IN THE

Supreme Court Of Virginia

RECORD NO. 140983

MITCHELL KAMBIS, et al.,

Appellants,

v.

APRIL CONSIDINE, et al.,

Appellees.

OPENING BRIEF OF APPELLANT MITCHELL KAMBIS

Mark H. Schmidt, Esquire
(VSB No. 44521)
AYERS & STOLTE, P.C.
710 North Hamilton Street
Richmond, Virginia 23221
(804) 358-4731 (Telephone)
(804) 864-0895 (Facsimile)
mschmidt@ayerslaw.com

Counsel for Appellant - Mitchell Kambis

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ASSIGNMENT OF ERROR 8

QUESTION PRESENTED 8

STANDARD OF REVIEW 9

ARGUMENT AND AUTHORITIES 9

CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Page

Court Cases:

Gilmore v. Finn, 259 Va. 448, 527 S.E.2d 426 (2000) 9, 15, 16

Nedrich v. Jones, 245 Va. 465, 429 S.E.2d 201 (1993) 15, 16

N. Va. Real Estate, Inc. v. Martins, 283 Va. 86,
720 S.E.2d 121 (2012) 9, 15

Shebelskie v. Brown, 287 Va. 18, 752 S.E.2d 877 (2014) 9

Other Authority:

Va. Code § 8.01-271.1 ..... 10, 14

Va. Sup. Ct. Rule 1:4 15

To the Chief Justice and the Justices of the Supreme Court of Virgina:

Mitchell Kambis, by counsel, petition this Honorable Court to grant his appeal from the March 24, 2014, Order awarding sanctions of $84,541.62 against him (as well as $64,319.38 separately against his former counsel, the Zobrist Law Group), all in the Circuit Court of Albemarle County, the Honorable Cheryl V. Higgins presiding, of which Appellant stands aggrieved.

STATEMENT OF THE CASE

Appellant Mitchell Kambis and Appellee April Considine were domestic partners and business partners throughout much of 2000 through 2010. During this time they engaged in a number of real estate transactions, both in their own names and in the names of entities they owned. The relationships ended badly, and litigation resulted.

On October 13, 2009, Mr. Kambis and his corporate entities (the "Kambis Parties") sued Ms. Considine, her corporate entity, and her mother (the "Considine Parties") in the Circuit Court of Albemarle County. The Kambis Parties filed a Complaint in response to which the Considine Parties filed a Demurrer and Special Plea of the Statute of Limitations.

However, prior to any hearing being held or ruling being made by the trial court on those pleadings, the Kambis Parties subsequently moved to

file a First Amended Complaint, and then filed a Second Amended Complaint (Appendix 1-111). The trial court never ruled as to the sufficiency or merits of the Complaint or the First Amended Complaint. And although it was titled "Second Amended Complaint," the Second Amended Complaint was the first "complaint" whose sufficiency was argued before the trial court on demurrer or otherwise.

The Second Amended Complaint contained nineteen counts numbered II to XX (there was no count I). Counts II and III alleged fraud in the inducement or alternately breach of contract; Count IV alleged conspiracy; Count V alleged fraud by Ms. Considine, Counts VI, VII, and XIV alleged breach of other contract; Counts VIII, IX, X, and XI alleged unjust enrichment; Counts XII, XV, and XVI alleged derivative claims (which assumed an "Assignment of Membership Interest" was invalid due to fraud in the inducement); Count XIII sued on a mechanic's lien; Count XVII alleged replevin seeking the recovery of personal property (should have been detinue); Count XVIII alleged defamation; Count XIX alleged battery; and Count XX alleged the tort of outrage.

In response to the Second Amended Complaint, the Considine Parties again filed a Demurrer and Special Plea of the Statute of Limitations. At the <u>first</u> hearing held in this case on August 13, 2012, the

Court heard arguments on the demurrer and plea to the Second Amended Complaint. At a subsequent hearing on September 14, 2012, the trial court announced its ruling from the bench on the demurrer and plea. (Appendix 154-177).

