency charged with the regulation of real estate licensees such as Kivlighan. He knew – or was required under Code § 8.01-271.1 to know – that DPOR proceedings have the safeguards of a judicial proceeding, meaning that the absolute privilege applies to defamation claims concerning statements made to DPOR. *Elder v. Holland*, 208 Va. at 21 22, 155 S.E.2d at 374. The defamation claims were frivolous and should never have been filed. This is especially true once the Gavins filed their Plea of Absolute Privilege on August 20, 2007. J.A. 40. Instead, though, Walpole insisted on fighting the defamation claims as hard as he could, all the way to a dismissal with prejudice in response to the Gavins' plea, after four months of litigation. J.A. 283. He even continued to fight the defamation claims after the Gavins identified the case law (in particular the *Elder* case) reciting the existence of the absolute privilege for quasi-judicial proceedings, and provided explicit citations to the statutes showing that the DPOR hearings have the

safeguards necessary for the absolute privilege to apply. J.A. 261-62.

But Walpole fought on, forcing the Gavins to endure four months of litigation on the frivolous defamation counts.[6] Sanctions were proper. This is also true of Count XI of the Amended Complaint and Second Amended Complaint, given that Walpole had no evidence of the alleged defamation and no evidence of damages.

4. Walpole's Claims for Damages Violated § 8.01-271.1 at the Time Each Pleading Was Filed.

In the original Complaint, Walpole sought damages based on five percent of the sale to the Wheelers (McEnearney's clients), J.A. 6 (Compl. ¶ 48), 8 (Compl. ¶ 69) – even though NVRE's listing agreement clearly stated that NVRE would only get two

[6] Note that, once Walpole was done filing amended complaints and the Gavins obtained a ruling on their plea of absolute privilege, Donna Gavin was finally free of the litigation (at least as a party), since she had been dropped from all other counts in Walpole's pleadings. *Compare* J.A. 286-306 (Second Amended Complaint, naming Donna Gavin only in Counts VIII, IX, and X), *with* J.A. 283 (Order sustaining the Gavin Defendants' Plea of Absolute Privilege and dismissing Counts VIII, IX, and X with prejudice).

percent of any sale to a buyer with an agent. J.A. 17 (listing agreement ¶ 7(C)). Oddly enough, even though five percent of the $697,000 Wheeler sale works out to $48,350.00, Walpole sought $100,000 in compensatory damages under his "interference with contract" and "interference with contract expectancy" counts. J.A. 7, 9. He has never explained this discrepancy.

By the time he filed his Amended Complaint and Bill of Particulars (both were filed the same day), Walpole had added to his claimed damages. In the Amended Complaint, he sought $168,000 in compensatory damages for "interference with contract expectancy" against the various Defendants.[7] In the Bill of Particulars filed that same day, Walpole explained the $168,000 figure as based on five percent of Alnifaidy's second offer to purchase the Kennedy home (which worked out to

[7] In the original Complaint, Walpole named Donna Gavin as one of the co-conspirators / interferers. J.A. 1-9 (naming Donna Gavin as one of the Defendants). In the Amended Complaint, he decided not to name her as a co-conspirator / interferer, contenting himself with naming her in the defamation counts for complaining about Kivlighan to the Real Estate Board. J.A. 60-82.

$37,500), plus six percent of a future sale of a rebuilt McMansion at $2,175,000 (which worked out to $130,500), for a total of $168,000. J.A. 93-95.

To date, Walpole has never explained ***any*** source supporting his damages theory. No document exists supporting a $2,175,000 sales price for the hypothetical McMansion to be built on the site of the Kennedy home by Alnifaidy. No person – not even Kivlighan – ever testified to a basis for coming up with the magical $2,175,000 figure. Indeed, no one has ever satisfactorily explained how Walpole thought he could justify a claim that some buyer somewhere would buy the Alnifaidy McMansion for $2,175,000 without having an agent of his or her own – which is the only way NVRE could possibly expect to get six percent of the sales price without splitting the commission.

Even now, Walpole claims that his demand for the speculative "second commission" was well-grounded in fact and warranted by existing law. Walpole Brief at 36-38. Yet the claim that NVRE would have received a listing from Alnifaidy was belied by Alnifaidy's testimony that he had not hired and would not hire

NVRE. J.A. 1630 (trial court's first letter opinion, reciting Alnifaidy Dep. at 60:5 – 61:3). The claim that the trial court applied hindsight regarding the "second commission" claim is preposterous; NVRE itself was unable to support the $2,175,000 price claimed for the future sale of the hypothetical McMansion, and no one ever produced any evidence supporting Walpole's theory that NVRE would have sold the future building without a buyer's agent on hand to split the commission.

