IN THE

SUPREME COURT OF VIRGINIA

RECORD NO: 101836

NORTHERN VIRGINIA REAL ESTATE, INC.
AND LAUREN KIVILIGHAN,
Appellants,

v.

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

Appellees.

BRIEF OF APPELLEES KAREN MARTINS AND McENEARNEY ASSOCIATES, INC.

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

Appellants Northern Virginia Real Estate, Inc. ("NVRE") and principal broker Lauren Kivlighan ("Kivlighan"), through attorney and Appellant Forrest Walpole ("Walpole"), filed a frivolous suit on July 18, 2007. NVRE and Kivlighan sued real estate agent Karen Martins ("Martins") and real estate brokerage McEnearney Associates, Inc. ("McEnearney") for conspiracy, tortious interference, and defamation despite their counsel's letter of June 25, 2007 warning that the known records and statements of the parties demonstrated no merit to Appellants' claims. NVRE and Kivlighan also sued Donna Gavin and David Gavin.

Some counts were dismissed on demurrers but others survived. Late on the second day of jury trial all Appellees raised motions to strike the evidence as soon as Appellants rested (JA 959 – 960), and began oral argument (JA 1020) which was interrupted by the end of the business day. (JA 1060 – 1961).

On the third day of jury trial, in light of compelling motions to strike the evidence, Appellants moved to nonsuit Martins and McEnearney (JA 1068 – 1069, 1137 – 1140) and ultimately David Gavin as well (JA 1179 – 1192).

Counsel for Martins and McEnearney acknowledged Appellants' apparent right to nonsuit since their motion to strike the evidence was not yet submitted to the Court (JA 1139 – 1140), and then raised their motion for sanctions immediately before and after the moment that the Court orally granted Appellants' motion for nonsuit. (JA 1140).

Mr. Charnoff:	However, I would like at least briefly preview our motion for sanctions, and I'd like to schedule that –
The Court:	I'll deal with that at some point when we get to that. Motion to nonsuit based on that representation – and I thank you for your candor – the motion is granted.
Mr. Charnoff:	Your Honor, would you like to hear the preview of the motion for sanctions now or wait for that later?
The Court:	When the case is completely over.

Later, once the trial court had orally granted the motion to nonsuit David Gavin, counsel for Martins and McEnearney asked the trial judge if he was available on the two-week Friday civil motions docket "because I want it to be within 21 days of the entry of the order today. I want motion for sanctions set for Friday, May 16, your Honor." (JA 1193). Counsel for the Gavins immediately advised the Court of their identical motion, and counsel for Martins and

McEnearney asked the trial judge for permission to set two motions on the docket. (JA 1193). At that time, without any objection from Walpole whatsoever, there was a discussion as to how and when the motions for sanctions would be briefed and scheduled for a hearing.

The Court:	I would much prefer you do a suspending order and I'll tell you why. All of the judges are gone 12, 13, 14 for mandatory judicial conference. I would not get it until the 15th.
Mr. Charnoff:	We're agreeable to suspend, your Honor.
The Court:	And if experience is any guide, I mean, this is last night and today only. If experience is any – and that's my research not yours – then I'm going to need more time. I don't know what the motions are, but you can certainly set them for another day. But I would suggest the two – all three of you confer. If there are any motions, decide a day that you want to argue, call Mr. King and get my available dates and he'll give them to you.
Mr. Tompkins:	May I suggest a suspending order of 30 days, your Honor, just to be safe?
The Court:	Thirty days is fine, or you can say until further order of Court. Whatever language you can agree on.

(JA 1193 – 1194).

The order entered April 30, 2008 (JA 1197, erroneously dated April 29, 2008) granted the motions to nonsuit all Defendants and went on to expressly state: "ADJUDGED, ORDERED, and DECREED that this Order is SUSPENDED until further order of this Court." (JA 1197). Counsel for all Appellees objected to the timing of the nonsuit. Counsel for NVRE and Kivlighan made no written objection on the order. Nor did Walpole object orally – indeed, he never appears in the transcript at all after arguing about the right to nonsuit. (JA 1181).

After Walpole failed to withdraw as counsel to NVRE and Kivlighan, and a Motion to Set a Briefing Schedule was filed, all counsel appeared in Calendar Control to pick a hearing date and briefing schedule. (JA 1216 – 1220, 1454 – 1456).

Martins, McEnearney, and the Gavins filed timely Motions for Sanctions pursuant to the agreed briefing schedule, and argued on the agreed date of August 29, 2008. (JA 1471 – 1532). The trial court subsequently requested detailed billing records of all defense counsel in November 2008. In its Order entered on May 19, 2009 (JA 1659 – 1674) the trial court granted the Motions for Sanctions and continued the matter to hear evidence and argument as to quantum

of sanctions, reasonableness of attorney's fees, and allocation of sanctions between Walpole and NVRE and Kivlighan.

A second hearing was held on October 13, 2009. (JA 1794 – 2130). Martins, McEnearney, and the Gavins and Walpole called expert witnesses on attorneys fees, and NVRE called Kivlighan and other witnesses. The trial court again took the matter under advisement.

After careful deliberation, the June 29, 2010 letter opinion concluded: "Plaintiffs and Mr. Walpole violated the Statute when they filed the Underlying Action for an improper purpose and without a proper basis in law and in fact." (JA 2145). The extensive, detailed, and carefully crafted opinion found that Walpole, NVRE, and Kivlighan had violated Code of Virginia § 8.01-271.1. (JA 2133 – 2145). The trial court had previously concluded that the suit was not well grounded in fact, not warranted by law, and that

> the combination of so many frivolous claims, supported by such wild speculation, so virulently prosecuted even after any legitimate prospect of success had vanished, convinces the Court that the claims were not an oversight or a mistake. The Court is of the firm conviction that they were filed out of a vindictive and malevolent desire to injure and intimidate a business competitor.

