IN THE

Supreme Court of Virginia

RECORD NO. 101836

NORTHERN VIRGINIA REAL ESTATE, INC., *et al.*,

Appellants,

v.

KAREN MARTINS, *et al.*,

Appellees.

RECORD NO. 101844

FORREST WALPOLE,

Appellant,

v.

KAREN MARTINS, *et al.*,

Appellees.

BRIEF *AMICUS CURIAE*
OF THE VIRGINIA TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF THE APPELLANTS

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BRIEF *AMICUS CURIAE* OF THE VIRGINIA TRIAL LAWYERS ASSOCIATION

INTRODUCTION AND SUMMARY OF ARGUMENT

Virginia law contains strong and adequate authority for our courts to control and punish by monetary and nonmonetary sanctions those who file frivolous claims or defenses or otherwise abuse judicial process. *See, e.g.*, *Va. Code* § 8.01-271.1 ("good-faith" pleading statute); Rule 4:1(g), *Rules of the Supreme Court of Virginia*; *Montgomery v. McDaniel*, 271 Va. 465, 628 S.E.2d 529 (2006) (reviewing elements of claim for abuse of process); *Va. Code* § 18.2-500 (authorizing damages, attorney's fees, and other relief for conspiracy to injure business).

Because imposition of sanctions can have a very serious chilling effect on the legitimate assertion of claims and rights by citizens and lawyers, Virginia law strikes an important balance between competing policy considerations. Sanctions must be administered so as to provide important tools for courts to prevent and punish frivolous and abusive litigation. At the same time, sanctions must be administered and reviewed in view of all

the pertinent policy considerations and evidence to insure that they are appropriate in nature and amount and do not unduly chill the rights of citizens and litigants to have their claims decided in courts of law. The right to seek and obtain adjudication of claims and defenses in our courts in accordance with the rule of law is, of course, of fundamental importance to a free and just society. For this right to have meaning, it must be fully protected and preserved not only in "clear" cases but even in cases which may appear "doubtful."

The threat of sanctions can deter not only frivolous litigation (which should be deterred) but can also deter the assertion of other claims and rights which, although arguably "doubtful," deserve to have their day in court. Appellate review of sanctions to guard against this danger is especially important where as here a trial court has imposed sanctions in the amount of $272,096.46 jointly and severally against the plaintiffs and their counsel.

The Virginia Trial Lawyers Association ("VTLA") files this Brief Amicus *Curiae*[1] not to challenge as a general matter the authority of Virginia trial courts to impose sanctions but instead to challenge the analysis used and the factors and evidence considered (or not considered) in arriving at the specific sanction imposed in this case and to challenge the nature, amount and allocation of the sanction in view of the requirements of the statute and the pertinent policies. VTLA contends that the trial court failed to exercise its discretion in accordance with the governing considerations and failed to consider evidence pertinent to those considerations. In addition VTLA submits that the trial court erred and abused its discretion by suspending the final nonsuit order (which disposed of all claims as to all parties) and imposing sanctions more than two years later after the parties moving for sanctions failed on more than one occasion to

[1] VTLA files this brief in support of the sanctioned parties, the Plaintiffs and their counsel in the trial court (Appellants Northern Virginia Real Estate, Inc., Lauren Kivlighan, and Forrest Walpole) solely with respect to and in support of the particular assignments of error, contentions and issues addressed herein. As to the other issues and contentions on appeal that are not addressed here, VTLA takes no position.

meet their burden of submitting evidence in support of its motion for sanctions.

An order of sanctions and the determination of the appropriate amount of the sanctions have vitally important implications for our system of justice. Sanctions can serve the important goal of deterring frivolous litigation. However, this Court has recognized that the threat of sanctions can also "stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case." *Oxenham v. Johnson*, 241 Va. 281, 286, 402 S.E.2d 1, 3 (1991). This concern is of particular importance since our society is often well-served even by litigation involving "doubtful rights." Seminal cases like *Brown v. Board of Education*, 347 U.S. 483 (1954), *overruling Plessy v. Ferguson,* 163 U.S. 537 (1896), immediately come to mind. Moreover, sanctions of the magnitude involved here can intimidate litigants (and their counsel) from asserting even what appear to be strongly-supported claims out of fear of financial ruin in the event the trial court later holds a different view of the claims.

Furthermore, in many cases, "doubtful rights" or good faith arguments for the extension of or changes in existing law must be asserted, defended or pursued by parties who have little to gain financially and have little compensation or reward to offer their counsel. Attorneys litigating "doubtful rights", including rights of profound importance to our liberty and way of life, must often do so at great professional and even personal risk and despite little or no prospect of financial reward. The threat of financial sanctions can easily have an undue chilling effect on litigants and lawyers.

