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IN THE

Supreme Court of Virginia

RECORD NO. 161640

THE ROBERT AND BERTHA ROBINSON FAMILY, LLC,

Appellant,

v.

DOUGLAS O. ALLEN, *et al*.,

Appellees.

OPENING BRIEF OF APPELLANT

Stephen D. Lofaso, Esq. (VSB 76992)
THE LAW OFFICES OF CLAY & LOFASO, PLLC
7430 Heritage Village Plaza
Suite 202
Gainesville, Virginia 20155
(703) 754-0503 (Telephone)
(703) 754-0580 (Fax)
filings@clay-lofaso.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT 2

STATEMENT OF FACTS 4

ARGUMENT 10

A. Assignment of Error 1 10
   1. Assignment of Error 1 – Standard of Review 10
   2. Assignment of Error 1 – Applicable Law 10
   3. Assignment of Error 1 – Application & Analysis of the Law 14
   4. Assignment of Error 1 – Conclusion 17

B. Assignment of Error 2 18
   1. Assignment of Error 2 – Standard of Review 18
   2. Assignment of Error 2 – Applicable Law 18
   3. Assignment of Error 2 – Application & Analysis of the Law 20
   4. Assignment of Error 2 – Conclusion 23

C. Assignment of Error 3 24
   1. Assignment of Error 3 – Standard of Review 24
   2. Assignment of Error 3 – Applicable Law 24
   3. Assignment of Error 3 – Application & Analysis of the Law 27
   4. Assignment of Error 3 – Conclusion 30

CONCLUSION 31

PRAYER FOR RELIEF 32

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

CASES

Ainslie v. Inman,
265 Va. 347, 577 S.E.2d 246 (2003)..... 10

Boyce v. Athey,
4 Va. Cir. 19 (Frederick County 1980) 13

Chesapeake & O. Ry. Co. v. Kinzer,
206 Va. 175, 142 S.E.2d 514 (1965)..... 11, 14, 15, 16

Covington Virginia v. Woods,
182 Va. 538, 29 S.E.2d 406 (1994)..... 10, 11, 14, 15, 16

EE Mart F.C., L.L.C. v. Delyon,
289 Va. 282, 768 S.E.2d 430 (2015)..... 19

Elite Child, Inc. v. Thor Gallery at Military Circle,
81 Va. Cir. 400 (Norfolk 2010) 19

Flippo v. CSC Assocs. III. L.L.C.,
262 Va. 48, 547 S.E.2d 216 (2001)..... 18

Flora v. Schulmister,
262 Va. 215, 546 S.E.2d 427 (2003)..... 18

Ford Motor Co. v. Benitez,
273 Va. 242, 639 S.E.2d 203 (2007)..... 19

Gilmore v. Finn,
259 Va. 448, 527 S.E.2d 426 (2000)..... 19

Glasser & Glasser, PLC v. Jack Bays, Inc.,
285 Va. 358, 741 S.E.2d 599 (2013)..... 10

Henderson v. Commonwealth,
285 Va. 318, 736 S.E.2d 901 (2013)..... 24

Hurst v. Ballard,
230 Va. 365, 337 S.E.2d 284 (1985)..... 14

K-B Corp. v. Gallagher,
218 Va. 381, 237 S.E.2d 183 (1977)..... 13

McMillion v. Dryvit Sys.,
262 Va. 463, 469, 552 S.E.2d 364, 367 (2001)..... 25

Oxenham v. Johnson,
241 Va. 281, 402 S.E.2d 1 (1991)..... 18, 19

Parrish v. Fannie Mae,
292 Va. 44, 787 S.E.2d 116 (2016)..... 17

Porter v. Commonwealth,
276 Va. 203, 661 S.E.2d 415 (2008)..... 27

Stockbridge v. Gemini Air Cargo, Inc.,
269 Va. 609, 611 S.E.2d 600 (2005)..... 24