As for the claim that NVRE was entitled to five percent rather than two percent of the consummated sale, NVRE's own listing agreement expressly provided that NVRE would split the commission with any buyer's agent, limiting NVRE to two percent of the sale. J.A. 17 (listing agreement ¶ 7(C)). Accordingly, even NVRE's claim to $37,500 was ill-founded.

5. Walpole Violated § 8.01-271.1 by Filing the Pleadings for an Improper Purpose.

Walpole's claim, Walpole Brief at 38, that the record is "bereft of any support for a finding of an improper purpose," is incorrect. First, as the trial court found, the frivolous claims were filed "out of a vindictive and malevolent desire to injure and

intimidate a business competitor." J.A. 1633. Second, it was abundantly clear throughout the case that Walpole was using the frivolous arguments for improper purposes. J.A. 1461 (Gavins' Reply Brief, citing harassment of the Defendants, needless increase in the cost of the litigation, and attempted extortion of higher settlement offers).

Contrary to Walpole's unsupported argument, Walpole Brief at 38, there was nothing about the trial court's decision that adopted the English Rule. Walpole's pleadings were frivolous when filed. He was not sanctioned for losing his case; he was sanctioned for violating § 8.01-271.1. J.A. 2139 (trial court's opinion).

2. The Trial Court Properly Determined the Quantum of Sanctions (Assignment of Error No. 4).

A. Standard of Review

A trial court's sanction under § 8.01-271.1 "will not be reversed on appeal 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). If the appellant fails to identify

particular charges awarded by the trial court that are excessive, then no abuse of discretion can be found. *Cardinal Holding Co. v. Deal*, 258 Va. 623, 632, 522 S.E.2d 614, 619 (1999).

B. Argument

Walpole's argument that the various Defendants failed to prove the amount of their attorneys' fees, Walpole Brief at 38, is incorrect. The Gavins and the McEnearney Defendants attached affidavits of their respective attorneys' fees to their motions for sanctions. J.A. 1267 (listing Gavins' sanctions exhibits), 1241-44 (McEnearney Defendants' affidavits). Walpole never challenged those exhibits, thus waiving any challenge to the amounts set forth in them. The trial court nevertheless gave the benefit of the doubt to Walpole and his clients and directed the parties to submit further evidence. Without any objection from Walpole or his clients, the trial court directed that the Defendants turn over their unredacted bills, which they did. J.A. 1533-1624. The trial court then gave Walpole and his clients the opportunity to challenge the reasonableness of the Defendants' attorneys' fees, even though neither Walpole nor his clients had raised any such

challenge. It was at the hearing granted to Walpole and his clients that the trial court heard evidence about the reasonableness of Defendants' counsel's fees, and the trial court then took the matter under advisement, carefully reviewed the entire record, and issued its ruling.

At the hearing, the trial court heard expert testimony from Mr. Brincefield for the Gavins and Mr. Mercer for the McEnearney Defendants supporting the reasonableness of the respective Defendants' fees. Walpole presented the testimony of one Richard Driscoll, who opined that all the Defendants' fees were unreasonable (neither NVRE nor Kivlighan presented an expert witness regarding fees).

The trial court was justified in accepting the testimony of the Defendants' experts and rejecting the testimony of Walpole's expert. Both of the Defendants' experts are outstanding in their field and worthy of belief by the trial court. On the other hand, Walpole's expert (1) relied on a District of Columbia case as authority, acknowledging that no Virginia authority supports his claim, J.A. 1922-23; and (2) did not know basic Virginia

procedure central to his main thesis that summary judgment should have been filed earlier in the case: he testified that "under the rules, you can file a motion for summary judgment at any time. . . . It's discouraged. But it's possible." J.A. 1975. *See* Va. Sup. Ct. R. 3:20 (summary judgment may be had "after the parties are at issue"). Demurrers were still being heard in March 2008. J.A. 366-375 (Gavin Demurrer to Second Amended Complaint, filed February 11, 2008), 1477-78 (transcript discussing the previous March 2008 hearings). One Answer was filed on the first day of trial, after the parties discovered that the last remaining demurrer had in fact been ruled on. J.A. 465-71. Driscoll's entire thesis relating to summary judgment was wrong, and the trial court was within its discretion to disregard it.