The VTLA believes that frivolous or abusive litigation is corrosive of our system of justice and deserves to be deterred by the imposition of sanctions. Frivolous or abusive litigation not only wastes valuable judicial and litigant resources, it unjustly erodes the image of and public confidence in the vast majority of lawyers who faithfully discharge their duties and responsibilities.

Nonetheless, the chilling effect posed by a six-figure sanction is a serious and severe threat indeed and casts a long and dark shadow. In most cases a six-figure sanction is (or

certainly can be) a career-ending sanction for a lawyer and financial ruin for a litigant. Unless the specific facts clearly mandate that sanction, the chilling effect cannot be justified.

In addition, it must be remembered, a severe sanction will have a chilling effect on other litigants and other attorneys that will not be confined to the particular facts involved in the case at hand. Not every finding, distinction, and nuance in a particular case imposing a six-figure sanction will be remembered. Rather, the very large amount of the sanctions will be remembered. Many litigants and many lawyers will then decide that in order to avoid the risk of exposure to ruinous sanctions they must fail to assert any claim or defense that could be viewed as "doubtful" in any way even though the claim or defense appears to have merit under existing law, or is based upon good faith arguments for changes in the law, and deserves to have its "day in court." A fundamental foundation of our system of justice is the principle that disputes over claims, rights, and defenses should be decided in our courts, by judges and juries, in accordance with the rule of law. The specter of frighteningly large sanctions can erode this

principle, can deter the assertion of even solidly-meritorious claims and rights, and can result in the de facto 'adjudication' and forfeiture of claims and rights merely because they are never asserted, never heard, and never decided on the evidence and under the law.

Prospective litigants will almost never review or appreciate the finer details and distinctions that attended a large sanctions award but instead out of fear of bankruptcy or potential financial ruin will decide, even in cases of substantial or clear merit, that the much safer course is simply to fail to assert potentially valid legal claims. Sanctions must therefore be carefully imposed and reviewed in the light of all the pertinent factors and evidence. In the absence of a clear case for the sanctions imposed, the public's right of access to the courts under the petition clauses of the Virginia and United States Constitutions are also implicated. *Virginia Constitution, Article I, §12; United States Constitution, Amendment I.* Unless the specific facts fully justify the imposition, nature, amount, and allocation of sanctions, the

unjustified chilling effect will far outweigh the legitimate purpose of the sanctions.

STATEMENT OF MATERIAL PROCEEDINGS AND STATEMENT OF FACTS

The pertinent proceedings and facts are addressed in the briefs of the parties. Where the parties disagree about or dispute the proceedings and the facts, the Court will obviously rely upon the full record to properly resolve such disagreements and disputes. VTLA does not undertake to address such disagreements and disputes among the parties at this time except as noted in this brief.

ARGUMENT

Standard of Review

There are two separate standards applicable to review of the issues in this case, i.e., abuse of discretion review on some issues and de novo review regarding questions of law and mixed questions of law and fact regarding the application of a statute.

Findings of fact upon conflicting factual evidence are to be given traditional weight and the decision of the trial court whether to impose sanctions is within the sound discretion of the court and will not be reversed on appeal unless the court abused its discretion. *Ford Motor Company v. Benitez*, 273 Va. 242, 249,

639 S.E.2d 203 (2007); *Flora v. Shulmister*, 262 Va. 215, 546 S.E.2d 427, 429 (2001).

The statute applied in this case provides that in the event of a violation of the statute the court "shall impose . . . <u>an appropriate sanction</u>[.]" *Va. Code* § 8.01-271.1 (emphasis added). Because the statute requires that the sanction be "appropriate," and that involves a mixed question of law and fact, the sanctions order is reviewable de novo. *Tullidge v. Board of Supervisors*, 239 Va. 611, 391 S.E.2d 288 (1990); *County of Prince William v. Rau*, 239 Va. 616, 391 S.E.2d 290 (1990). Thus, even where an award of some type of sanction is warranted, the Supreme Court of Virginia should review whether the trial court's determination and imposition of the particular sanction (including the amount thereof) were proper.