Super Fresh Food Mkts. v. Ruffin,
263 Va. 555, 561 S.E. 2d 734 (2002)..... 14

Supinger v. Stakes,
255 Va. 198, 495 S.E.2d 813 (1998)..... 24

Surles v. Mayer,
48 Va. App. 146, 628 S.E.2d 563 (2006) 26, 27

Taboada v. Daly Seven, Inc.,
272 Va. 211 636 S.E.2d 889 (2006)..... 18

Tonti v. Akbari,
262 Va. 681, 553 S.E.2d 769 (2001)..... 19

Tvardek v. Powhatan Village Homeowners Ass'n, Inc.,
291 Va. 269, 784 S.E.2d 280 (2016)..... 11, 14, 16

United States v. Neeley,
420 Fed. Appx. 228 (4th Cir. 2011) 24

Volkswagen of Am., Inc. v. Smit,
279 Va. 327, 689 S.E.2d 679 (2010) 24

Warehouse Distrib., Inc. v. Prudential Storage & Van Corp.,
208 Va. 784, 161 S.E.2d 86 (1968) 23

Waterfront Marine Constr. v. North End 49ers Sandbridge Bulkhead Groups, 251 Va. 417, 468 S.E.2d 894 (1996) 25

CONSTITUTIONAL PROVISIONS

Va. Const. Art I. § 11 (2016) 24, 29

STATUTES

Va. Code § 8.01-271.1 (2016) 18, 20, 23, 29, 31

Va. Code § 16.1-88.01 (2016) 14

Va. Code § 16.1-106 (2016) 12, 14, 15

Va. Code § 16.1-106.1 (2016) 25, 29, 30, 31, 32

Va. Code § 16.1-107 (2016) 12, 15

Va. Code § 16.1-112 (2016) 14

SECONDARY SOURCES

Black's Law Dictionary, (Unabridged 10th Ed. 2014) 12

Black's Law Dictionary, 357 (Abridged 6th Ed. 1991) 26

Black's Law Dictionary, 403 (Abridged 6th Ed. 1991) 26

I. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR NO. 1 – THE TRIAL COURT MISAPPLIED LAW IN HOLDING IT HAD JURISDICTION TO HEAR APPELLEES' COUNTERCLAIM APPEAL AND HOLDING THE DE NOVO PROVISION OF VA. CODE § 16.1-106 AUTOMATICALLY APPEALS COUNTERCLAIMS ALTHOUGH APPELLEES NEVER FILED A NOTICE OF APPEAL OR PERFECTED THEIR COUNTERCLAIM APPEAL FROM GENERAL DISTRICT COURT. (JA 150-157; JA 269-277; JA 190-192).

B. ASSIGNMENT OF ERROR NO. 2 – THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING APPELLEES' MOTION FOR SANCTIONS PURSUANT TO VA. CODE §8.01-271.1 FOR APPELLANT'S ALLEGED LACK OF GOOD FAITH AND BASIS IN FACT OR AT LAW FOR ITS CLAIM. (JA 193-255; JA 269-277; JA 190-192; JA 266-268).

C. ASSIGNMENT OF ERROR NO. 3 – THE TRIAL COURT MISAPPLIED LAW IN ENTERING JUDGMENT FOR APPELLEES ON THEIR COUNTERCLAIM WITHOUT REQUIRING A TRIAL ON THE MERITS. (JA 193-255; JA 269-277; JA 190-192; JA 266-268).

II. STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

A. Statement of the Nature of the Case

This case stems from the appeal of a general district court case that the Appellant withdrew prior to trial in circuit court. The case involves questions regarding the fundamental right to a trial on the merits in civil cases between private litigants. The issue of whether an appeal of a counterclaim must be noted and perfected. It also involves the proper standard upon which the law regarding sanctions should be imposed upon litigants.

B. Material Proceedings in the Trial Court

Appellant, The Robert and Bertha Robinson Family, LLC ("Robinson") sued Appellees, Douglas Allen ("Mr. Allen") and ("Mrs. Allen") (collectively, the "Allens") for breach of contract. (JA 5-26). Robinson based the claim up a written lease and filed the action in the Warren County General District Court ("Warren GDC") (JA 5-26). After trial, Robinson appealed the decision of the Warren GDC to the Warren County Circuit Court ("Trial Court"). (JA 2-4).