Walpole's argument that the Gavins failed to carry their burden is simply incorrect. The Gavins' original Motion for Sanctions included an expert-witness affidavit, together with copies of their bills, detailing the reasonableness of the Gavins' counsel's fees. Walpole utterly failed to challenge those fees, thus waiving any challenge to what was a prima facie case

regarding reasonableness. The fact that the trial court then gave Walpole multiple opportunities to make the attacks he originally chose not to make has nothing to do with whether the Gavins carried their burden.

The trial court heard Walpole and his clients on the issue of mitigation of damages, block billing practices, and "unreasonable overbilling." It considered his arguments and ruled against him, J.A. 2140-44, and Walpole has failed to show an abuse of the trial court's discretion. Moreover, on this record, Walpole has failed to demonstrate that "block billing" practices are so unreasonable that the trial court's exercise of its discretion in this area, J.A. 2141, was an abuse of discretion. Looking at the record in the light most favorable to the appellees, the trial court could reasonably have decided that Walpole's expert, Mr. Driscoll, was unworthy of belief compared to the Gavins' expert and the McEnearney Defendants' expert. Similarly, the trial court could reasonably have concluded that banning "block billing" was too drastic a step to take on the strength of one witness who didn't

even know the rules governing the area in which he was hired to express an opinion.

The parties are in agreement that attorneys' fees awarded under § 8.01-271.1 must be reasonable. And it is true, as Walpole argues, Walpole Brief at 40, that the party seeking attorneys' fees must put on evidence sufficient to support the award.

But, on appeal, the burden shifts to the appellant to show an abuse of discretion by the trial court. *Switzer v. Switzer*, 273 Va. 326, 331, 641 S.E.2d 80, 83 (2007) (trial court's sanction under § 8.01-271.1 "will not be reversed on appeal 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").

Here, Walpole has utterly failed to demonstrate any error by the trial court in determining the proper *quantum* of fees. His argument that the Gavins' counsel "overstaffed and overbilled," Walpole Brief at 41-42, fails to account for the fact that the trial court specifically considered those arguments and reduced the Gavins' counsel's fees accordingly. J.A. 2144. Walpole's

argument that the fees should be reduced because the Gavins' lawyers incurred fees with respect to the Gavins' Counterclaim is belied by the fact that the trial court specifically excluded the Counterclaim-related fees from its calculations. J.A. 2140.

Walpole's complaint that the Gavins' fee-related expert witness, James C. "Beau" Brincefield, Jr., Esquire, was not "independent," Walpole Brief at 43, misses the fact that, because the trial court was the trier of fact with respect to the attorneys' fee issue, the trial court is the judge of the credibility of the witness. *Cheatham v. Gregory*, 227 Va. 1, 4, 313 S.E.2d 368, 370 (1984). Its finding is not to be set aside on appeal unless it is plainly wrong. *Morris v. Mosby*, 227 Va. 517, 522, 317 S.E.2d 493, 497 (1984). The trial court obviously credited Mr. Brincefield. Walpole cannot now challenge that finding.

Walpole's complaint that some of the Gavins' counsel's bills contained duplicative time and an excessive amount of time researching jury instructions, Walpole Brief at 43, misses the fact that the trial court deducted for those very matters. J.A. 2142.

In short, everything Walpole complains about to this Court was already considered and ruled on by the trial court. If Walpole wanted to challenge the specific line items ruled on by the trial court (or, perhaps, to argue that the trial court missed a few items), he should have ensured that the record was sufficiently complete for this Court to review his claims. *Cardinal Holding Co. v. Deal*, 258 Va. 623, 632, 522 S.E.2d 614, 619 (1999) (where appellant failed to identify the amounts he claimed were improperly included in a sanctions award, "the record is insufficient for us to decide whether the court erred in doing so"). Walpole's failure to identify specific fee items that he claims are inadequate is fatal to this part of his appeal. *Id.* To the extent that Walpole wishes to challenge specific items not contained in the record, his appeal must fail for failure to preserve the record. Va. Sup. Ct. R. 5:11(a)(1); *Pettus v. Gottfried*, 269 Va. 69, 81, 606 S.E.2d 819, 827 (2005) ("When a party seeks to have an issue decided in her favor on appeal, she is charged with the responsibility of presenting an adequate record from which the appellate court can determine the merits of her argument");

Omohundro v. Arlington County, 194 Va. 773, 778, 75 S.E.2d 496, 499 (1953) ("Questions raised in the brief about evidence not shown in the record cannot be considered by us").