Although the Supreme Court of Virginia defers to fact-finding by a trial court and will reverse a properly-made discretionary decision only upon a showing of an "abuse of discretion," the Supreme Court owes no deference to the trial court with respect to issues of law and those issues are reviewed and considered *de*

novo on appeal. "We review questions of law de novo, including those situations where there is a mixed question of law and fact." *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 574, 621 S.E.2d 114, 118 (2005). Moreover, even when a particular decision falls within the trial court's discretion, whether the trial court employed the proper legal analysis, addressed the pertinent factors, and considered the evidence relevant to those factors is an issue of law for the Supreme Court's *de novo* review. *See Poulston v. Rock*, 251 Va. 254, 262, 467 S.E.2d 479, 484 (1996) (holding that "[b]ecause the trial court failed to consider all the relevant factors necessary for a proper evaluation" of the issue before it, "the trial court abused its discretion"); *Oxenham v. Johnson*, 241 Va. 281, 290, 402 S.E.2d 1, 6 (1991) (holding that in determining sanctions the trial court "based its conclusion upon an erroneous application of the law and thereby abused its discretion").[2]

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[2] In *Switzer v. Switzer*, 273 Va. 326, 641 S.E.2d 80 (2007), the Court began its "analysis with the established principle that a court's imposition of a sanction 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

A. The trial court erroneously assumed, without proper legal and evidentiary analysis, that the imposition of the opposing parties' attorneys' fees and costs was the "appropriate sanction."[3]

Section 8.01-271.1 of the *Code of Virginia* became effective July 1, 1987. The statute provides authority for a court to order sanctions against parties and attorneys who file pleadings or make motions "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Va. Code* § 8.01-271.1. The statute does not provide that an award of attorney's fees is always or automatically "an appropriate sanction" in every case. Rather, the statute provides that in the event of a violation the court shall impose "<u>an appropriate sanction</u>, which <u>may</u> include an order to pay to the other party or parties the amount of the reasonable expenses

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employed." 273 Va. at 331, 641 S.E.2d at 83. VTLA submits that the rest of the Court's analysis in *Switzer* demonstrates that whether the sanction imposed was "appropriate" under all the circumstances presents a mixed question of law and fact which should be reviewed de novo. The *Switzer* opinion further demonstrates that a failure of the lower court to consider the pertinent factors and apply the proper analysis constitutes an error of law and an abuse of discretion.

[3] *See, e.g.,* Walpole Assignment of Error No. 4.

incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee." *Va. Code* § 8.01-271.1 (emphasis added). To say that an award of reasonable attorney's fees "may" constitute an appropriate sanction in some cases is also to say that it "may not" constitute an appropriate sanction in other cases. Even where a violation of the statute is shown, the trial court must still exercise its discretion to determine what constitutes "an appropriate sanction."

Here, the trial court determined, without explanation and without legal or evidentiary analysis[4], that because the statute had been violated the sanction imposed would be an award of the full amount of Defendants' reasonable attorney's fees and costs. The trial court considered numerous issues related to what

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[4] The trial court in its opinions provided extensive discussion and analysis of a) whether the statute had been violated and b) the amount of the reasonable attorney's fees of the opposing parties. The point emphasized here is that the trial court did not provide any explanation, legal analysis, or evidentiary discussion in support of its conclusion that imposition of the opposing parties' reasonable attorney's fees was the "appropriate sanction" under all the circumstances.

constituted the total amount of the attorney's fees and costs and gave the Defendants at least two separate hearings to satisfy that aspect of court's inquiry. The following statement appears, however, to constitute the entirety of the trial court's discussion and analysis of what would constitute an "appropriate sanction":

> Both Mr. Walpole and 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.

Joint Appendix (hereinafter "JA") at 2139, June 29, 2010 Letter Opinion at 7 (emphasis added).

Even more importantly, it is apparent that the trial court never engaged in any analysis pertinent to the issue of "an appropriate sanction" under all the circumstances, under applicable case law and in view of the competing public policy considerations.

The jurisprudence of the Supreme Court of Virginia rightly establishes that the severity of the sanctions imposed should and must be evaluated and tested both in the trial court and on appeal. Recently, in *Switzer v. Switzer*, 273 Va. 326, 641 S.E.2d

80 (2007), the parties essentially agreed that the good-faith pleading statute had been violated by a father who had previously filed a frivolous appeal of a decision relating to the father's petition pursuant to *Virginia Code* Section 16.1-241(A)(1) alleging that his son was a "child in need of services" (CHINS). In that earlier proceeding, the Court of Appeals imposed a $500 sanction on the father, pursuant to *Virginia Code* Section 8.01-271.1, after it determined that his arguments on appeal of the decision regarding his petition were not made in good faith and that the appeal was filed to harass, cause unnecessary delay, and cause a needless increase in the cost of litigation. The Court of Appeals also entered a separate order barring the father from filing any further appeals until he had paid the $500 sanctions judgment. When the father subsequently filed two separate appeals challenging the circuit court's divorce and permanent custody decrees, the Court of Appeals dismissed them for failure to pay the judgment.