At the hearing, just prior to trial of the appeal, held on or around June 8, 2016, the parties agreed to allow Robinson to withdraw its appeal. (JA

269-277). After agreeing to the withdrawal, the Allens requested the Trial Court sanction Robinson for making a claim in bad faith. (JA 269-277). Robinson countered this argument by stating the legal basis for its claim. Robinson further argued that the Trial Court lacked jurisdiction to hear the counterclaim appeal because of the Allens' failure to notice and perfect an appeal from the Warren GDC. (JA 269-277). The Trial Court dismissed Robinson's appeal as withdrawn but awarded the Allens judgment on their counterclaim and sanctioned Robinson by awarding the Allens' attorney's fees pursuant to Va. Code § 8.01-271.1 and set a future hearing date to determine the quantum to be awarded. (JA 269-277; JA 190-192).

At the hearing held on or around July 21, 2016, for determining reasonable attorney's fees, Robinson moved the Trial Court for reconsideration of its ruling citing the constitutional right to a trial on the merits and the limits of Va. Code § 16.1-106.1(E) as the reasons for reconsideration. (JA 193-255; JA 269-277). Robinson further objected to the Allens' request for over $12,000.00 in attorney's fees claiming evidence existed showing the good faith nature of its claim. (JA 269-277). The Trial Court declined to reconsider its prior ruling and entered judgment against Robinson in the amount of $2,600 and sanctioned Robinson $10,000 in attorney's fees. (JA 266-268).

III. STATEMENT OF FACTS

Robinson sued the Allens for breach of lease agreement in the Warren GDC under Case No. GV15002039-00. (JA 5-26). The Allens filed a counterclaim under Case No. GV15002745-00 alleging Robinson failed to return their security deposit as required under the lease. (JA 52-57).

The Warren GDC found for the Allens and against Robinson regarding the rents and damages in Case No. GV15002039-00. (JA 90-92). The Warren GDC never entered a judgment in Case No. GV15002745-00 on the counterclaim. However, the Warren County GDC did discuss the counterclaim in its judgment opinion letter issued in Case No. GV15002745-00 and found for Robinson and against the Allens stating a refund of the deposit was not due. (JA 90-92).

Robinson appealed the Warren GDC judgment to the Trial Court. (JA 2-4). The Allens never filed a notice of appeal for their counterclaim. Further, the Allens never posted a bond or paid any writ tax for an appeal on their counterclaim. (JA 1-92).

At the initial scheduling hearing after Robinson perfected its appeal, the Trial Court set trial for June 8, 2016. (JA 93-97). Robinson and the Allens made various motions prior to the trial date which the Trial Court heard on the date of trial. (JA 115-144; JA 150-157; JA 164-170). At the

hearing, the parties agreed to allow Robinson to withdraw its appeal. (JA 269-277).

After agreeing to the withdrawal, the Allens requested the Court sanction Robinson for making a claim in bad faith. (JA 269-277). In doing so, the Allens based their argument upon the fact that Robinson had failed to provide documents in response to discovery requests, timely. (JA 269-277). The Allens claimed this lack of documentation proved the claim was in bad faith. (JA 269-277). The Allens also claimed, through proffer of their side of the litigation, that Robinson had orally waived its rights to receive unpaid rent and have the premises leased returned to its pre-lease condition. (JA 269-277).

Robinson countered this argument by relating how its managing-member, a senior citizen of over ninety years and his wife, both had medical conditions. (JA 269-277). Robinson argued that the lack in documentation and timely discovery responses was due to an emergency medical situation suffered by the managing-member's wife which left the managing-member severely limited in functionality and unable to gather the documentation proving its claim as to the property damage at the premises leased. (JA 269-277).

Robinson, in further defense of the good faith nature of the claim, also noted that the Allens' proffered theory of the case was not consistent with the executed written lease agreement between the parties which clearly showed the written lease was integrated and not waivable via oral modification. (JA 269-277). Robinson argued that its claim was made in good faith but still requested the appeal be withdrawn because it believed its managing-member was not capable of fulfilling the duties required to successfully litigate the case and without the documentation proving the condition of the premises, which did exist, that any possibility of receiving a different result from that in the Warren GDC was unlikely. (JA 269-277).