(JA 1625 – 1633).

By its order dated June 29, 2010 (JA 2131 – 2132), the trial court granted the Motion for Sanctions, ordered Walpole and NVRE and Kivlighan, jointly and severally, to pay costs and reasonable attorney's fees of Martins and McEnearney, as well as those of the Gavins, and lifted the suspension of Appellants' nonsuit.

STATEMENT OF FACTS

Martins and McEnearney correct and amplify NVRE and Kivlighan's Statement of Facts as follows, generally and specifically:

Neither Martins nor McEnearney ever listed the subject property for sale, nor received a listing commission. (JA 713 – 714). Martins represented the Wheelers at all times as a buyer's agent. (JA 713). Martins had an initial two minute phone call with Donna Gavin, and never spoke with her again until after Donna Gavin terminated Kivlighan and NVRE. (JA 779 – 780, 830). Martins never suggested to Donna Gavin that Kivlighan should not be retained as a real estate agent. (JA 715 – 717). Nor did Martins suggest to Bernadette Kennedy that Kivlighan should not be retained as a real estate agent. (JA 717 – 718). Martins, on behalf of the Wheelers, contacted Kivlighan as the listing agent (JA 665 – 666, 830 – 831), after David Gavin directed Martins to NVRE (834-835).

When Martins next spoke with David Gavin she learned that NVRE was being terminated. (JA 837 – 838). Martins thus did not know that NVRE expected to receive a commission after that point, and indeed knew the exact opposite. (JA 1324, 1505). Kivlighan admitted that she was not owed any commission from any offer by Mr. Alnifaidy. (JA 711). Martins had no agreement with David Gavin and never told him to fire Kivlighan (JA 922 – 923).

McEnearney wrote a letter to Kivlighan and NVRE at the time they submitted the Wheelers' offer directly to Donna Gavin advising them that the offer was being conveyed. (JA 718 – 719).

Contrary to the first of NVRE and Kivlighan's eight citations to evidence, Martins had no communication with owner of the subject property, and no substantive communication with Donna Gavin until after Donna Gavin terminated Kivlighan and NVRE. (JA 779 – 780, 830). Martins only spoke with David Gavin, who is not the owner of the subject property, when he explained that Kivlighan and NVRE were being fired. (JA 837 – 838, 1505).

Contrary to the third of NVRE and Kivlighan's eight citations to evidence, Martins did not make false statements to anyone. Martins correctly advised David Gavin (not Donna Gavin) what she learned

from Kivlighan and that it was dissuading to the submission of an offer by the Wheelers. (JA 833 – 834). Specifically, Kivlighan had told Martins about a full-price offer (which was a lie; JA 883), a discounted commission (which was a lie; JA 731 – 734), and that Kivlighan had seen no reason why the seller would not accept the offer (which was purely speculative since at that time Kivlighan had been sitting on the offer for three days without conveying it to the Gavins (JA 719 – 720) and the net price was less than what was called for in the listing agreement). Nor did Martins tell David Gavin that Kivlighan was just working in the interest of her own contract. (JA 855, 892).

Contrary to the fifth of NVRE and Kivlighan's eight citations to evidence, Martins "letter" of May 8, 2007 was never sent – there is no evidence that is was anything but a draft. Martins testified repeatedly and endlessly that she had started drafting paperwork but had stopped because David Gavin had advised that they had to wait three days. (JA 843 – 845, 848 – 851, 857 – 867).

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

1. The Rule 1:1 Jurisdictional Argument is Meritless (Assignment of Error No. 1)

Martins and McEnearney agree that the standard of review for Assignment of Error No. 1 is *de novo* to the extent it involves the interpretation of a rule. Ainslie v. Inman, 265 Va. 347, 352, 577 S.E.2d 246, 248 (2003).

Immediately after the trial court orally agreed to grant the request for nonsuits, before the jury was dismissed, Martins, McEnearney, and the Gavins asked if the trial judge was available to hear their respective sanctions motions within twenty-one days of the entry of the nonsuit order. (JA 1193). The trial court swiftly responded, "I would much prefer you do a suspending order and I'll tell you why. All of the judges are gone 12, 13, 14 for mandatory judicial conference. I would not get it until the 15th." The trial court further noted that a suspending order of "[t]hirty days is fine, or you can say until further order of Court. Whatever language you can agree on." (JA 1193 – 1194). And indeed the entered order that day granted the nonsuits and suspended the case until further order of the trial court. (JA 1197).

No objection to the suspension was noted on the April 2008 order itself (JA 1197). Nor was the present Rule 1:1 objection raised within twenty-one days of the order, which is the only time the objection would have allowed the Court to make a determination that would not be moot. Nor was the Rule 1:1 objection raised in the Opposition to Motions for Sanctions filed on August 1, 2008. (JA 1268 – 1288). Instead, the issue was raised after both of the hearings on sanctions, after the lengthy letter opinions of the Court, and after entry of the June 29, 2010 final order. (JA 2131 – 2132). Raising the objection now is untimely because the trial court was never presented with the actual opportunity to rule upon the issue. NVRE and Kivlighan have waived the alleged error. Virginia Rule 5:25. See e.g. Hawthorne v. VanMarter, 279 Va. 566, 581, 692 S.E.2d 226, 235 (2010) (argument not considered for failure to raise it before the Circuit Court).