On appeal to the Supreme Court of Virginia, this Court held that even though sanctions were plainly warranted, a significant

issue for review was whether the sanctions of dismissal were too severe. This Court explained:

> We first observe that the Court of Appeals' dismissal of the two appeals before us was the ultimate sanction that the Court of Appeals could have imposed in the litigation of these cases. Thus, our inquiry focuses on the question whether implementation of such a severe sanction was an abuse of the Court of Appeals' discretion.

273 Va. at 331, 641 S.E.2d at 82-83 (2007) (emphasis added).

Switzer held that the dismissals sanctions were indeed too severe and reversed them. 273 Va. at 332, 641 S.E.2d at 84. The situation presented here is very similar. A sanction of the full amount of the opposition's attorney's fees and costs of $272,096.46 is, in effect, the "ultimate" or most severe sanction that could have been imposed. In *Switzer*, this Court provides further guidance regarding the analysis that should be applied to evaluate the severity of the sanction:

> This sanction of dismissal, applied in accordance with the terms of the May 2003 order, was an unduly severe sanction and was not narrowly tailored to correct the problem presented.

273 Va. at 333, 641 S.E.2d at 84 (emphasis added).

In *Switzer*, the Court held that "the imposition of a particular sanction must be sufficient to deter such practices when they have occurred." 273 Va. at 331, 641 S.E.2d at 83. There, as in this case, the particular sanction imposed was not narrowly tailored to correct the problem presented but instead was far more severe than what would have been sufficient to deter the problem presented. There was no support or evidence in the record for the trial court's apparent assumption that sanctions of more than $272,000 were necessary to deter the Plaintiffs and their counsel. The trial court should have considered whether sanctions of some lesser amount would have been fully "sufficient" to serve the purpose of deterrence.

In this case, it appears that the major "rub" for the Plaintiffs and their counsel in the present case occurred on the first day of trial when the trial court ruled against them for failing to respond to Rule 3:11 allegations set up in Defendants' responsive pleadings. According to the trial court's subsequent letter opinion, this ruling, made on the first day of trial, was "devastating" for Plaintiffs and as a result "any legitimate

prospect of success had vanished" at that time. JA at 1633. Yet Plaintiffs proceeded ahead to the beginning of the third day of trial before moving for a nonsuit. JA 1179, 1192. In the trial court's opinion:

> Counsel's decision to pursue a three day jury trial in the face 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 at 1633.

Plaintiffs apparently, perhaps naively, argue this ruling was unexpected given their "affirmative" allegations elsewhere in the pleadings, their argument that the "reply" requirement was not applicable, and their argument that in any event the trial court had the discretion to extend the time for making a reply. JA 2181-82. Under the circumstances, one wonders whether the trial court would still have imposed full attorney's fees and costs even if the Plaintiffs had immediately moved for their first nonsuit of right upon receipt of the unfavorable rulings. It seems fair to consider whether a sanction of the defense attorney's fees and

expenses for those two additional days of trial would be the "narrowly tailored" deterrent to address the problem.

The sound teaching of this Court's holding and opinion in *Switzer* is that a sanction must not be "unduly severe" and it must be "narrowly tailored to correct the problem presented." In this case, the trial court never considered whether the sanction was "unduly severe" and never considered whether it was "narrowly tailored to correct the problem presented."[5] This

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[5] Regardless of whether a case involves the imposition of sanctions with respect to the assertion of claims or defenses, the VTLA has been consistent in its position that the "good-faith" pleading statute and sanctions under it must be judiciously handled and cautiously applied. Thus, for example, in its Brief Amicus *Curiae* filed in 2006 in *Ford Motor Company v. Benitez*, 273 Va. 242, 639 S.E.2d 203 (2007), the VTLA emphasized:

> The statutory good-faith pleading requirement is thus a minimum standard or outer limit that should be flexibly and cautiously applied in order to sanction only truly frivolous pleadings, but at the same time to protect and guard against unjustly . . . denying litigants the ability in good faith to assert, preserve, and conduct discovery regarding claims and defenses. . . . In this regard, the VTLA vigorously agrees with the reliance of the Virginia Association of Defense Attorneys upon this Court's sound admonition in *Gilmore* v. *Finn:* "The threat of a sanction should not be used to stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case." *Gilmore v. Finn,* 259 Va. 448, 466, 527 S.E.2d

analysis was not only never undertaken, it also would have required inquiry into factors and evidence not addressed by the Court. For example, the trial court made no findings and had no evidence before it regarding the nature and extent of the need for deterrence, whether an extremely large sanctions award was necessary to serve that purpose, the prior conduct and sanctions history of the litigants and their counsel, their ability to pay, their level of experience and legal resources, and similar matters.[6] The trial court also did not undertake any balancing of the need for deterrence with respect to these litigants and their counsel

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> 426, 435 (2000) (quoting *Oxenham v Johnson,* 241 Va. 281, 286, 402 S.E.2d 1,3(1991)).