> We cannot review the ruling of a lower court for error when the appellant does not bring within the record on appeal the basis for that ruling or provide us with a record that adequately demonstrates that the court erred. Our rules require the appellant to "present a sufficient record on which the court can determine whether or not the lower court has erred." Wansley v. Commonwealth, 205 Va. 419, 422, 137 S.E.2d 870, 872-73 (1964) (citing Justis v. Young, 202 Va. 631, 632, 119 S.E.2d 255, 256, 257 (1961)). "An appellant who seeks the reversal of a decree . . . has the primary responsibility of presenting to this [C]ourt, as a part of the printed record, the evidence introduced in the lower court, or so much thereof as is necessary and sufficient for us to give full consideration to the assignment of error. . . . [W]here the evidence on which the decree is based has not been made a part of the record to be considered by us, it is impossible for us to pass on the point that the decree is contrary to the law and the evidence."

Prince Seating Corp. v. Rabideau, 275 Va. 468, 470-71, 659 S.E.2d 305, 307 (2008).

Walpole's arguments that the trial court should have considered his ability to pay the sanctions, Walpole Brief at 43,

and that he is concerned about being jailed if he fails to pay the sanctions, Walpole Brief at 43-44, are new arguments in this case. They were never raised below[8] and should not be considered here. Va. Sup. Ct. R. 5:25.

3. The Trial Court Properly Denied Walpole a Hearing on His Motion for a Suspending Order (Assignment of Error No. 5).

A. Standard of Review

As a question of law, the interpretation of one of this Court's rules is subject to de novo review. *Brown v. Commonwealth*, 279 Va. 210, 217, 688 S.E.2d 185, 189, *cert. denied*, 131 S. Ct. 217 (2010).

B. Argument

The only reason Walpole gave to the trial court for seeking a suspending order was his desire to file a motion for

---

[8] Raising the "ability to pay" argument sixteen days after entry of the final order, without offering any evidence of an ***inability*** to pay the sanction and without even proffering that Walpole could not pay the sanction, J.A. 2169-72, is too late. The trial court had already ruled, and Walpole's decision to wait until after the court's final ruling to raise the issue constitutes invited error. He is not entitled to relief. *Rowe v. Commonwealth*, 277 Va. 495, 501-03, 675 S.E.2d 161, 164-65 (2009); *Kessler v. Friedman*, 152 Va. 446, 450, 147 S.E. 201, 202 (1929); Va. Sup. Ct. R. 5:25.

reconsideration. J.A. 2152. Later, Walpole filed his Motion for Reconsideration, setting out the arguments he intended to make. J.A. 2162-2165. But everything in his Motion for Reconsideration had already been presented to the trial court.

The trial court reviewed Walpole's Motion for Reconsideration and denied it on the ground that nothing in it was new. J.A. 2174 ("Walpole has not raised any issues not already considered in the matter"). Walpole's only real contention, therefore, is that he wanted to have an oral argument on his Motion for Reconsideration. But "Oral argument on a motion for reconsideration . . . shall be heard orally only at the request of the court." Va. Sup. Ct. R. 4:15(d). Accordingly, the trial court did not err in denying the oral argument.

In any event, Walpole has failed to show any prejudice resulting from the trial court's denial of oral argument on his motion for reconsideration. Among other things, he has failed to proffer what he would have said had such a hearing been held. This failure to proffer is fatal to his appeal. Rule 5:25.

4. The Trial Court Had Jurisdiction to Consider the Motions for Sanctions (Assignment of Error No. 6).

A. Standard of Review

As a question of law, the interpretation of one of this Court's rules is subject to de novo review. *Brown v. Commonwealth*, 279 Va. 210, 217, 688 S.E.2d 185, 189, *cert. denied*, 131 S. Ct. 217 (2010).

B. Argument

Walpole's argument misses the point of what actually took place on day three of trial. After Walpole nonsuited the last remaining claims at trial, defense counsel inquired as to the trial court's availability on May 16, 2008 for a hearing on defense motions for sanctions, pointing out that the motions to be filed needed to be heard within Rule 1:1's 21 days (and, under the trial court's local procedures, the parties needed permission to place two such motions on the same day in the same case). In response, the trial court requested a suspending order for the court's benefit (because of expected judicial absences); the Gavin Defendants suggested a 30-day suspension to accommodate the court; and the trial court directed that all counsel confer and

prepare a suspending order for either 30 days, "or you can say until further order of Court. ***Whatever language you can agree on.***" J.A. 1194 (emphasis added).