Aware of this stark reality, NVRE and Kivlighan suggest that this is a jurisdictional error that can be raised at any time, relying upon Wackwitz v. Roy, 244 Va. 60, 63, 418 S.E.2d 861, 863 (1992).[1]

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[1] In Wackwitz the issue was whether a nonresident administrator could maintain a wrongful death action. The Court found that the plaintiff/administrator's failure to be duly qualified in Virginia was not

However, the two cases that Wackwitz relied upon for the proposition that jurisdictional error that can be raised at any time involved fundamental issues of valid service where the trial court never acquired jurisdiction. Beck v. Semones' Adm'r., 145 Va. 429, 441, 134 S.E. 677, 680 (1926); Slaughter v. Commonwealth, 222 Va. 787, 793, 284 S.E.2d 824, 827 (1981). The present procedural posture is far different. All parties were clearly subject to jurisdiction, were represented by counsel, and appeared at trial. All parties had an opportunity to raise a jurisdictional challenge, but NVRE and Kivlighan failed to do so as they participated in the post-trial proceedings without complaint.

Indeed, "it is improper for a litigant to invite error and take advantage of the situation created by her own wrong," and NVRE and Kivlighan should be estopped from raising this issue at all. Matthews v. Matthews, 277 Va. 522, 675 S.E.2d 157 (2009)(citations omitted). Here, counsel for NVRE and Kivlighan affirmatively consented to the continuing jurisdiction of the trial court, did not

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a jurisdictional defect. Since the defendant had not "properly and seasonably" challenged the non-resident administrator's right to maintain the action, the defect was waived and could not be raised for the first time on appeal.

object to a briefing schedule, and did not object to the filing of opening briefs beyond twenty-one days after the entry of the order.

In any event, the trial court had complete authority to timely suspend the nonsuit order under Rule 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.

There is no question that the order granting the motions to nonsuit also suspended itself on the first day of the twenty-one day period. (JA 1197). NVRE and Kivlighan's reliance on City of Suffolk v. Lummis Gin Co., 278 Va. 270, 275, 683 S.E.2d 549, 551-52 (2009) and Super Fresh Food Markets v. Ruffin, 263 Va. 555, 564-67, 561 S.E.2d 734, 739 (2002) is misplaced.

The order in City of Suffolk v. Lummis Gin Co. did not expressly suspend itself, and thus rulings after twenty-one days were considered a nullity. That is inapposite to the expressly suspended order in this case. Here, the order states: "ADJUDGED, ORDERED, and DECREED that this Order is SUSPENDED until further order of this Court." (JA 1197). Appellants concede that the "facts of Lummis Gin Co. are certainly distinguishable in part from the facts," here. Opening Brief p. 16.

Appellants suggest that in our case there was not an order that clearly and expressly suspended the final judgment. However, there was no express reference to a final judgment in the April 30 Order (JA 1197), while the trial court did include in the June 29, 2010 Order that "THIS CAUSE IS FINAL." (JA 2132). There is nothing ambiguous about that. Appellants would have this Court ignore the express language of the April 30 order that "this Order is SUSPENDED until further order of this Court" (JA 1197) while simultaneously reading language into the April 30 order that is not there (that the order was expressly intended to be final).

The order in Super Fresh, supra, also did not expressly suspend the final order, but merely acknowledged that some additional motions had been filed. Moreover, unlike the instant case, the order in Super Fresh "clearly rendered a final judgment at the time of entry, and the record establishes that the trial court and the parties treated it as doing so." 263 Va. at 562. Here the record reflects the exact opposite. (JA 1193 – 1194).

The case of Williamsburg Peking Corp. v. Kong, 270 Va. 350, 619 S.E.2d 100 (2005) strongly supports Martins and McEnearney. This Court held that a trial court erred by failing to consider a motion

for sanctions within twenty-one days after the entry of the nonsuit order. This Court went on to clarify "[m]anifestly, the General Assembly never intended that a nonsuit order could exonerate a litigant's misconduct." Id. at 354; 102. Yet here NVRE and Kivlighan seek to escape the consequences of their misconduct by asking this Court to construe Rule 1:1 against its clear language. Accepting their argument would eviscerate Code of Virginia § 8.01-271.1 by allowing violators to nonsuit and then simply take whatever steps were expedient to stall resolution of the sanctions motion beyond twenty-one days.

NVRE and Kivlighan's argument that suspension somehow interferes with or diminishes the absolute right to nonsuit is nonsense. The nonsuit under Code of Virginia § 8.01-380 still allows for the voluntary dismissal of the action without prejudice. Indeed, a suspension only has the effect of further extending the time a plaintiff ultimately would have to re-file any voluntarily dismissed claims. There is no discernible prejudice.

NVRE and Kivlighan next makes a stunningly contradictory argument. If the pleadings were frivolous when filed, Appellants argue, then Martins and McEnearney should have moved for

sanctions immediately instead of sitting on their rights and wasting the time of the court and jurors. Opening Brief pp. 19 – 20. In the next breath, Appellants argue that a hearing would be necessary for the court to determine if the claims had factual support or if the claims were asserted for an improper purpose, but that this would unfairly result in an evidentiary hearing on the same claims that were nonsuited. Opening Brief p. 20. The only logical way to reconcile these arguments is that Appellants advocate a system where sanctions cannot be sought despite Code of Virginia § 8.01-271.1.

Waiting until the end of the case prevents the trial court from struggling with a sparse record, allows the sanctioned party the opportunity to have created a full record in advance of specifically opposing a sanctions motion, and prevents claims of tactical maneuvering by filing a "premature" motion for sanctions.