The trial court sustained the Considine Parties' demurrer as to Counts II and III (fraud in the inducement and/or breach of contract), to Counts XII, XV, and XVI (derivative claims), and to Counts IV (conspiracy), VIII and IX (unjust enrichment), XIII (mechanic's lien), XIV (breach of contract), and XVIII (defamation), and granted the special plea of the statute of limitations as to Count VI (breach of contract), and partially as to counts XIX (battery) and XX (outrage). All counts that were dismissed were dismissed *with prejudice*, except Count XX which plaintiffs were permitted to amend.

Count V (fraud by Ms. Considine), and Counts VII (breach of contract), XI (unjust enrichment), XVII (replevin), XIX (battery), and XX (outrage) survived the demurrer and plea in whole or in part. The trial court entered an Order on October 18, 2012, embodying its ruling (Appendix 147-179).

Subsequently, the trial court also denied Ms. Considine's Motion for Summary Judgment as to Count V (fraud by Ms. Considine) of the Second Amended Complaint. (Appendix 180-181).

On September 27, 2012, the defendants filed a Motion for Sanctions (Appendix 112-146) and later a Supplement (Appendix 250-253) thereto against the Kambis Parties and their attorney for filing of the Second Amended Complaint.

On March 5, 2013, the Kambis Parties subsequently filed a seven count Third Amended Complaint (Appendix 182-247), with six of those counts carrying forward from the Second Amended Complaint, including Mr. Kambis' count for fraud against Ms. Considine. That "fraud" claim which was Count V in the Second Amended Complaint became Count II of the Third Amended Complaint.

Although the defendants demurred and pleaded in bar to the Third Amended Complaint, all but one count from that complaint, survived and were set for trial, including Count II (fraud by Ms. Considine). The count that was struck was Count VI (formerly XVII) alleging "replevin" which the defendants had finally realized was an abolished cause of action in Virginia. The trial court refused to allow the Kambis Parties to amend and re-name their replevin count, and dismissed it from the Third Amended Complaint with prejudice. (Appendix 248-249).

Trial was set for September 23, 2013, by Order entered January 29, 2014. (Appendix 329-331).

Prior to trial (but by an Order not entered until December 11, 2013 – see Appendix 319-322), the Zobrist Law Group withdrew as counsel for the Kambis Parties. As Mr. Kambis could not represent his entities, the trial court continued the trial as to the Kambis Parties' corporate claims until March 24, 2014, (by Order entered January 29, 2014 – see Appendix 329-331) to allow the entities an opportunity to obtain counsel.

However, the trial court refused to continue the trial of Mr. Kambis' personal claims. (Appendix 296). So on September 23, 2013, Mr. Kambis, *pro se*, having lost several evidentiary rulings (Appendix 270-304), was unable to go forward at trial and attempted to nonsuit all of his personal claims (See generally Appendix 256-304).

However, the trial court refused to permit Mr. Kambis to nonsuit Count II (fraud by Ms. Considine) due to the existence of a counterclaim. (Appendix 267-268). So, following consultation by Mr. Kambis at the trial court's request with an un-related attorney who was present in the courtroom (Appendix 298-299), Count II was "dismissed … with no finding either of prejudice or no prejudice." (Appendix 298-303; see also Order entered January 29, 2014 at Appendix 332-335). Mr. Kambis' fraud claim against Ms. Considine was never heard on its merits.

Later, by Order entered February 18, 2014, the trial court ruled Count II (fraud by Ms. Considine) had been dismissed "with prejudice." (Appendix 413-414).

On February 28, 2014, the trial court took evidence and heard arguments on the Motion for Sanctions against the Kambis Parties.

At the hearing, the Considine Parties sought an award of $79,541.62 against Mr. Kambis separately, in connection with his fraud claim against Ms. Considine (Count II of the Third Amended Complaint a/k/a Count V of the Second Amended Complaint) (See Appendix 456, 465A, 475), as well as additional sanctions against the Kambis Parties and the Zobrist Law Group.

However, at the hearing, the Considine Parties offered no evidence regarding the merits of Mr. Kambis' claim for fraud against Ms. Considine, no evidence as to whether or not the claim was well grounded in fact or warranted by law, and no evidence regarding whether the claim was brought for any improper purpose. Their only evidence consisted of Mr. Burke's testimony and exhibits relating to the amount and reasonableness of the attorney's fees he had charged.