After making its case for the good faith nature of its claim, Robinson further argued that the Trial Court lacked jurisdiction to hear the counterclaim appeal because of the Allens' failure to notice and perfect an appeal from the Warren GDC. (JA 269-277). Robinson, in its argument, claimed that because the Allens did not file either a notice of appeal or perfect that appeal from the Warren GDC, they waived their right to appeal the counterclaim. (JA 269-277). Robinson contended that the withdrawal of its appeal and the failure of the Allens to appeal their counterclaim should finalize all issues before the Trial Court such that the parties could

end the litigation through the withdrawal of Robinson's appeal. (JA 269-277).

The Trial Court dismissed Robinson's claim as withdrawn but awarded sanctions under Va. Code § 8.01-271.1. (JA 190-192). The Trial Court stated that the rule on sanctions required a party to have all evidence in hand prior to even filing a lawsuit. (JA 269-277). The Trial Court awarded the Allens' attorney's fees to be determined at a later hearing. (JA 190-192; JA 269-277). After the Trial Court finished rendering its opinion, the Allens then requested judgment on their counterclaim appeal which the Trial Court granted pursuant to Va. Code § 16.1-106.1(E) claiming the right to enter any order including judgment for the counterclaim appeal because Robinson withdrew its appeal. (JA 190-192; JA 269-277).

Robinson then moved the Court for reconsideration of its ruling citing demonstrative evidence as proof of Robinson's good faith claim, the constitutional right to a trial on the merits, and the limits of Va. Code § 16.1-106.1(E) as grounds for reconsideration. (JA 193-255; JA 269-277). At the hearing on reconsideration, Robinson argued that its claim was in fact brought in good faith. (JA 269-277). Robinson cited the lease agreement between the parties as proof that its claim was brought in good faith. (JA 193-255). Robinson specifically called to the Trial Court's attention

paragraph 41(b) of the lease agreement which stated that the Allens could not create an oral lease outside of the written lease upon expiration of the initial term of the written lease as argued by the Allens in their proffer. (JA 193-255; JA 269-277). Robinson also cited case law in Virginia which holds that a hold-over tenant is still obligated to perform on the written lease governing the parties' relationship prior to the expiration of the term of the lease. (JA 193-255; JA 269-277).

Robinson further argued that the Allens proffer of an oral agreement governing the parties' relationship upon expiration of the written lease term was contrary to the very language contained in the written lease which required the written lease to govern in just such a situation. (JA 269-277). Robinson contended that upon expiration of the initial written lease paragraph 41(b) became effective thus requiring the Allens to pay double the normal lease rate per month and leave the premises in the same repair as it was when they took possession. (JA 269-277).

Robinson next claimed that because the lease still governed the relationship that paragraph 41(a) was effective at the time of the Allens' departure from the premises. (JA 269-277). Robinson cited paragraph 41(a) for the proposition that the premises must be returned in good order and condition and broom-clean with the removal of all additions and

alterations made. (JA 193-255; JA 269-277). Robinson then referred to the demonstrative evidence provided with its Motion for Reconsideration which showed the premises were not returned in good order and condition but rather needed thousands of dollars of repairs to bring it back to its prior form. (JA 193-255; JA 269-277).

Next, Robinson addressed the Trial Court's decision to enter judgment without trial on behalf of the Allens regarding the Allens' counterclaim. (JA 269-277). Robinson argued that the Trial Court's interpretation of Va. Code § 16.1-106.1(E) which allowed the Trial Court to enter judgment against Robinson without a trial and without the Trial Court taking evidence violated the Virginia Constitution which requires trial on the merits in suits between private parties. (JA 269-277). Robinson urged the Trial Court to reconsider its ruling because the Trial Court heard no evidence or witnesses before reaching its judgment. (JA 269-277).

The Court declined to reconsider its prior ruling and entered judgment against Robinson and for the Allens and awarded the Allens $2,600.00 on the lease security deposit claim and $10,000 in sanctions via an award of attorney's fees. (JA 266-268).

IV. ARGUMENT

A. Assignment of Error No. 1

1. Standard of Review

The issue of whether the Trial Court had subject matter jurisdiction over the Allens' counterclaim is one of law which this Court reviews de novo. *Glasser & Glasser, PLC v. Jack Bays, Inc.*, 285 Va. 358, 369, 741 S.E.2d 599, 604 (2013). Furthermore, the interpretation of a statute is a pure question of law that must be reviewed *de novo*. *Ainslie v. Inman*, 265 Va. 347, 352, 577 S.E.2d 246, 248 (2003).

