In the

Supreme Court of Virginia

At Richmond

Record No. 150693

ENVIRONMENT SPECIALIST, INCORPORATED,
t/a HOWELL'S HEATING AND AIR CONDITIONING CO.,

Plaintiff/Appellant,

– v. –

WELLS FARGO BANK NORTHWEST, N.A., as TRUSTEE OF THE GSA FREDERICKSBURG FBI 2013 PASS-THROUGH TRUST,

Defendant/Appellee.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 3

ARGUMENT AND AUTHORITIES 3

I. Howells' Appeal Must be Denied Because the Record Provided by Howells is Insufficient for the Court to Evaluate Howells' Assignment of Error. 3

II. The Trial Court Did Not Err in Awarding Sanctions Because Howells Filed Its Motion for an Improper Purpose. 7

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Caplan v. Bogard,
264 Va. 219 (2002) 3, 13

Gilmore v. Finn,
259 Va. 448 (2000) 3, 8, 9, 13

Langman v. Alumni Ass'n of the Univ. of Va.,
247 Va. 491 (1994) 6

McNally v. Rey,
275 Va. 475 (2008) 10, 11, 12

Nusbaum v. Berlin,
273 Va. 385 (2007) 7

Pascarella v. McCoy,
2011 Va. App. LEXIS 8 (Va. Ct. App. 2011) 6

Pulte Home Corp. v. Parex, Inc.,
265 Va. 518 (2003) 6

Sturgis v. Stinson,
241 Va. 531 (1991) 3, 9, 13

STATUTES

Code § 8.01-271.1 ..... 3, 7, 8, 10, 13

RULES

Rule 3:8 9

Rule 5:11 ..... 4, 5, 7

STATEMENT OF THE CASE

Plaintiff/Appellant, Environment Specialist, Incorporated, t/a Howell's Heating & Air Conditioning Co. ("Howells"), filed its Complaint in the case below in the Circuit Court of Stafford County, Virginia (the "Trial Court") on or about October 21, 2013 (the "Complaint"). Joint Appendix ("JA") 1-36. Among the defendants named by Howells in its Complaint was Defendant/Appellee, Wells Fargo Bank Northwest, N.A., as trustee of the GSA Fredericksburg FBI 2013 Pass-Through Trust ("Wells Fargo").

Howells served its Complaint on Wells Fargo by service on the Secretary of the Commonwealth. A Certificate of Compliance was filed with the Trial Court stating that service was made on October 30, 2013.

Counsel for Wells Fargo first received the Complaint from Wells Fargo on Thursday, November 21, 2013, and immediately contacted counsel for Howells, by both telephone and email, to request a very brief extension of time within which to file an answer.[1] Counsel for Howells refused to consent to the requested extension.

Wells Fargo immediately filed a Motion for Leave to File Answer Out of Time (the "Motion for Leave") with the Trial Court on the following day,

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[1] *See* JA40 (Exhibit A to Wells Fargo's Motion for Leave to File Answer out of Time).

Friday, November 22, 2013, and filed its Answer on Monday, November 25, 2013. JA37-42, 43-49.

It is common knowledge that motions to file an answer out of time requesting an extension of only a few days, in circumstances such as these, are routinely consented to and, in all likelihood, will be granted, if opposed. Nevertheless, Howells opposed Wells Fargo's Motion for Leave and filed a Motion for Default Judgment against Wells Fargo and the other defendants to the suit below (the "Motion for Default Judgment"). JA53-57.

The Trial Court, after hearing oral argument on February 3, 2014, entered an order of the same date (the "Sanctions Order," JA58-59) granting Wells Fargo's Motion for Leave and awarding sanctions against counsel for Howells for the reasons stated at the hearing, presumably because it determined that Howells' Motion for Default Judgment had been filed for an improper purpose.

Shortly after the Sanctions Order was entered, Howells filed its Petition for Appeal and then filed a Replacement Petition for Appeal that was substantially the same, but included previously omitted exhibits (the "Petition for Appeal"). This Court awarded Howells an appeal and Howells filed its Opening Brief of Appellant on October 28, 2015 (the "Brief of

Appellant"). Notably, Howells has not provided this Court with a record of the February 3, 2014 hearing to review in this appeal.

STANDARD OF REVIEW

This Court reviews a trial court's order awarding sanctions for abuse of discretion. *See Gilmore v. Finn*, 259 Va. 448 (2000).

"[F]actual determinations of the trial court are accorded substantial deference on review and will be reversed only if plainly wrong or without evidence to support them." *E.g.*, *Sturgis v. Stinson*, 241 Va. 531, 536 (1991); *Caplan v. Bogard*, 264 Va. 219, 225 (2002).