Nor is there any support for the notion that Appellees advocate a "sanction-happy" environment or wish to strain judicial resources. That is a blame-the-victim argument. Appellants are responsible for creating this circus, not Appellees. Victims of frivolous suits are not "banking" sanctions motions, running up legal fees, or wasting judicial resources – they are defending themselves from vexatious actions.

Here, the trial court immediately, expressly, and with the full authority of Rule 1:1 suspended the nonsuit order, retaining jurisdiction. There is no reversible error.

2. The Allocation Argument was Waived, and is Unsupportable (Assignment of Error No. 2)

Martins and McEnearney do not agree that the standard of review for Assignment of Error No. 2 should be *de novo*. Code of Virginia § 8.01-271.1 is quite clear that the court "shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction . . . ." There is nothing about the statute that requires interpretation. The only issue is whether the trial court abused its discretion in awarding sanctions jointly and severally. This Court would "review the circuit court's imposition of sanctions under Code § 8.01-271.1 pursuant to an abuse of discretion standard." Williams & Connolly, LLP v. People for the Ethical Treatment of Animals, 273 Va. 498, 509, 643 S.E.2d 136, 140 (2007).

As a preliminary matter, the trial court did not err in awarding sanctions under Code of Virginia § 8.01-271.1 jointly and severally against NVRE, Kivlighan and their trial counsel where NVRE, Kivlighan and their trial counsel waived any argument by failing to

brief it (JA 1268 – 1288) and failing to argue it at the August 29, 2008 hearing (JA 1471 – 1532), and where the trial court nevertheless allowed NVRE and Kivlighan to present evidence and argument on the issue despite the waiver (JA 1794 – 2130), and where the trial court twice made specific written findings that NVRE, Kivlighan, and their trial counsel were each culpable for several violations of the sanctions statute (JA 1628 – 1633, 2137).

NVRE and Kivlighan's argument begins with the straw man suggestion that "this Court has never imposed vicarious liability on a litigant for her counsel's conduct." Opening Brief p. 22. The trial court here did nothing of the sort. Instead, the trial court made specific findings with respect to the role and misconduct of NVRE and Kivlighan. There is not a single line from either letter opinion in which the trial court is imposing vicarious liability on NVRE and Kivlighan.

NVRE and Kivlighan cite to Federal Rules of Civil Procedure Rule 11 and federal cases from Illinois and Texas District Courts for the proposition that the sanctioning court should allocate sanctions between the attorney and the client based on their relative culpability. This is a policy argument which, while defensible, is simply not in the text of § 8.01-271.1.

Nevertheless, even if § 8.01-271.1 did expressly require the trial court to parcel out relative responsibility for sanctionable conduct by counsel and client, there would be no grounds to suggest that was not adequately done here. The trial court made specific findings throughout both letter opinions noting the role and misconduct of NVRE and Kivlighan.

For example, in the March 2009 opinion the trial court excerpts Kivlighan's deposition testimony at length to demonstrate how utterly baseless her damages claims were. (JA 1630). The trial court was completely unable to find any factual basis for Kivlighan's claims for defamation. (JA 1630 – 1631). The trial court observed that while "Kivlighan does make vague references to a breach of professional standards, or etiquette, or something, and incredibly, to a breach of fiduciary duty," there are no facts in support of any of the conspiracy claims. (JA 1631). And regardless of "[w]hatever circumstantial inferences Kivlighan would have the Court draw from the fact that Gavin and Martins spoke on the telephone, they could not rise to the level of clear and convincing proof." (JA 1631).

In the June 2010 letter opinion (JA 2133 – 2145) the trial court specifically addressed the contention that NVRE and Kivlighan should

not be sanctioned for the manner in which the case was prosecuted, and that they were merely acting on the advice of counsel. This contention was firmly rejected. "The Court, however, finds that Plaintiffs are as culpable as their lawyer in this case." (JA 2136). "[T]here is substantial evidence of sanctionable behavior on the part of both the litigants and the lawyer." (JA 2137). NVRE and Kivlighan shopped their case to other lawyers until "Walpole offered Plaintiffs a grab bag of remedies." (JA 2137). "Ms. Kivlighan was not a passive participant in the process." (JA 2137). "Moreover, her actions throughout the litigation are indicative of and establish the improper purpose with which she filed this lawsuit." (JA 2137). Finally

> Ms. Kivlighan's behavior during her testimony at the aborted trial was equally elusive. Instead of answering the questions posed to her by counsel, she constantly engaged in diatribes which were non-responsive and irrelevant. It is clear from her behavior on the witness stand that she possesses a vendetta against Defendants. Indeed, this behavior, taken with her other actions, convinces the Court that she filed this lawsuit out of a vindictive and malevolent desire to injure each of the Defendants and to intimidate a business competitor. Moreover, her behavior is indicative of the lack of a factual basis for bringing the Underlying Action.

The argument that the trial court somehow failed to consider or compare the role and relative responsibility of the clients versus the attorney, or that NVRE and Kivlighan did nothing other than follow the

lead of their attorney, is demolished by the trial court's findings detailed in the extensive letter opinions. The second sanctions hearing also demonstrates that the trial court understood and entertained this argument (over the waiver objection), and took evidence of allocation of responsibility between NVRE and Kivlighan and their counsel. (JA 1981 – 1990, 2066 – 2076).