2. Applicable Law

This Court has never ruled on the issue of whether a defendant's counterclaim made in general district court is automatically appealed to circuit court upon a plaintiff's notice of appeal and perfect thereof. Therefore, Robinson contends this is an issue of first impression for this Court.

The right to an appeal is a statutory creation and does not exist at common law. *Covington Virginia v. Woods*, 182 Va. 538, 543, 29 S.E.2d 406, 409 (1994). To receive an appeal, even one of right, the statutory prerequisites must be observed and followed for the appellate court to obtain jurisdiction. *Id*. Strict compliance with the statutory scheme must be

adhered to because the legislative prescription for the exercise of a right to appeal is the exclusive method which grants jurisdiction to the appellate court. *Id*. A Court should not change these rules without express legislative direction and then only to the extent the clear language of the statute allows. *Id*. In other words, the statutory right to appeal is in contrast with the common law which does not grant a right of appeal. *Id*.

When a right created by statute is in derogation of the common law, the statute must be strictly construed. *Chesapeake & O. Ry. Co. v. Kinzer*, 206 Va. 175, 181, 142 S.E.2d 514, 518 (1965). The statute should be interpreted using a strict textual understanding of the express terms of the statute and should not be construed by construction beyond those terms. *Id*. In interpreting the statutory text, the presumption should be that the legislature carefully chose its words when enacting the statute. *Tvardek v. Powhatan Village Homeowners Ass'n, Inc.*, 291 Va. 269, 277, 784 S.E.2d 280, 284 (2016). Interpretations should not add words to the statute that the legislature chose to omit nor remove terms the legislature chose to include. *Id*. Instead, the interpretation should enforce the plain meaning of the statute as written and not create rights that are not explicitly stated when the statute contradicts the common-law rule. *Id*.; *Chesapeake & O. Ry. Co.*, at 181.

The right to appeal a civil judgment for a court not of record requires the noticing of an appeal and the perfection of that appeal. Va. Code § 16.1-106 - 107 (2016). The statutory language authorizing appeals for courts not of record allows for an appeal of right to a court of record if taken within 10 days of entry of the civil judgment. Va. Code § 16.1-106 (2016). Next, the statute states the appeal shall be *de novo* in nature. *Id*. Trial *De Novo* means a new trial on the entire case as to fact and law as if the lower court had not ruled on the merits of the case. Black's Law Dictionary, (Unabridged 10th Ed. 2014).

The statutory language states that once the movant notes the appeal, the paying of a writ tax is required by statute. Va. Code § 16.1-107 (2016). Furthermore, a bond may be required. *Id*. If a bond is required, an appeal is not allowed until the movant posts the bond. *Id*. The movant does not need to post a bond when the movant is the plaintiff, in a civil case, and the defendant has not asserted a counterclaim. *Id*. However, any party wishing to appeal must pay a writ tax regardless of whether a bond is required. *Id*.

While the statutory language is well-known, precedential case law on the issue of whether a counterclaim defendant must note the appeal and pay a bond and the writ tax is scant. The only case of record discussing

the issue of whether a counterclaim is automatically appealed failed to reach a decision on the merits of that issue. *K-B Corp. v. Gallagher*, 218 Va. 381, 386, 237 S.E.2d 183, 186 (1977). In *K-B Corp.*, the defendant filed a counterclaim in a court not of record but failed to ensure the court entered a judgment on the claim. *Id*. The *K-B Corp.* Court held the defendant waived his counterclaim by failing to ensure the lower court entered an appealable judgment. *Id*. Other than the K-B Corp. case, no Supreme Court cases have taken up the issue. Furthermore, the issue has only been addressed directly in one non-precedential but informative opinion from the circuit courts of the commonwealth.