ARGUMENT AND AUTHORITIES

Howells' request for relief should be denied because (I) the record provided by Howells is insufficient for the Court to evaluate Howells' assignment of error, and (II) the Trial Court properly awarded sanctions against Howells for filing a motion "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *See* Code § 8.01-271.1.

I. Howells' Appeal Must be Denied Because the Record Provided by Howells is Insufficient for the Court to Evaluate Howells' Assignment of Error.

"It is the obligation of the petitioner/appellant [Howells] to ensure that the record is sufficient to enable the Court to evaluate and resolve the

assignments of error." Va. Sup. Ct. R. 5:11(a)(1). Pursuant to Rule 5:11(a)(1), if Howells fails to provide a sufficient record, "**any assignments of error affected by the omission shall not be considered.**" *Id.* (emphasis added).

In this case, Howells failed to provide a record of the February 3, 2014 oral argument, at which the Trial Court was able to question the parties about the pleadings at issue. Other than the pleadings, the arguments of counsel were the sole basis for the Trial Court's ruling. By failing to provide the basis for the Trial Court's ruling to this Court, Howells has failed to provide a sufficient record for this Court to evaluate the Trial Court's ruling, and therefore, Howells' appeal must be denied.

Rule 5:11 permits Howells to satisfy its obligation to provide a record to the Court in one of two ways. First, Howells may provide a transcript of the hearing below. No transcript was provided. Second, Rule 5:11 also permits Howells to provide a written statement in lieu of a transcript, but such written statement only "becomes a part of the record when . . . [it] is signed by the trial judge." Rule 5:11(e).[2]

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[2] The full text of Rule 5:11(e) is as follows:

(e) *Written Statement in Lieu of Transcript* . **A written statement of facts, testimony, and other incidents of the case, which may inc lude or**

Howells filed a self-serving Written Statement in Lieu of Transcript ("Howells' Written Statement") that entirely omits the statements made by counsel to the Trial Court at the February 3, 2014, and omits the findings of the Trial Court upon which it based its award of sanctions.[3] Presumably, due to these omissions, the trial judge refused to sign Howells' Written Statement. Because the trial judge did not sign Howells' Written Statement, it is not a part of the record. Rule 5:11(e).

The only other documents provided to the Court by Howells are the pleadings filed with the Trial Court below and the Trial Court's orders, which can be found in the Joint Appendix. Of those documents, only two

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consist of a portion of the transcript, becomes a part of the record when:

> (1) within 55 days after entry of judgment a copy of such statement is filed in the office of the clerk of the trial court. A copy must be mailed or delivered to opposing counsel on the same day that it is filed in the office of the clerk of the trial court, accompanied by notice that such statement will be presented to the trial judge no earlier than 15 days nor later than 20 days after such filing; **and**
> **(2) the statement is signed by the trial judge** and filed in the office of the clerk of the trial court. The judge may sign the statement forthwith upon its presentation to him if it is signed by counsel for all parties, but if objection is made to the accuracy or completeness of the statement, it shall be signed in accordance with paragraph (g) of this Rule.

(emphasis added).

[3] Wells Fargo objected to Howells' Written Statement due to these omissions in its Objection to Written Statement, timely filed pursuant to Rule 5:11(g). Counsel for the other parties to the suit below also objected due to these omissions, and noted their objections on the signature page of the Written Statement in Lieu of Transcript submitted to the Trial Court.

concern the bases upon which the Trial Court awarded sanctions: the Trial Court's February 3, 2014 Sanctions Order and the Trial Court's February 18, 2015 Final Order (the "Final Order").

The Trial Court's February 3, 2014 Sanctions Order states only the amount of the award and that the award is to "reimburse [Wells Fargo's] counsel for fees and costs incurred regarding the [Motion for Leave]." JA58-59.

The Trial Court's February 18, 2015 Final Order states that sanctions were awarded "against counsel for Howells for its failure to voluntarily extend the time in which Wells Fargo might file its Answer." JA 62-67.

These two orders, while they make clear the general basis for the sanctions award, do not discuss in detail the February 3, 2014 hearing in which the Trial Court determined that sanctions were appropriate. They do not discuss the argument and representations of counsel at that hearing, and they do not discuss the findings the Trial Court made at that hearing.[4]

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[4] Note that the Trial Court is not required to state all of its findings in its written order. *Pascarella v. McCoy*, 2011 Va. App. LEXIS 8 (Va. Ct. App. 2011) (holding that the trial court "did not err by orally announcing its classifications and valuations from the bench"); *see also Langman v. Alumni Ass'n of the Univ. of Va.*, 247 Va. 491, 503 (1994) (evaluating "oral findings" of the trial court); *Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518, 521 (2003) (discussing an "oral ruling" of the trial court).