In contrast, Mr. Kambis offered evidence at the hearing by testifying that the facts he had pleaded in support of his fraud claim were true and

correct, and that he had wanted to go forward at the trial on September 23, 2013 on that claim, but simply could not do so without counsel. (Appendix 466-468). His testimony was uncontradicted.

On March 24, 2014, the trial court announced its ruling regarding sanctions from the bench. (Appendix 605-609). The trial court found that the mechanic's lien claim, the breach of contract and conspiracy claims, all of which were dismissed with prejudice on demurrer, were not sanctionable. It then found that the replevin and defamation claims were sanctionable, but *de minimis* in their impact on the litigation and its costs. The trial court next found the derivative claims and the premature appeal were sanctionable, but <u>only</u> attributable to the Zobrist Law Group, PLLC, and not to Mr. Kambis as they involved highly technical issues. (Appendix 606-608).

However, the trial court also noted there was "a certain level of intent to intimidate Ms. Considine in this particular case, and that Mr. Kambis was aware of the extent of the litigation." (Appendix 608). Then, the trial court held Mr. Kambis responsible for the "costs of trial and going forward" and awarded the Considine Parties $84,541.62 in sanctions, which was exactly $5,000 more than the $79,541.62 in sanctions they asked for in connection with Mr. Kambis' dismissed fraud claim. (Appendix 608-609).

By Order entered March 24, 2014, the trial court awarded sanctions of $84,541.62 separately against Mr. Kambis and $64,319.38 separately against the Zobrist Law Group. (Appendix 600-602).

On March 24, 2014, the trial court entered a Final Order ending the case. (Appendix 597-599).

On April 15, 2014, Mr. Kambis timely noted an appeal.

ASSIGNMENTS OF ERROR

8. The trial court erred by awarding sanctions against Mr. Kambis.

(Preserved at Appendix 432-435, 475A-478N, and 601).

9. The trial court erred by awarding sanctions against Mr. Kambis based in substantial part upon his *pro se* nonsuiting and dismissal of claims just prior to trial.

(Preserved at Appendix 433, 476-478, and 601).

QUESTIONS PRESENTED

1. Whether the trial court erred by awarding sanctions against Mr. Kambis. Assignments of Error #8 and #9.

2. Whether the trial court erred by awarding sanctions against Mr. Kambis based in substantial part upon his *pro se* attempt to nonsuit and/or resulting dismissal of his fraud claim against Ms. Considine just prior to trial. Assignments of Error #9.

STANDARD OF REVIEW

The Supreme Court applies an abuse-of-discretion standard of review to a trial court's award of sanctions. Shebelskie v. Brown, 287 Va. 18, 26, 752 S.E.2d 877, 881-82 (2014); N. Va. Real Estate, Inc. v. Martins, 283 Va. 86, 103, 720 S.E.2d 121, 129 (2012); Gilmore v. Finn, 259 Va. 448, 466, 527 S.E.2d 426, 435 (2000).

In applying that standard, the Court uses an objective standard of reasonableness in determining whether a litigant and his attorney, after reasonable inquiry, could have formed a reasonable belief that a pleading was well grounded in fact, warranted by existing law, and not interposed for an improper purpose. Ids.

The Court has also held 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 employed." Ids.

ARGUMENT AND AUTHORITIES

The trial court erred by awarding sanctions against Mr. Kambis in this case, especially by awarding sanctions against Mr. Kambis based in substantial part upon his *pro se* nonsuiting and dismissal of claims just prior to trial.

In particular, the trial court erred by awarding sanctions (as specifically requested by Ms. Considine) relating to Mr. Kambis' "fraud" claim against her in the amount of the "costs of trial and going forward."

This award by the trial court was error because: (1) that fraud claim had survived demurrers, special pleas, and summary judgment before being set for trial – and was never otherwise heard on its merits; (2) the Considine Parties never presented any evidence to the trial court that the fraud claim was not well grounded in fact, not warranted by law, or interposed for any improper purpose; (3) the trial court never made any findings that the fraud claim was not well grounded in fact, not warranted by law, or interposed for any improper purpose; and (4) the amount of the award was not related to any particular sanctionable event, if any.

The sanctions statute, Va. Code § 8.01-271.1, provides that:

> The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after a reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

and

> If a pleading, motion, or other paper is signed or made in violation of this rule, the Court, upon motion or upon its own

> motion, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

Thus, sanctions must be related to a specific pleading, motion, or other paper.