Appellants argue that, as non-lawyers, they cannot be held liable for filing claims not warranted by law. But ignorance of the law is not an excuse, as "every man is supposed to know the law." Charlottesville v. Marks' Shows, Inc., 179 Va. 321, 332 (Va. 1942). Even if this Court wanted to seriously consider the argument that NVRE and Kivlighan as non-lawyers can never be responsible (which would render part of § 8.01-271.1 null and void), the record shows that Kivlighan was a real estate broker with twenty years of experience who had handled over 500 settlements. (JA 625).

NVRE has no escape. A corporation can only act through its agents and "must be represented by counsel in order to properly appear before the Court." Davis v. Davis, 72 Va. Cir. 523, 528 (Va. Cir. Ct. 2007) (citing Virginia Rule 1A:4). It is legally impossible for NVRE to hide behind Walpole. (JA 1903).

More generally, NVRE and Kivlighan selected Walpole as counsel and cannot simply disclaim his filings on their behalf. Kivlighan consulted with several lawyers prior to consulting with Walpole, no other attorney suggested that NVRE could recover more than a broker's fee, no other attorney suggested (like Walpole) that NVRE could recover $1.8 million, and Kivlighan selected Walpole. (JA 1996 – 1997). Kivlighan herself admitted in part to speaking with several lawyers besides Walpole. (JA 2019 – 2020, 2043 – 2047).

NVRE and Kivlighan also argue that as non-attorneys they had no way of knowing the legal impact of evidentiary rulings on the morning of the first day of trial. But they misleadingly suggest that the decision to proceed with a three day jury trial solely led to an award of sanctions, and to the full amount awarded to all Appellees. On the contrary, the sanctionable conduct began with the filing of the initial Complaint almost a year earlier, and was subsequently compounded by the filings of the Bill of Particulars, Amended Complaint, and Second Amended Complaint. Similarly, the cost of the actual three day jury trial was significant, but only a modest part of the overall litigation costs and attorneys fees suffered by Martins and McEnearney and the Gavins.

Appellants also occasionally forget that the trial court found disjunctive violations of three separate requirements of § 8.01-271.1: well grounded in fact, warranted by existing law, and not interposed for an improper purpose. There is no reversible error.

3. The Trial Court Employed an Objective View, Did Not Rely on Any Improper Considerations, and Otherwise Acted Appropriately When Assessing Sanctionable Behavior (Assignment of Error No. 3)

Martins and McEnearney agree that the standard of review for Assignment of Error No. 3 is an abuse of discretion standard. In particular, this Court would "review the circuit court's imposition of sanctions under Code § 8.01-271.1 pursuant to an abuse of discretion standard." Williams & Connolly, LLP v. People for the Ethical Treatment of Animals, 273 Va. 498, 509, 643 S.E.2d 136, 140 (2007). Although § 8.01-271.1 uses mandatory language that the court "shall impose" a sanction for violations of the statute, an abuse of discretion standard is still applied because

> we are usually confronted with a mixed question of law and fact in such cases . . . . Such an inquiry into a person's actual state of knowledge in the light of applicable principles of law can seldom present a clear-cut issue of fact, but requires the exercise of sound judicial discretion.

Ford Motor Co. v. Benitez, 273 Va. 242, 249-250, 639 S.E.2d 203, 206 (2007).

Code of Virginia § 8.01-271.1 requires that pleadings be well grounded in fact, warranted by law, and not brought for an improper purpose. An important policy animating the statute,

> [f]or the protection of the public from harassment by frivolous, oppressive, fraudulent or purely malicious litigation, the General Assembly has chosen to hold attorneys and pro se litigants to a high degree of accountability for the assertions they make in judicial proceedings.

Shipe v. Hunter, 280 Va. 480, 484, 699 S.E.2d 519, 521 (2010) (explaining why the sanctions statute requires the signature of counsel on papers filed). Thus, less than six months ago this Court affirmed the very essence of the result in the matter appealed from, which is protecting the public from nakedly frivolous litigation by holding litigants accountable.

Martins and McEnearney agree that the trial court should (and did) employ an objective standard of reasonableness when making findings as to sanctionable conduct. See Oxenham v. Johnson, 241 Va. 281, 287-88, 402 S.E.2d 1, 4-5 (1991). The duty of reasonable inquiry arises every time a pleading is filed. Id.

Here, the trial court examined extensive briefs, conducted two hearings, allowed additional evidence, and expressly employed an objective standard of reasonableness to determine whether Appellants could have formed a reasonable belief after a reasonable inquiry that their pleadings were well grounded in fact. Appellants were provided the opportunity to demonstrate any plausible merit to their claims. The trial court exercised great care in awarding sanctions:

> The danger that a decision to sanction a party in one action could intimidate future parties and prevent them from asserting their valid rights, is not one the Court takes lightly. One of the foundational functions of civilized government is to provide a forum where parties may peacefully resolve their disputes. The Court feels a particular obligation to avoid the "wisdom of hindsight," and objectively evaluate the actions of the parties taking into account only the information available to them at that time. Having given this matter thorough consideration, the Court is of the opinion that sanctions are warranted.

(JA 1632).