However, pursuant to Rule 5:11(a)(1), Howells is required to provide this Court with an adequate record, so that the Court can evaluate Howells' appeal. Because the record provided by Howells does not include the bases upon which the Trial Court ruled, this Court cannot evaluate Howells' claim that the Trial Court did not have a valid basis for its ruling. Accordingly, Howells' assignment of error "shall not be considered" and its appeal must be denied. *See* Rule 5:11(a)(1).

II. The Trial Court Did Not Err in Awarding Sanctions Because Howells Filed Its Motion for an Improper Purpose.

"[T]rial court[s] [have an] inherent power to supervise the conduct of attorneys practicing before [them] and to discipline an attorney who engages in misconduct . . . ." *Nusbaum v. Berlin*, 273 Va. 385, 400-401 (2007). To sanction an attorney by imposing an award of attorneys' fees and costs to the opposing parties, the Trial Court must find a basis for doing so in a statute or rule of court. *Id.*

Code § 8.01-271.1 specifically authorizes the court to impose sanctions that "include an order to pay to the other party or parties the amount of the reasonable expenses incurred" when a motion is filed for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Further, sanctions are appropriate not only when a litigant advances "unfounded factual [or] legal

claims" but also when a litigant advances "valid claims for improper purposes." *Gilmore v. Finn*, 259 Va. 448, 466 (2000) (emphasis added).

In this case, counsel for Wells Fargo requested an extension of a few days to file its answer to the Complaint. Such motions are routinely consented to as a matter of professional courtesy among members of the Bar and, in all likelihood, will be granted if opposed. Nevertheless, Howells refused to consent, opposed Wells Fargo's Motion for Leave, and filed a Motion for Default Judgment against Wells Fargo. Howells' filing of a motion that it knew, or should have known, would be denied caused unnecessary delay and needlessly increased the cost of litigation by forcing Wells Fargo to appear at a contested hearing to argue the motion.

The Trial Court was entitled to find under these circumstances, and based upon its evaluation of the oral representations made by counsel at the February 3, 2014 hearing, that Howells' opposition and Motion for Default Judgment were filed for an improper purpose. And, on that basis, the Trial Court had the authority, pursuant to Code § 8.01-271.1, to enter sanctions in the amount of the attorney's fees incurred by Wells Fargo at the February 3, 2014 hearing. Moreover, the Trial Court's finding that the Motion for Default Judgment was filed for an improper purpose is entitled to "substantial deference" and cannot be reversed on appeal unless "plainly

wrong or without evidence to support [it]." *Sturgis v. Stinson*, 241 Va. 531, 536 (1991).

The Trial Court's finding that Howells' motion was filed for an improper purpose is not "plainly wrong or without evidence to support [it]," and, for that reason, this Court must affirm the Trial Court's Sanctions Order.

Howells' primary contentions appear to be that sanctions could not be properly imposed upon Howells because Howells' motion was technically permissible under the Rules and, taking that a step further, that Howells is ethically obligated to advocate on behalf of its clients to the maximum extent permitted by the Rules.[5]

However, Howells' position cannot be correct because Virginia law is clear that the assertion of "valid claims"—*i.e.*, claims permitted by the Rules—is subject to sanctions if the assertion of those claims is "for [an] improper purpose[]." *Gilmore v. Finn*, 259 Va. 448, 466 (2000) ("The possibility of a sanction can protect litigants from . . . the assertions of valid claims for improper purposes"). This is clear from the plain language of the statute itself, which requires that all pleadings be <u>both</u> "well grounded in

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[5] *See* Brief of Appellant at 12, 14 ("Insisting that a defendant file its Answer within the time required by Rule 3:8 . . . may not be said to be an improper purpose. . . . the circuit court's ruling impinges on our ethical obligations to our clients").

fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law **and** . . . not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Code § 8.01-271.1 (emphasis added). The ethical duties of Howells' counsel to their clients do not require them to advocate in a manner that is designed to harass or needlessly increase the cost of litigation, even if such advocacy could provide an advantage to Howells in the litigation. In fact, this is what the Code expressly prohibits. Frankly, an attorney has a duty to control clients who push for this type of unprofessional and inappropriate advocacy.

In support of its position, Howells cites primarily to *McNally v. Rey*, but that case is readily distinguishable from the case at bar. *See* Brief of Appellant at 10-13 (citing *McNally v. Rey*, 275 Va. 475, 478 (2008)). In *McNally*, a trial had been scheduled for November 15, 2006. The defendant filed its witness and exhibit list in accordance with the trial court's scheduling order. The day before trial, the defendant filed for bankruptcy. Subsequently, the trial court awarded sanctions against the defendant under Code § 8.01-271.1 for fees incurred by the plaintiff on the basis that defendant's counsel filed his witness and exhibit list when he did not intend to try the case. This Court, after reviewing the pleadings and the oral

testimony of the parties below, found that that the trial court abused its discretion in awarding sanctions:

> The circuit court's order that imposed the sanctions agains t McNally was based upon the circuit court's conclusion that McNally filed a witness and exhibit list when he did not intend to try the case. There is simply nothing in the record before this Court that supports this finding. There is no evidence in the record that McNally's act of filing the witness and exhibit list was not well grounded in fact. There is nothing in the record before this Court that supports a finding that the witness and exhibit list was interposed for an improper purpose, such as to harass or cause unnecessary delay, or needless increase in the cost of litigation.