At the February 28, 2014, hearing on sanctions, the Considine Parties specifically requested an award of $79,541.62 against Mr. Kambis in connection with his "fraud" claim against Ms. Considine.

That "fraud" claim, which was Count II of the Third Amended Complaint and Count V of the Second Amended Complaint, had survived demurrers, special pleas, and summary judgment. Thus, the trial court had repeatedly confirmed the objective reasonableness of that claim as pleaded. And the trial court set that fraud claim for trial.

When the Zobrist Law Group, PLLC, withdrew as Mr. Kambis' counsel, Mr. Kambis, *pro se*, tried to obtain new counsel, but could not. (See Sealed Appendix). Next, Mr. Kambis tried to have the trial continued until new counsel could be obtained. When that failed, following consultation (at the trial court's request) with an un-related attorney who happened to be in the court room, Mr. Kambis, *pro se*, nonsuited his claims

(except the fraud claim was “dismissed” due to a counterclaim). The fraud claim was never heard on its merits.

At no time, not at the September 23, 2013, trial, nor at the February 28, 2014, hearing on sanctions, nor at any other time, did the Considine parties ever offer any evidence that the fraud claim was was not “well grounded in fact” or not “warranted by existing law.” At no time did the Considine Parties offer any evidence that the fraud claim was “interposed for any improper purpose.”

At no time, not at the September 23, 2013, trial, nor at the February 28, 2014, hearing on sanctions, nor at any other time, did the trial court ever find or hold that Mr. Kambis’ fraud claim was not “well grounded in fact” or not “warranted by existing law.” At no time did the trial court find or hold that Mr. Kambis’ fraud claim was “interposed for any improper purpose.”

At the March 24, 2014, hearing, the trial court announced its ruling on sanctions. The trial court found that the mechanic’s lien claim, the breach of contract and conspiracy claims, all of which were dismissed with prejudice on demurrer, were not sanctionable. It then found that the replevin and defamation claims were sanctionable, but *de minimis* in their impact on the litigation and its costs. The trial court next found the

derivative claims and the premature appeal were sanctionable, but only attributable to the Zobrist Law Group, PLLC, and not to Mr. Kambis as they involved highly technical issues. (See Appendix 606-608). The trial court awarded $64,319.38 as sanctions against the Zobrist Law Group, PLLC, regarding the foregoing.

Still, however, the trial court awarded $84,541.62 in sanctions against Mr. Kambis holding him responsible for the "costs of trial and going forward." (See Appendix 608-609). The $84,541.62 award was exactly $5,000 more than the $79,541.62 sanction the defendants sought for Mr. Kambis' "fraud" claim that was set for trial.

This despite that all the claims that went "forward" to "trial," including the fraud claim, were those that had survived demurrer, pleas in bar, and summary judgment. Claims which essentially been vetted by the trial court and found worthy to go to trial. By definition, without additional evidence to the contrary, these were not sanctionable claims. They were essentially "court approved" claims.

These claims were then nonsuited or dismissed without the trial court ever addressing their merits. And no evidence concerning the merits of those claims was put on by the Considine Parties at the February 28, 2014, hearing on sanctions. No discovery materials were introduced at the

hearing regarding the merits of those claims. There was no indication whatsoever that the claims that were set to be tried were not well grounded in fact and warranted by existing law, or interposed for an improper purpose.

While the trial court did comment that there was "a certain level of intent to intimidate Ms. Considine in this particular case, and that Mr. Kambis was aware of the extent of the litigation," (Appendix 608), that falls far short of ruling that Mr. Kambis brought on his fraud claim for an improper purpose. And frankly, it is difficult to conceive of any litigation involving any significant sum of money that is not intimidating to the parties. And parties should be aware of the extent of the litigation.

Moreover, the mere fact that Mr. Kambis, having lost his attorney and several evidentiary rulings, nonsuited his claims just prior to trial (fraud being "dismissed" due to a counterclaim), cannot be *per se* sanctionable conduct. To hold such would destroy the plaintiff's statutory right to a nonsuit for fear of being sanctioned under § 8.01-271.1.