The underlying Circuit Court opinion in Ford Motor Co. v. Benitez, supra, is useful because it shows how low the bar is with respect to reasonable inquiry. Sanctioned defense counsel had asserted a litany of affirmative defenses that were factually groundless. On a motion to reconsider, defense counsel asserted

that sanctions had been awarded because defense counsel had not fully developed the facts in support of the affirmative defenses when filed. The trial court was clear in rejecting that notion:

> This assertion is in error. The Court repeatedly asked counsel for any fact – even a single fact – to support the contentions that the Plaintiff could have been contributorily negligent, could have assumed a known risk, that a breach of duty or care by a third-party was the proximate cause of the Plaintiff's injuries or that the Plaintiff failed to mitigate her damages under a contract claim.
>
> Counsel admitted that there was no factual basis for the defensive claim of contributory negligence. In addition, the Court asked Counsel for any authority from any one of the 50 states that stood for the proposition that a passenger in an automobile could be contributorily negligent by being seated in that automobile, and Counsel could not.
>
> Contrary to Mr. Wise's assertion, the Court did not require the facts for the defense of contributory negligence be fully developed. The Court asked for a single fact, or even an argument that a fact could reasonably be developed from discovery to support the defense of a passenger in a car being contributorily negligent, and Counsel could not provide one. Not in the response to Plaintiff's Motion to Strike Affirmative Defenses nor during oral argument.

Benitez v. Ford Motor Co., 68 Va. Cir. 156, 158 (Va. Cir. Ct. 2005)

Contrary to the panicked concern shared by Appellants and the VTLA that the sky is falling, affirming the trial court's award of sanctions here would be unremarkable and well within this Court's

jurisprudence. Indeed, it is embarrassing to the Commonwealth and the bar in particular that there would be any hand-wringing that the egregious facts in this case ended up producing an award of sanctions.

Throughout trial, and especially when discussing the motions to strike the evidence, the trial court searched high and low for even a single fact that could support Appellants' far flung claims. (JA 1036 – 1060). A similar colloquy occurred during the first sanctions hearing. (JA 1485 - 1499 – 1515).

A. The Trial Court's Focus Was Appropriate.

Appellants complain that the trial court "failed" to limit its focus to the Second Amended Complaint. Appellants fail to explain why the trial court should have been limited to the Second Amended Complaint. Appellees were forced to defend every iteration of the baseless suit right through three days of jury trial. Appellants violated Code of Virginia § 8.01-271.1 when they filed the Complaint, the Bill of Particulars, the Amended Complaint, and the Second Amended Complaint. There is nothing particularly special about the Second Amended Complaint, and which pleading was operative for purposes of the nonsuited trial is completely irrelevant.

Appellants are simply wrong that the trial court did not consider evidence because of evidentiary admissions and rulings. As evidenced by the record, the trial court allowed the parties to file motions, submit exhibits, and many exhibits were received by the trial court which were not admitted at trial or would never have been admissible at trial. Not only did the trial court avoid employing hindsight, the trial court went out of the way to give Appellants every opportunity to explain themselves.

All Appellants and the VTLA argue that the trial court was invoking the English Rule when it awarded sanctions which reflected in part attorneys fees and costs of the Appellees.

> Generally, in the absence of a statute or contract authorizing the award of attorney's fees, a prevailing party cannot recover attorney's fees from the losing party. This has been called the "American rule" in contrast to the "English rule" which reaches the opposite result. West Square v. Communication Technologies, 274 Va. 425, 433, 649 S.E.2d 698 (2007).

Nedelka v. KIA Motors of Am., Inc., 77 Va. Cir. 379, 381 (Va. Cir. Ct. 2009). However this argument fails out of the gate because the English Rule shifts liability for attorneys fees from prevailing parties to the losing parties. There were no losing parties in the instant case. Appellants nonsuited on the third day of jury trial.

B. The "Second Commission" Was Absurd and Speculative As a Matter of Law.

The so called "Second Commission" theory is, respectfully, offensive to any reasonable mind. Setting aside a host of dispositive problems with their case, at best NVRE could have brought a simple breach of contract action against Bernadette Kennedy (or her estate) for 2% of the $697,000 Wheeler purchase of the subject property, which amounts to $13,940. But the testimony at the second sanctions hearing was that Kivlighan wanted more, and she shopped attorneys until Walpole "offered Plaintiffs a grab bag of remedies." (JA 1996 – 1997, 2137).

Appellants premised the whole suit upon two fundamental, howling falsities. The first groundless theory of damages was that NVRE was owed a first commission on a sale of the subject property to Osman Alnifaidy that undisputedly never occurred. Instead of seeking $13,940 Appellants sought a commission of 5% of an offer of $750,000 by Mr. Alnifiady that was never accepted.

The "Second Commission" theory is that NVRE was owed a second commission on the subsequent speculative sale of the subject property by Mr. Alnifaidy after he would buy the subject property, under an offer that the seller never agreed to, that he would

tear down the existing house at the subject property, hire Kivlighan's ex-boyfriend Brian Kearney to build a mansion of unknown dimensions and features, and then sell it for $2.175 million through NVRE and Kivlighan despite Mr. Alnifaidy's consistent testimony to the contrary, and assuming the unidentified future purchaser would not engage a buyer's real estate agent, such that NVRE would collect a full 6% sales commission on the sale. This is absurd.

Appellants' own evidence both in discovery and at trial was crystal clear that there was never an accepted offer from Mr. Alnifaidy (neither for $730,000 nor $750,000), and there could be no commission paid without an accepted offer to create a contract. Kivlighan testified at deposition and trial that she knew that an accepted written contract was a prerequisite for the receipt of any real estate commission. (JA 711).

Applellants' own evidence both in discovery and at trial was that Mr. Alnifaidy did not have any enforceable arrangements with anyone to do anything in particular with the subject property if purchased, and that Mr. Alnifaidy had no intention to hire any real estate agent to list and sell the subject property, much less NVRE and Kivlighan. (JA 1630). Applellants' knew that there was no colorable claim for a

commission on any sale of the subject property, but pressed ahead anyway.