Brief Amicus *Curiae* of The Virginia Trial Lawyers Association filed in *Ford Motor Company v. Benitez*, Record No. 051769, at page 7. The VTLA contended that the imposition of sanctions under the statute "requires a flexible and fact-specific inquiry." *Id.* at 11.

[6] The trial court also did not address whether there was any need or deterrent benefit for continuing education for Plaintiffs' counsel in the areas of ethics, professionalism or case investigation and pleading requirements. As to the Plaintiff real estate agent and the Plaintiff business, the need and benefit for similar training in that field was not addressed.

against the danger of an undue chilling effect upon other litigants and other lawyers.[7]

The trial court also appeared to focus almost exclusively, or at least unduly heavily, upon the goal of compensating the opposing parties and their counsel for their attorney's fees and costs. The trial court apparently believed that a violation of the statute's requirements automatically and necessarily renders the opposing parties and their counsel automatically **liable** for the full amount of the opposing parties' reasonable attorney's fees and costs. *See, e.g.*, JA 2139-41 (referring to the Plaintiffs' and their counsel's "liability" for violating the statute). The statutory

[7] The trial court explicitly recognized the danger of an undue chilling effect that inheres in sanctions awards and explicitly referred to the "danger that a decision to sanction a party in one action could intimidate future parties and prevent them from asserting their valid rights[.]" J.A. (March 17, 2009 Opinion) at 8. The trial court insisted that this danger "is not one the Court takes lightly." *Id.* The trial court then stated that "[h]aving given this matter thorough consideration, the Court is of the opinion that sanctions are warranted." *Id.* Once again, however, the Court erroneously collapsed the two-part statutory analysis (i.e., part one is the determination of whether a violation has occurred, and part two is the determination of what constitutes "an appropriate sanction") into a one-step process under which a violation automatically warrants imposition of attorney's fees and costs.

language does not provide, however, for strict or automatic liability but instead provides that even when the statute is violated the trial court must still make a determination of what constitutes "an appropriate sanction."

The trial court acknowledged that at least one claim pursued by Plaintiffs "was reasonably well grounded in fact" based on contract having a value of approximately $37,500.00. JA 1633. From the trial court's summary it appears that claim resulted from Plaintiffs' written listing agreement signed by Defendant Donna Gavin as fiduciary of property owner Mrs. Kennedy. *Id.*

Despite this circumstance, the trial court made no reduction in the Defendants' attorneys fees and costs for work on Plaintiffs' valid claim(s) as required by this Court in *Oxenham v. Johnson*, 241 Va. 281, 402 S.E.2d 1 (1991). In *Oxenham*, the Court explained that

> the sanction requested and imposed was an award of attorneys' fees. **Therefore, Johnson's attorneys' time spent in defending the punitive damage claim should have been segregated and the sanction based only on the time taken in defending that claim. Although the trial court did not award the full**

> **amount of the attorneys' fees claimed, it based its award upon a projection of the time Johnson's attorneys spent in defending the entire case. In doing so, it based its conclusion upon an erroneous application of the law and thereby abused its discretion.**
>
> We further are of opinion that any effort to segregate the additional expense and anguish occasioned by Oxenham's continued assertion of a frivolous claim for punitive damages would impose additional and unnecessary burdens upon Johnson and the trial court. Under these circumstances, we will reverse the trial court's sanction of the payment of attorneys' fees and enter final judgment for Oxenham on that issue.

241 Va. at 290, 402 S.E.2d at 6.

This Court has never comprehensively addressed in a single opinion all the factors that should be considered in deciding what constitutes "an appropriate sanction." This Court has made clear, however, that the sanction must be narrowly tailored to deter the conduct in question and the courts should take into account the fundamentally important and competing public policy considerations that must guide the analysis:

> We have previously identified some of the policy considerations in sanction cases. "The possibility of a sanction can protect litigants from the mental

> anguish and expense of frivolous assertions of unfounded factual and legal claims and against the assertions of valid claims for improper purposes. . . . Yet the threat of a sanction should not be used to stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case." Oxenham v. Johnson, 241 Va. 281, 286, 402 S.E.2d 1, 3 (1991). . . . .