The parties then prepared an order entering the nonsuit and suspending the order until further order of the court. Walpole consented to this procedure and noted no objections. J.A. 1197 (Apr. 30, 2008)[9] (noting no objections from Plaintiffs or Walpole). He cannot now complain of a procedure to which he agreed. Rule 5:25.

Note that Walpole tacitly admits failing to preserve this objection. Under Rule 5:27(c), Walpole was required to state the pages of the Appendix on which the alleged error was preserved. Walpole cited only five pages of the Joint Appendix for this assignment of error: 2169-73. Walpole Brief at 3. Those pages were a single document: Walpole's Exceptions and Objections to the Final Order. J.A. 2169-73. That document was filed on July 15, 2010 – 16 days ***after*** the final order had been entered.

---

[9] It is undisputed that, although the Order bears a signature date of April 29, 2008, it was in fact signed by the trial judge on April 30, 2008. J.A. 1197.

J.A. 2131-32. Waiting until after the trial court issues its ruling to say "Gotcha!" is inconsistent with the requirements of Rule 5:25. *Kessler v. Friedman*, 152 Va. 446, 450, 147 S.E. 201, 202 (1929) ("It is not a compliance with the rule for the petitioner, after the rulings are made and record completed, to file a petition setting forth the reasons for his objections to such rulings. The trial court must have a fair opportunity to pass upon the grounds of the objections"). In effect, such a litigation tactic is no more than setting a trap for the trial court and should not be allowed. *Id.* at 451, 147 S.E. at 202.

Walpole's attempt to argue that his Rule 1:1 argument is jurisdictional and therefore open to being raised at any time, Walpole Brief at 3, is incorrect. The trial court clearly had jurisdiction over both the subject matter and the parties. Va. Code Ann. § 17.1-513. The trial court certainly had jurisdiction to enter a suspending order. Va. Sup. Ct. R. 1:1 ("All final judgments, orders, and decrees, . . . shall remain under the control of the trial court and subject to be . . . suspended for twenty-one days after the date of entry, and no longer"). So the

only question before this Court is whether the trial court erred by entering a suspension to which Walpole and the Plaintiffs specifically agreed. The "invited error" doctrine answers this question. *See Rowe v. Commonwealth*, 277 Va. 495, 501-03, 675 S.E.2d 161, 164-65 (2009).

Walpole's reliance on *Wackwitz v. Roy*, 244 Va. 60, 63, 418 S.E.2d 861, 863 (1992), is misplaced. The trial court did ***not*** lack subject-matter jurisdiction. Va. Code Ann. § 17.1-513. And, clearly, the trial court had jurisdiction to suspend its nonsuit order. Va. Sup. Ct. R. 1:1 ("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").

Walpole's claim is merely that the trial court, for reasons he now raises on appeal, should not have exercised that jurisdiction in the way it did. But that argument – which is ***not*** a jurisdictional argument – was waived. First, Walpole consented to the original suspension, J.A. 1197, and then failed to complain

of the ongoing suspension until after the trial court had ruled. Second, Walpole never availed himself of the opportunity to avoid the lengthy suspension, either by seeking a ruling under Va. Code Ann. § 17.1-107 or by notifying the trial court that he no longer consented to the suspension.

The claim that sanctions could vitiate the right to nonsuit under Code § 8.01-380, Walpole Brief at 32-35, is misplaced. This Court has already held that sanctions may issue under § 8.01-271.1 notwithstanding the right to nonsuit. *Williamsburg Peking Corp. v. Kong*, 270 Va. 350, 354-55, 619 S.E.2d 100, 102 (2005). Whether sanctions are actually pending when a nonsuit is requested does not affect the right to seek it.

Indeed, Walpole's argument flies in the face of the *Kong* case. Allowing a nonsuit to prevent the decision of a motion for sanctions "undermines the public policy expressed by the General Assembly in Code § 8.01-271.1." *Id.* at 354, 619 S.E.2d at 102. Under Walpole's argument, "litigants would be left to abuse of process without remedy, effectively nullifying the purposes of the statute." *Id.* at 355, 619 S.E.2d at 102.