Applellants argue that the trial court paid insufficient attention to Kivlighan's "reasonable belief" that NVRE would obtain the Second Commission. This reveals that Appellants mistake a subjective standard for an objective one ("reasonable inquiry"). However unlikely, assume it is Kivlighan's genuine belief that NVRE is entitled to exclusively receive any and all commissions for the subject property every time the property is sold for the next 200 years, that no agent will ever represent a buyer such that NVRE will get 6% commission, that the improvements will be habitually torn down and rebuilt more extravagantly each time, and that NVRE will be entitled to $25 million. No matter how many times Kivlighan swears that she really believes that, the theory remains speculative as a matter of law.

C. The Trial Court Did Not Create a New Rule as to Seeking Damages.

Appellants briefly argue that the trial court was creating a new rule where any time a litigant falls far short of her *ad damnum* she will subject to a motion for sanctions. Nonsense. Nothing in either letter opinion says anything of the sort.

Moreover, the standard for damages would be the same as for any other allegation pled in a suit: After reasonable inquiry, does a prospective plaintiff have at least some factual basis and some plausible legal theory that warrants hauling someone into court? Presumably in cases involving unliquidated damages trial courts will continue to afford litigants all the deference and benefit of the doubt required by justice and as governed by the low standard of the sanctions statute. On the other hand, seeking $5 million in a contract claim when the only viable theory of damages would elicit $5,000 may indeed violate the statute.

D. The Defamation Claims Were Totally Baseless.

The defamation claims against Martins and McEnearney arose from statements that were obviously opinion, not statements of fact, and could never support a defamation claim. Worse, Paragraphs 89, 92, 95, and 98 of the original Complaint all stated: "(an allegation likely to have evidentiary support after a reasonable opportunity for discovery)" which is not the standard for pleading practice in Virginia. (JA 9 – 11).

Martins and McEnearney successfully argued at Demurrer to the Amended Complaint that, "speech that does not contain a

provably false factual connotation, or statements which cannot be reasonably be interpreted as stating actual facts about a person, are not actionable." Yeagle v. Collegiate Times, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998). "Statements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion." Jordan v. Kollman, 269 Va. 569, 576, 612 S.E.2d 203, 206 (2005). This is basic law, not new or novel, and the claims cannot be construed as having been made by Appellants in a good faith effort to extend existing law.[2]

In other words, even considering the allegations in the light most favorable to Appellants, and even if the statement was not un-actionable opinion, the statement did not impute to Kivlighan unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of duties of such an office or

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[2] For example, one allegedly defamatory statement made by Martins to David Gavin was, "Lauren Kivlighan is not working in your best interests." (JA 70). This was obviously not an actionable statement for at least two reasons, and failed as a matter of law. First, the statement was not a factual assertion capable of confirmation or refutation by any objective means. It was an opinion, and not actionable. See id. Second, the statement was senseless and not otherwise defamatory to the extent that Appellants did not allege any contractual relationship (or even a business expectancy) with David Gavin.

employment, nor words which prejudices Kivlighan in her profession or trade. None of the three defamation claims against Martins and McEnearney should ever have been filed as clearly frivolous and not warranted by long established and clear law.

Worse, not only did Appellants seek baseless compensatory damages, they went even further and demanded punitive damages. "Because punitive damages are in the nature of a penalty, they should only be awarded in cases of the most egregious conduct." Philip Morris, Inc. v. Emerson, 235 Va. 380, 407, 368 S.E.2d 268, 283 (1988). Not only were the allegations insufficient to legitimately pursue compensatory damages, they were orders of magnitude from anything that could be the legitimate basis for punitive damages. Seeking punitive damages was not just unwarranted as a matter of law but also done to harass Martins and McEnearney, a business competitor.

E. Conspiracy Was Always Totally Speculative.

NVRE and Kivlighan, through Walpole (and indeed through subsequent counsel), could never point to a single fact to show that Martins (or any agent of McEnearney) entered into an agreement with David Gavins or engaged in criminal or unlawful conduct, which is

dispositive as to a claim of conspiracy. Commercial Bus. Sys., Inc. v. Bellsouth Services, Inc., 249 Va. 39, 48, 453 S.E.2d 261 (1995); see also R&D 2001, LLC v. Collins, 2006 Va. Cir. LEXIS 131 (demurrer to conspiracy claim sustained with prejudice for failure to allege criminal or unlawful purpose or means); George K. Degnon Associates, Inc. v. Academy for Eating Disorders, 2005 Va. Cir. LEXIS 202 (dismissing conspiracy claims with prejudice for failure to allege an unlawful purpose or to achieve a lawful purpose by criminal or unlawful means).

NVRE and Kivlighan continue to insist that the bare fact that Martins and David Gavin spoke on the phone was circumstantial evidence of some sinister conspiracy. (JA 1499, 1505 – 1506). But when repeatedly pressed for any evidence whatsoever of an agreement between Martins and David Gavin, Appellants had nothing to offer except to insist that David Gavin was upset and circumstances were suspicious. No documents, admitted at trial or otherwise, has ever evidenced the existence, purpose, or terms of any agreement between Martins and David Gavins regarding NVRE and Kivlighan. Martins did not admit any agreement to harm NVRE, and David Gavin specifically denied it when asked. (JA 922).

In contrast, on cross-examination at trial Kivlighan admitted that she never personally overheard any telephone conversations between Martins and David Gavin, that she never overheard a tape or recording of a telephone conversation between Martins and David Gavin, that McEnearney never listed the subject property, that McEnearney never had a listing agreement for the subject property, and that McEnearney did not receive any commission as the listing broker. (JA 713 – 715). Kivlighan knew all of these things, yet she authorized counsel to file suit for her and NVRE.