Gilmore v. Finn, 259 Va. 448, 466, 527 S.E.2d 426, 435 (2000).

Here, the trial court failed to engage in the required analysis. Moreover, the trial court failed to take into account the conduct of opposing parties and counsel and their contribution to the protracted litigation and its costs. While acknowledging that the Defendants could have ended the litigation much earlier by moving for summary judgment, the trial court made no adjustment for the oppositions' decision to "wait until trial to play the ace dealt to them by Plaintiffs." JA at 2140 (June 29, 2010 Letter Opinion at 8).

VTLA submits that the conduct of the opposing parties and their counsel <u>should</u> be considered in deciding what constitutes "an appropriate sanction." In this case, the sanctioned parties and their counsel argued that the Defendants and their counsel could have filed a dispositive motion for summary judgment long

before trial. The trial court agreed that "[c]ertainly, this case would have been a prime candidate for summary judgment." JA at 2140 (June 29, 2010 Letter Opinion at 8). The trial court refused, however, to give this factor any consideration in deciding what constituted "an appropriate sanction." The trial court held:

> The Court will not use the benefit of hindsight to judge litigation strategy after the fact. **Instead of filing a motion for summary judgment, they waited until trial to play the ace dealt to them by Plaintiffs**. This perfectly acceptable strategy does not free Plaintiffs and Mr. Walpole from their liability for needlessly bringing the frivolous litigation in violation of the Statute.

JA at 2140-2141 (June 29, 2010 Opinion at 8-9) (emphasis added).

It is equally apparent that a motion to deem an unanswered Rule 3:11 allegation admitted could have been brought for hearing anytime after the 21 days had passed for responding. It is difficult to see how Defendants' holding back of that "ace" was justified when it was potentially dispositive of the case and might thereby end all parties' attorneys' fees and costs.[8] After all, the

[8] The trial court ruled, immediately prior to opening statements at trial, that under Rule 3:11 the Plaintiffs' failure to reply to the

Defendants presumably should have been as eager to avoid any further "frivolous litigation" as they claim the Plaintiffs' and their counsel should have been. Even if the Defendants were willing to gamble that the trial court would ultimately award them their full attorney's fees and costs as sanctions, the unnecessary protraction of frivolous litigation at the hands of either party is contrary to societal interests, wasteful of judicial resources, and should not be countenanced. While the Defendants' holding back of their case-dispositive "ace" should not completely absolve Plaintiffs' conduct from scrutiny, it certainly should be a factor to consider in the determination of what constitutes an "appropriate sanction."

The Defendants prolonged the litigation and the costs and burden to their clients, the trial court, the jurors, and the system

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new matter asserted in the Fifth Affirmative Defense precluded the Plaintiffs from offering any evidence or argument that there was a contract with the owner of the property or a reasonable contractual expectancy. JA at 550-551. Even then, the Defendants failed to ask the trial court to grant summary judgment in their favor on any or all claims, despite the fact that such a motion might well have spared the trial court, the jurors, the parties, and their counsel the time, trouble, and expense of part or all of the two days of trial which followed.

of justice by their behavior. The parties or their counsel may legitimately make strategic decisions impacting the litigation, but the trial court, when it undertakes the profoundly serious and important role of imposing sanctions, has a duty to fully consider what constitutes "an appropriate sanction" under all the circumstances, including the factors and evidence pertinent to the particular case before it and also the policy considerations for our system of justice more generally.

In this case, the trial court erred since it failed to consider whether the sanction was an "appropriate sanction" under all the circumstances and was "narrowly tailored to correct the problem presented." The sanction appears severely excessive, focused too heavily or perhaps exclusively upon compensating opposing parties and their counsel, and unnecessarily punitive under all the circumstances.

An exercise of "discretion" which fails to consider the pertinent factors and evidence is actually not an exercise of discretion but rather an abuse of discretion. *See Poulston v. Rock*, 251 Va. 254, 262, 467 S.E.2d 479, 484 (1996) (holding

that "[b]ecause the trial court failed to consider all the relevant factors necessary for a proper evaluation" of the issue before it, "the trial court abused its discretion").

B. Sanctions are not an automatic fee-shifting device.[9]

Virginia law, as the law in most if not all states in this country, is very cautious about shifting attorney's fees, costs and expenses of litigation from one party to another. Virginia adheres to the "American rule" under which as a general matter each party to litigation must bear its own attorney's fees. Thus, "far from being 'a routine matter,' an award of attorney's fees as a sanction is a matter that must be made under proper authority and with due exercise of the trial court's sound judicial discretion." *Tonti v. Akbari*, 262 Va. 681, 685, 553 S.E.2d 769, 771 (2001).