In any event, if this Court should find the trial court did have some kind of basis for sanctioning Mr. Kambis (which it did not), the Court should still find it was an abuse of discretion to sanction Mr. Kambis for the "costs of trial and going forward" as there were no sanctionable events associated

with his going forward to trial.

Furthermore, while Mr. Kambis is not appealing on behalf of the Zobrist Law Group, PLLC, in this petition for appeal, no sanctions should have been awarded at all in this case.

Here, most claims that were dismissed from the case were dismissed following only one demurrer/plea hearing. This was not a case where claims were dismissed on demurrer, brought back again, and then dismissed again or were dismissed at trial once it was discovered there was no evidence to support the claims pleaded. See Martins, *supra*, (sanctions awarded after plaintiffs moved for a nonsuit to avoid the defendant's motion to strike at the close of the plaintiff's evidence); compare Nedrich v. Jones, 245 Va. 465, 471, 429 S.E.2d 201, 204 (1993) (dismissal on first demurrer does not necessitate finding plaintiff's counsel could not have held reasonable belief that claims were warranted by existing law).

Also, had an assignment of membership interest at issue in the case been found invalid, then the derivative claims, with amendment, could have been properly made. Rule 1:4 of the Rules of the Supreme Court of Virginia expressly permits pleading in the alternative. *See also* Gilmore v. Finn, 259 Va. 448, 466 (2000) (threat of sanctions should not be used to

stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case);

Moreover, the bar for an award of sanctions is high. For example, in Gilmore, *supra*, Governor Gilmore pled and argued that a law that permitted the withdrawal of life sustaining care to an individual, prohibited the withdrawal of that life sustaining care, if it would result in death. Yes, at first glance the argument does not seem to make any sense whatsoever. And the trial court sanctioned Governor Gilmore. Nonetheless, the Supreme Court reversed the sanctions award as an abuse of the trial court's discretion.

Nedrich, *supra*, also stands for the proposition that "inartful" pleading is not sanctionable, and that a court should consider the gist of what was "essentially" pleaded and whether the party and his counsel "could have reasonably believed" the pleadings were warranted, when assessing sanctions. And both of the above cases demonstrate that merely "losing" is not sanctionable.

And there is no authority that supports any contention that a claim which has survived the demurrer process, pleas, and summary judgment becomes sanctionable when subsequently nonsuited or dismissed not on its merits.

By awarding sanctions against Mr. Kambis, the trial court abused its discretion, and it's judgment should be reversed.

CONCLUSION

For the reasons stated above, Mitchell Kambis, by counsel, respectfully requests that the Court set aside and vacate that portion of the March 24, 2014, Order awarding sanctions against him in the amount of $84,541.62.

Respectfully submitted,

MITCHELL KAMBIS,

By: /s/ Mark H. Schmidt
Counsel

Mark H. Schmidt, Esq.
(VSB # 44521)
AYERS & STOLTE, P.C.
710 North Hamilton Street
Richmond, Virginia 23221
(804) 358-4731 telephone
(804) 864-0895 facsimile
Email: mschmidt@ayerslaw.com
Counsel for the Appellant

CERTIFICATE REQUIRED BY RULE 5:26(h)

(1) The appellant Mitchell Kambis is represented by Mark H. Schmidt, Esq., VSB # 44521, Ayers & Stolte, P.C., 710 North Hamilton Street, Richmond, Virginia 23221. (Telephone: (804) 358-4731; Facsimile: (804) 864-0895; Email: mschmidt@ayerslaw.com).

(2) The appellees, April Considine, Patricia G. Wolfe, and Villa Deste, LLC, are represented by John K. Burke, Esq., VSB # 16798, Setliff & Holland, P.C., 4940 Dominion Boulevard, Richmond, Virginia, 23060. (Telephone (804) 377-1263; Facsimile: (804) 377-1283; Email: jburke@setliffholland.com).

(3) On June 8, 2015, a PDF version of this Opening Brief of Appellant and the Appendix was filed with the Clerk of Court and served on opposing counsel, and ten (10) printed copies of the Opening Brief and three (3) printed copies of the Appendix were filed with the Clerk of Court, by hand.

(4) The word count of this Opening Brief of Appellant is 3,657.

(5) The Appellant Mitchell Kambis, by counsel, certifies that he has complied with Rule 5:26.

__/s/ Mark H. Schmidt____
Mark H. Schmidt