The Fredrick County Circuit Court ruled that a defendant's counterclaim is appealed when plaintiff appeals a judgment. *Boyce v. Athey*, 4 Va. Cir. 19 (Frederick County 1980). The *Boyce* Court cited Va. Code §§ 16.1-106, 112, and 88.01 in determining that a counterclaim is automatically appealed upon plaintiff's perfection of an appeal. *Id*. The *Boyce* Court reasoned that the interplay of the cited statutes created a legislative intent to allow counterclaims to "piggy-back" on plaintiff's claim into a court of record. In doing so, it held that a defendant with a counterclaim has its appeal perfected even though defendant does not notice an appeal or pay any bond or writ tax.

However, contrary to Frederick County Court's ruling, this Court has ruled that the noting of an appeal and the payment of the writ tax is jurisdictional. *Super Fresh Food Mkts. v. Ruffin*, 263 Va. 555, 563, 561 S.E. 2d 734, 739 (2002); *Hurst v. Ballard*, 230 Va. 365, 367, 337 S.E.2d 284, 285 (1985). Furthermore, the language of Va. Code §§ 16.1-106 and 107 state the noticing of an appeal, posting of a bond, and the paying of the writ tax are required to exercising the right to an appeal. *Id*. While the direct language of the statutes requires a general district court to issue a judgment both to claims and counterclaims, Va. Code §§ 16.1-106, 16.1-112, and 16.1-88.01 do not specifically grant a counterclaimant a right of appeal without fulfilling the jurisdictional requirements. Relying on the interplay of these statutes rather than direct statutory language dispositive of the issue is contrary to the rationale for the jurisdictional nature of the notice of appeal and payment of bond and writ tax which matches the legal theories set for in *Covington Virginia*, *Chesapeake & O. Ry. Co.*, and *Tvardek.*

3. <u>Application & Analysis of the Law</u>

The statutory language of the Va. Code §§ 16.1-106 and 107 do not directly address whether a defendant's counterclaim is automatically appealed when a plaintiff perfects its appeal. The plain language of the

Virginia Code never addresses the situation. As such, by precedent as stated in *Chesapeake & O. Ry. Co.*, the language should not be added by attempting to divine legislative intent. Furthermore, by following the plain language of the statutes, it is clear certain mandatory requirements must be fulfilled to appeal to a court not of record.

The statutes do lay out three mandatory and jurisdictional requirements that must be satisfied for an appeal to be taken as required by *Covington Virginia*. The very wording of Va. Code § 16.1-107 shows the mandatory and jurisdictional nature of the statutes by stating "No appeal shall be allowed". In other words, the statutory right granted herein shall not be allowed unless the requirements are met. Therefore, to perfect an appeal, a party must satisfy all three requirements of Va. Code §§ 16.1-106 & 107.

The first mandatory and jurisdictional requirement is found in Code § 16.1-106. It requires a moving party to note its appeal within 10 days or forfeit its right to appeal. The second mandatory and jurisdictional requirement is found in Va. Code § 16.1-107 and requires the party wanting an appeal to pay a bond, when required. Finally, the third requirement, also found in Va. Code § 16.1-107, makes the payment of the writ tax mandatory to the perfection of the appeal.

In the instant case, the Allens did not note any appeal or pay any bond or writ tax. By failing to do so, the Allens failed to perfect their right to an appeal by failing to satisfy any of the three mandatory requirements to trigger the court of records' jurisdiction. While the *Boyce* Court's ruling holds that the Allens do not need to satisfy these requirements because of the *de novo* basis of the trial, the holdings in *Covington Virginia*, *Chesapeake & O. Ry. Co.*, and *Tvardek* make it clear that the legislative intent should not be considered when interpreting a statute that is in derogation of the common law.

Furthermore, the holding in *Boyce* requires the plaintiff to confer a benefit upon the defendant paying for the appeal and allowing him to get a free appeal without taking one affirmative action. Considering this practical effect of prejudice to the plaintiff and the legal and equitable principles which is the aim of American jurisprudence, any interpretation which allows for a benefit to one party due to the effort of only the other party is clearly in error. If the legislature wanted defendant to get an automatic appeal of its counterclaim, it would have done so, specifically. While the *de novo* nature of an appeal does treat the lower court's decision as null and void, it voids the Court's rulings as to law and fact not as to whether a party complied with mandatory and jurisdictional requirements for preserving the party's

right to appeal. Regardless of the *de novo* nature of the appeal, it is still an appeal, which claims are subject to jurisdictional requirements, and still a continuation of the lower court case to the extent the appellate court has jurisdiction over those claims. *Parrish v. Fannie Mae*, 292 Va. 44, 54, 787 S.E.2d 116, 121 (2016).