While fee-shifting sanctions are an option for the court under the statute if the evidence proves that an award of full attorney's fees constitutes the "appropriate sanction," their imposition should be rare and imposed only when clearly necessary and

[9] *See, e.g.,* Walpole Assignment of Error No. 4.

when there is no behavior by the opposing party and its counsel which contributes to the protraction of the litigation. The sanction statute should not be used as a backdoor around or a means to undermine the American rule.

C. The trial court failed to consider factors and evidence regarding the allocation of the sanctions imposed.[10]

In the event of a violation of the statute, the court "shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction . . . ." *Va. Code* § 8.01-271.1 (emphasis added). Obviously, under the authorities cited previously, the court needs to exercise a sound discretion in determining not only the nature and amount of the sanctions, but the individual actors and allocation of the sanction imposed. Here, the trial court did not discuss what factors or evidence supported its decision with respect to the joint and several allocation of the entire amount of the sanction. Instead, the trial court simply stated at the end of its opinion,

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[10] *See, e.g.*, Northern Virginia Real Estate, Inc. and Kivlighan Assignment of Error No. 2.

"[t]hese sanctions are joint and several against Plaintiffs and Mr. Walpole." JA 2145 (June 29, 2010 Letter Opinion at 13).

Imposition of joint and several liability may, in some cases, not only fail to serve the purposes of the sanctions statute, it can actually disserve those purposes. When sanctions are imposed jointly and severally, any one of the multiple persons or entities subject to the sanctions can be forced to pay the full amount of the sanctions. This can make the nature and extent of the sanctions (and hence the punishment and deterrent effect) imposed upon each of the sanctioned persons or entities vary depending upon factors which are completely unrelated to deterrence or punishment (such as which person or entity is chosen for or pursued most quickly in collection proceedings, which one has assets most readily available for levy, etc.). When sanctions are imposed jointly and severally, some of the parties whom a court intends to sanction may end up paying none of the sanctions (particularly if contribution and indemnity are found to be unavailable either as a legal or practical matter). Imposing sanctions jointly and severally thus may sometimes serve the

goal of compensating the opposing party for its fees and costs, but it is a disservice to the other policy considerations involved.

The trial court concluded that both plaintiffs and their counsel violated the statute (JA 2139 (June 29, 2010 Opinion Letter at 7)), but provided no basis for its assumption that imposing the attorney's fees and costs jointly and severally constituted "an appropriate sanction."

D. The trial court erred in suspending the nonsuit order for more than two years in order to permit a sanctions motion to be filed.[11]

On the morning of the third day of trial, April 30, 2008, the Plaintiffs moved for a nonsuit and the trial court entered an Order which stated that "[t]he Motions to Nonsuit is [sic] granted, and this case is dismissed as to all counts and all parties[.]" JA 1197. The trial court, however, also included in its nonsuit order language which purported to suspend the order "until further order of this Court." JA 1197. <u>More than two years passed</u> before the trial court entered its Order dated June 29, 2010 which

[11] *See, e.g.,* Northern Virginia Real Estate, Inc. and Kivlighan Assignment of Error No. 1; Walpole Assignment of Error No. 6.

awarded a total of $272,096.46 in sanctions and discontinued the previous "suspension" of the nonsuit order.

Virginia law is clear that "the entry of a nonsuit order does not conclude a case as to any pending motion for sanctions" and where a "motion for sanctions pursuant to Code §8.01-271.1 is pending when a plaintiff moves for a first nonsuit, the trial court is empowered to consider the sanctions motion either before the entry of the nonsuit order or within 21 days after the entry of the nonsuit order." *Williamsburg Peking Corporation v. Kong*, 270 Va. 350, 619 S.E.2d 100 (2005).

Although a trial court ordinarily has the authority to suspend orders it has entered, this case presents the important question of whether a trial court has the authority to "suspend" a nonsuit it has already granted as to all parties and all claims solely for the purpose of permitting a party to file a sanctions motion. It can be argued, of course, that a nonsuit order should be viewed as the same as any other order, and thus should be subject to suspension. On the other hand, a nonsuit order is <u>not</u> like any other type of order. The litigant taking a nonsuit has an absolute

right to one nonsuit of a cause of action. *Va. Code* § 8.01-380(B). Neither the trial court nor opposing counsel can prevent a party from taking a nonsuit that is properly sought within the limitations imposed by the statute and by case law. *City of Suffolk v. Lummis Gin Co.*, 278 Va. 270, 275, 683 S.E.2d 549, 551-52 (2009).