McNally v. Rey, 275 Va. 475, 482 (2008).

McNally differs from the case at bar in at least two material respects. First, in *McNally* there was a disconnect between the sanctioned conduct (filing the witness and exhibit list) and the evidence offered to prove that the witness and exhibit list was filed for an improper purpose (the filing of a bankruptcy petition). The defendant's eventual filing of a bankruptcy petition was not proof that the defendant intended to file bankruptcy at the time counsel filed his witness and exhibit list some fifteen days prior. Moreover, as this Court noted, "counsel in [the] state court proceeding . . . [did] not have an obligation to inform opposing counsel . . . that the attorney's client is considering filing a petition in bankruptcy." *Id.* at 482. In the case at bar, however, all of the information relevant to the Trial Court's

ruling was known to Howells at the time it filed its Motion for Default Judgment. As a result, the Trial Court could properly conclude from the circumstances that Howells knew its motion was all but certainly not going to be granted, yet proceeded anyways for an improper purpose.

Second, in *McNally* this Court had the benefit of a complete record. It had not only the pleadings, but also the transcript of oral argument.[6] As a result, the Court had been apprised of all of the information provided to and considered by the trial court, and could determine that there was no information before the trial court that would support its finding. *Id*. In this case, however, and as discussed above in more detail, Howells has not provided any record of the February 3, 2014 hearing at which the Trial Court had the opportunity to question counsel, and at which the Trial Court made oral findings. Accordingly, the Court does not have before it all of the information considered by the Trial Court in reaching its decision. And, in the absence of that information, this Court cannot conclude that the Trial Court did not have sufficient information to find that Howells filed its motion for an improper purpose.

Howells may not agree with the Trial Court's conclusion that Howells filed its motion for the purpose of needlessly increasing the cost of

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[6] *See id.* at 478-479 (quoting specific hearing testimony).

litigation, but on appeal the only question is whether the Trial Court abused its discretion in reaching that conclusion. *See Gilmore v. Finn*, 259 Va. 448 (2000). Further, the determination that Howells filed its motion for an improper purpose is a factual determination based, in part, on the Trial Court's evaluation of the credibility of oral representations made by counsel for Howells at the February 3, 2014 hearing. Such determinations are "accorded substantial deference on review and will be reversed only if plainly wrong or without evidence to support them." *E.g.*, *Sturgis v. Stinson*, 241 Va. 531, 536 (1991); *Caplan v. Bogard*, 264 Va. 219, 225 (2002). Given the facts of this case and the fact that this Court was not provided all of the information considered by the Trial Court, this Court cannot conclude that the Trial Court abused its discretion in awarding sanctions.

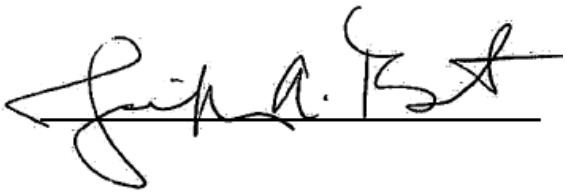
Finally, Howells also claims that the Trial Court's ruling creates "uncertainty" about whether an attorney may rely on the Rules, but that argument lacks merit. Brief of Appellant at 14. The Code is very clear that a motion that complies with the Rules may still give rise to sanctions if it is interposed for an improper purpose. Counsel must comply with the Rules at all times, but must also be aware that they have an additional obligation under Code § 8.01-271.1 to not file motions for an improper purpose. This

Court must not allow counsel to use the Rules as an excuse to advance unprofessional and improper advocacy.

CONCLUSION

For the foregoing reasons, the Trial Court's February 3, 2014 Order awarding sanctions to Wells Fargo against Howells should be affirmed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, November 20, 2015, the foregoing Brief of Appellee was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the same were hand delivered to the clerk's office. This same date, a copy of the Brief of Appellee was sent via email to all counsel of record, at the email addresses below:

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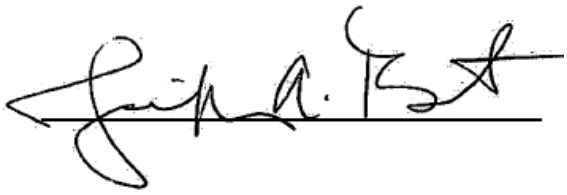

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