Walpole's reliance on the commentary to Rule 1:1 is misplaced. Rule 1:1 is not ambiguous; accordingly, resort to its legislative history is improper. *Taylor v. Shaw & Cannon Co.*, 236 Va. 15, 19, 372 S.E.2d 128, 130-31 (1988).

> [W]hen the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted because we take the words as written to determine their meaning. . . . And, when an enactment is unambiguous, extrinsic legislative history may not be used to create an ambiguity, and then remove it, where none otherwise exists. . . .

Id. (citations omitted).

Rule 1:1 is clear: the trial court may suspend a final order if it does so within 21 days following entry of that order. The trial court has the power under Rule 1:1 to modify, vacate, or suspend the final order. It did so, without any complaint from Walpole until Walpole had lost the case. Indeed, the order in question clearly and expressly suspended itself, J.A. 1197 – meaning that no final order was yet effective. The trial court had both jurisdiction to enter its orders and the acquiescence of all parties to do so. Walpole's appeal should be denied.

CONCLUSION

Walpole chose, with the consent of his clients, to multiply a $13,940 dispute into a multi-million dollar claim filled with laughable arguments, imaginary damages, and frivolous allegations. The trial court correctly and properly held him to account for it. The trial court's ruling should be affirmed.

Respectfully submitted,

DAVID GAVIN
DONNA GAVIN
By Counsel

RICH ROSENTHAL BRINCEFIELD
MANITTA DZUBIN & KROEGER, LLP

By: _____
Michael W. Tompkins, VSB No. 31888
201 North Union Street, Suite 140
Alexandria, Virginia 22314
(T) (703) 299-3440
(F) (703) 299-3441
mwtompkins@rrbmdk.com
Counsel for Appellees David Gavin and Donna Gavin

CERTIFICATE

In accordance with Rule 5:26(h), undersigned counsel hereby certifies as follows with respect to this Brief of Appellee:

1. On this the 22nd day of February, 2011, fifteen (15) copies of this Brief of Appellees were filed via UPS Next Day Air with the Clerk of this Court on February 22, 2011, along with one (1) electronic version on CD; and

3. On this same day, three (3) copies of this Brief were served, via UPS Ground Transportation, to each of the following, along with one (1) electronic version on CD:

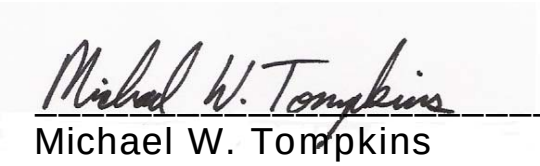
Sean C.E. McDonough, Esquire, VSB No. 33137
David D. Hudgins, Esquire, VSB No. 20602
Hudgins Law Firm
515 King Street, Suite 400
Alexandria, Virginia 22314
(T) (703) 739-3300
(F) (703) 739-3700
smcdonough@hudginslawfirm.com
dhudgins@hudginslawfirm.com
Counsel for Appellant Forrest Walpole

Kevin M. Rose, Esquire, VSB No. 35930
Lindsay C. Brubaker, Esquire, VSB No. 76544
BotkinRose PLC
3210 Peoples Drive
Harrisonburg, Virginia 22801
(T) (540) 437-0019
(F) (540) 437-0022
krose@botkinrose.com
lbrubaker@botkinrose.com
Counsel for Appellants NVRE and Kivlighan in Docket No. 101836

Mikhael D. Charnoff, Esquire, VSB No. 43929
Sands Anderson, P.C.
1497 Chain Bridge Road, Suite 202
McLean, Virginia 22101
(T) (703) 893-3600
(F) (703) 893-8484
mcharnoff@sandsanderson.com
Counsel for Appellees McEnearney Associates, Inc. and Karen Martins

Roger T. Creager, Esquire, VSB No. 21906
The Creager Law Firm, PLCL
2800 North Parham Road, Suite 205
Richmond, Virginia 23294
(T) (804) 747-6444
(F) (804) 747-6477
rcreager@creagerlawfirm.com
Counsel for Proposed Amicus Curiae Virginia Trial Lawyers Association

Mary Lynn Tate, Esquire, VSB No. 16085
Tate Law, PC
16006 Porterfield Highway
Abingdon, Virginia 24211
(T) (276) 628-5185
(F) (276) 628-5045
mltate@tatelaw.com
Counsel for Proposed Amicus Curiae Virginia Trial Lawyers Association



_____
Michael W. Tompkins