Moreover, a nonsuit of an action as to all claims and as to all parties completely disposes of the entire litigation. As a result, serious questions can be raised as to whether a trial court should be allowed to delay entry of or suspend a nonsuit order. The delay in entry of or suspension of a final nonsuit order may arguably have the effect of preventing the plaintiff from refiling the action during the entirety of any such delay. The delay in entry of a final nonsuit order also operates to extend the statutory 6-month refiling period.

These concerns will presumably be of little consequence, of course, in a case involving nonsuiting of frivolous claims, but these concerns may be of major importance in other meritorious cases. The VTLA submits that a nonsuit order of the type

involved in this case should not be subject to suspension and a sanctions award must be made, if at all, within 21 days after the nonsuit is granted. Alternatively, VTLA submits that the trial court abused its discretion in continuing its suspension of the nonsuit order for a period of over two years to allow the movant to present evidence which it could and should have presented within 21 days after the granting of the nonsuit and should have, at the latest, presented at the first hearing on the sanctions motion. When a nonsuit has been granted, the parties moving for sanctions should not be allowed to conduct hearings of this type and present their arguments and evidence in a seriatim fashion that extends over months and even years. When the movants failed to present sufficient evidence in support of their sanctions motion, the motion should have been denied for failure of the movants to meet their burden of proof.[12] *See*, *e.g.*, *Bethel*

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[12] The nonsuit was granted during arguments on the morning of the third day of trial (April 30, 2008). JA at 1192, 1197. The motions for sanctions were heard on August 29, 2008. JA at 1471-1532. On November 20, 2008, the trial court informed Defendants that they had failed to submit sufficient evidence as to the amount of sanctions. Instead of denying the motions due to insufficiency of evidence, the trial court gave the Defendants a

Inv. Co. v. City of Hampton, 272 Va. 765, 771, 636 S.E.2d 466, 470 (2006) ("[t]he City bore the burden of proof on that issue . . . and failed to carry it. Because the evidence supporting the trial court's finding was insufficient as a matter of law, the City is not entitled to relitigate that issue on remand").

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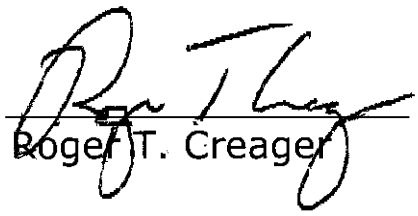
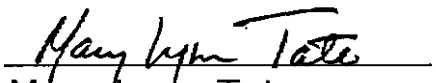
further opportunity to submit evidence to support the motions. JA at 1533, 1616. In its March 17, 2009 letter opinion, the trial court ruled that the statute had been violated but further ruled that the Defendants had still failed to provide sufficient proof regarding the amount of the sanctions. JA at 1633, March 17, 2009 Opinion Letter at 9 (stating that "on this record the Court is unable to determine the appropriate size of the sanction"). Another hearing was held on October 13, 2009, and on June 29, 2010, more than two years after the April 30, 2008 nonsuit order, the trial court issued its Order and Opinion jointly and severally sanctioning the Plaintiffs and their counsel. JA at 2131-2145.

CONCLUSION

In this case, the trial court erred since it failed to consider whether the sanction was an "appropriate sanction" under all the circumstances, whether it was "unduly severe," and whether it was "narrowly tailored to correct the problem presented." The sanction appears severely excessive, overly focused upon compensating the opposing litigants and their counsel without due regard for other pertinent considerations, and unduly punitive under all the circumstances. The trial court erred and abused its discretion in suspending the nonsuit order and imposing sanctions more than two years after the nonsuit even though the Defendants failed despite numerous opportunities to meet their burden of proof. The sanctions Order should be reversed.

Respectfully submitted,

THE VIRGINIA TRIAL LAWYERS ASSOCIATION

By:  and By: 

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CERTIFICATE

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2. I do hereby certify that the foregoing brief complies with the page-length requirements and other requirements of the *Rules of the Supreme Court of Virginia* and I further certify that fifteen copies of the foregoing Brief Amicus *Curiae* of The Virginia Trial Lawyers Association have been filed by hand with the Clerk of the Supreme Court of Virginia on this 26th day of January, 2010, and that three true copies of the foregoing Brief Amicus *Curiae* of The Virginia Trial Lawyers Association have been mailed, via first-class U.S. Mail postage prepaid, to all of the counsel listed above on this 26th day of January, 2011. And electronic copy in PDF was also emailed to the court and all counsel this same day.

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