Appellants' arguments as to legal malice are roundly contradicted by the factual record. Moreover, even though the Realtor Code of Ethics (JA 2202 – 2209) was correctly excluded from trial on multiple bases,[3] Appellants were free to bring it to the attention of the trial court during the sanctions phase. The Code proves nothing anyway because the consistent evidence was that Martins was speaking with David Gavin on the understanding that NVRE was in the process of being terminated for misrepresentations and professional negligence.

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[3] The Code of Ethics was never produced in discovery, private rules do not set the standard of care to others, the Code is written hearsay, it could provide a fact-finder with an improper basis and likely mislead or confuse a jury, and it was irrelevant and immaterial.

F. No Improper Basis for Sanctions.

Appellants generically claim that the trial court wrongly placed emphasis on matters outside the scope of Code of Virginia § 8.01-271.1. They are mistaken.

Whether the trial court was correct or not on the 3:11 ruling on the morning of the first day of trial does not matter with respect to sanctions. The significance of the ruling was that "any legitimate prospect of success had vanished," as the trial court observed in both letter opinions. (JA 1633, 2135). Nevertheless, Appellants insisted on pressing forward for three days of jury trial before seeking a nonsuit. The trial court reasonably regarded that decision as yet further evidence of improper purpose in prosecuting a frivolous and hopeless suit. The admission played no other role.

G. No Circumstances or Inferences Support Any Claims.

Kivlighan knew she had a pocket buyer, that she failed to list the subject property within two days (or ever) which was a material first breach of the listing agreement, that the Gavins were angry with her for not being forthright and honest with them, that Martins had contacted Kivlighan as the listing agent to express interest from her clients (the Wheelers), and that NVRE was deservedly fired.

H. There is No Chilling Effect.

Finally, all Appellants imply, and the VTLA *amicus curiae* brief expressly argues, that "the magnitude [of the award] involved here can intimidate litigants (and their counsel) from asserting" legitimate claims. VTLA p. 4. This "chilling effect" argument is unsupportable.

First, there is nothing for litigants nor counsel to fear so long as they undertake even some kind of reasonable inquiry as required by the statute. See Benitez v. Ford Motor Co., 68 Va. Cir. at 158 (where trial judge asked counsel for just one fact that could support obviously inapplicable affirmative defenses that had been asserted).

Second, this Court has previously declined to hear a case where a Circuit Court judge awarded a similar amount pursuant to Code of Virginia § 8.01-271.1. In B.F. Saul Real Estate Investment Trust v. United Healthcare Servs. Inc., 49 Va. Cir. 436; 1999 Va. Cir. LEXIS 363; 51 Va. Cir. 68; 1999 Va. Cir. LEXIS 505, a landlord asserted "unfathomable" claims (49 Va. Cir. at 438) and "groundless defenses and counterclaims" (49 Va. Cir. at 437) under the circumstances, and the judge awarded $251,018 in attorneys fees and costs. On April 17, 2000 this Court issued a one-page order

finding no reversible error.[4] A denial of writ has no precedential value in and of itself. Nevertheless, this Court neither accepted nor invoked some notion that the magnitude of the sanctions award was inherently or *de facto* too high.

Indeed, the only significance of the size of the award is that it is likely driving this appeal despite the case law and facts that weigh so heavily against it. Ironically, the specter of sanctions itself had no discernible effect on Kivlighan and Walpole. They ignored pre-suit correspondence warning that they were pursuing "a course of action in gross disregard of the facts," (JA 1470) and filed suit without making reasonable inquiry. Then after the filing of the initial Complaint they ignored the express notice that their allegations were not "consistent with Code of Virginia § 8.01-271.1" (JA 49) and filed further pleadings that were baseless. Ultimately, NVRE and Kivlighan object not to a finding of sanctionable behavior so much as being made accountable for such behavior.

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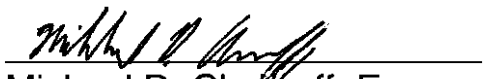
[4] (Record No. 992936); Law No. 174215 (Fairfax Cir. Ct. Aug. 18, 1999), *reported in* P. Fletcher, *Sanctions of $251K Assessed in Fairfax*, Virginia Lawyers Weekly 099-8-340 (Oct. 4, 1999) *and in* Virginia Lawyers Weekly, *Supreme Court Won't Disturb Sanctions Award*, Virginia Lawyers Weekly 099-8-340 (Va. Apr. 17, 2000).

CONCLUSION

The entire suit was an exercise in baseless, speculative, and vindictive litigation, and is precisely the sort of case that Code of Virginia § 8.01-271.1 was designed to deter. The trial court did not abuse its discretion or otherwise err. The trial count made specific findings of violations, correctly determined that sanctions were mandatory, and exercised great care and discretion in determining the award of attorneys fees. Respectfully, in the absence of finding any reversible error, the Court should affirm the trial court's rulings as warranted, sound, and just.



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CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEES KAREN MARTINS AND McENEARNEY ASSOCIATES, INC.:

1. was this 22nd day of February, 2011, served by first class mail upon the following:

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2. I do hereby certify that fifteen (15) copies of the foregoing Brief of Appellees Karen Martins and McEnearney Associates, Inc. have been hand filed with the Clerk of this Court along with an electronic version via email and that three copies have been mailed to opposing counsel at the above addresses this 22nd day of February, 2011.

Mikhael D. Charnoff