4. <u>Conclusion</u>

The purpose of the statutes governing the appeal process from a court not of record to a court of record is to give the litigants and the courts certainty as to the end of litigation. The statutory code set out by the legislature abrogates the common law which does not allow for appeals. Because the statutes change the common law, the statutory code must be strictly construed and adhered to by the courts.

The requirements of the statutes must be met for a court of record to have jurisdiction over the case. When, as in the instant case, a party fails to advance their claim and takes no affirmative action to note or perfect their appeal, the result must be the entry of a final judgment as to that claim. To do anything else would cause uncertainty as to the end of the litigatory process and would be in contradiction of the plain language of the appeal statutes and equity and fairness.

B. Assignment of Error No. 2

1. Standard of Review

The standard of review of the Trial Court's decision to grant sanctions is one of abuse of discretion. *Oxenham v. Johnson*, 241 Va. 281, 287, 402 S.E.2d 1, 4 (1991). The standard is one of reasonableness which determines whether the Trial Court could have reasonably believed Robinson's actions in filing the appeal were not well grounded in fact and warranted under law. *Flora v. Schulmister*, 262 Va. 215, 220, 546 S.E.2d 427, 429 (2003).

2. Applicable Law

Va. Code § 8.01-271.1 governs the law of sanctions in Virginia. To avoid sanctions a claimant actions must be (1) well-grounded in fact; (2) warranted by existing law or a good-faith basis for changing existing law; and (3) not filed for any improper purpose. Va. Code § 8.01-271.1 (2016). In determining whether a litigant conformed with the statute's proscriptions such that sanctions should or should not be imposed, an objective standard must be used to determine the good faith basis of the claim. *Taboada v. Daly Seven, Inc.*, 272 Va. 211, 215, 636 S.E.2d 889, 890 (2006); *Flora*, 262 Va. at 220; *Flippo v. CSC Assocs. III. L.L.C.*, 262 Va. 48, 65–66, 547

S.E.2d 216, 227 (2001); *Gilmore v. Finn*, 259 Va. 448, 466, 527 S.E.2d 426, 435 (2000).

Before ever awarding sanctions, careful consideration should be taken to ensure the matter is dealt with in a serious manner with careful consideration. *Tonti v. Akbari*, 262 Va. 681, 685, 553 S.E.2d 769, 771 (2001); *Oxenham*, 241 Va. at 286, 402 S.E.2d 1, 3 (1991). The sanction should only address actions litigants took before the tribunal considering the sanctions and not matters in other tribunals, including but not limited to, courts not of record. *EE Mart F.C., L.L.C. v. Delyon*, 289 Va. 282, 286, 768 S.E.2d 430, 432-33 (2015); *Elite Child, Inc. v. Thor Gallery at Military Circle*, 81 Va. Cir. 400 (Norfolk 2010). When considering sanctions, they should not be used to stifle unique clams or theories of recovery that are well-grounded in fact and or existing law. *Gilmore* at 466. Instead, the Court should consider all facts and evidence before it and base its ruling upon an assessment of the actual knowledge of the attorney executing the pleading at the time of execution as to the attorney's knowledge that no factual or legal support existed for his allegations. *Ford Motor Co. v. Benitez*, 273 Va. 242, 250-51, 639 S.E.2d 203, 207 (2007). Finally, just as the exercise of a statutory right is not grounds for a finding of abuse of

process, it should not be grounds for sanctions pursuant to Va. Code § 8.01-271.1.

3. <u>Application & Analysis of the Law</u>

In the current case, the Allens moved for sanctions upon Robinson's request to withdraw its appeal. The Allens, through proffer, claimed the Parties created an oral agreement at the end of the Allens' tenancy and that through this oral agreement Robinson agreed to forgive all rent amounts due and owing under the written lease. The Allens also claimed Robinson waived its rights to have the premises returned in good repair under the written lease through this oral agreement. Robinson disagrees with the Allens' proffer and understanding of law and advanced its claims based upon theories well-grounded in the facts and the law such that the imposition of sanctions was not reasonable.

As stated early, Robinson and the Allens executed a written agreement for the lease of the premises at issue in this case. Paragraph 41(b) of the written lease specifically states that,

> "If Tenant shall hold possession of the Demised Premises after the expiration or sooner termination of the term of this Lease, Landlord shall have the right, at its sole option and discretion, to determine the nature of Tenant's possession of the Demised Premises after the end of the term of this Lease, in accordance with the following provisions: (i) If Landlord so desires, Tenant shall be deemed to be occupying the Demised Premises as a Tenant from

> month to month, at double the annual minimum rent prescribed herein in effect during the last lease year hereof immediately preceding such holdover period, adjusted to a monthly basis, and subject to all the other conditions, provisions and obligations of this Lease insofar as the same are applicable, or as the same shall be adjusted; to a month-to-month tenancy; or (ii) If Landlord so desires, Tenant may be treated as a trespasser, and Landlord shall be entitled to the benefit of all laws relating to the speedy recovery of the possession of the Demised Premises. Unless Landlord notifies Tenant in writing to the contrary within thirty (30) days after the expiration or sooner termination of the term of this Lease, the provisions of paragraph (i) above shall apply and this Lease shall automatically become a month-to-month lease, and Tenant's possession hereunder a month-to-month tenancy, without notice from Landlord."

Besides the above, paragraph 41(a) also required the Allens to restore and repair the premises and return it in good and broom-clean condition.

By the very terms of the lease agreement, one can see Robinson's theory of the case and claim for breach of contract is clearly made in good faith. The lease provides that upon expiration of the initial term the tenant, in this case the Allens, shall become tenants at sufferance unless a written executed option to terminate is signed by the landlord, in this case Robinson. The parties do not contest that Robinson never issued a written notice pursuant to this paragraph of the lease agreement. As such, Robinson, who based its claim upon the written lease not an oral modification outside the lease which the lease language clearly does not

allow, had a good cause of action against the Allens for breaching the lease agreement.

In support of its claims, Robinson points to the numerous receipts for work performed and costs expended included in its request for reconsideration. Robinson specifically draws the Court's attention to the pictures of the premises @ JA 241-255 which show damaged fuse boxes, damaged floors, damaged walls, etc. as demonstrative proof that counsel upon executing the Notice of Appeal and perfection thereof had a factual basis to state the condition of the premises upon the Allens' termination of the tenancy did not conform to paragraph 41(a) of the lease. Robinson's reliance upon these two sections of the lease along with the documentary evidence which represents the cost of repairs to the property and the condition of the property upon the Allens' vacancy demonstrates the claim for breach of contract was brought in good faith.

Nevertheless, the Trial Court sanctioned Robinson irrespective of the exhibits produced with Robinson's request for reconsideration. Robinson believes this is because the Court's never heard any evidence nor gathered all the facts before deciding Robinson's claim was made in bad faith. Instead, Robinson argues that the ruling was based upon the fact that Robinson withdrew its appeal. Robinson believes that the Trial Court saw

the request for withdrawal of the appeal as an admission that the case was not brought in good faith. However, a litigant's exercise of a statutory right allowed by the legislature should not be grounds for sanctioning a party. While the court may have believed Robinson's withdrawal was proof of bad faith, the withdrawal of the case is allowed by law much like a non-suit a court should not punish a litigant for its exercise of a right granted it.

4. <u>Conclusion</u>

While the parties may differ as to the effect of the lease agreement after the end of the term and the effect of any alleged oral agreement outside the lease, such difference in legal analysis do not rise to the level of actions prohibited by 8.01-271.1. While the Court may have disagreed with Robinson's analysis, a reasonable inquiry shows no bad faith on the part of Robinson in bringing the claim for breach of contract. Robinson was clearly attempting to make the case that the Allens were tenants at sufferance and were required conform to the lease agreement terms. Such a basis for recovery has been recognized in this commonwealth. *See*. *Warehouse Distrib., Inc. v. Prudential Storage & Van Corp.*, 208 Va. 784, 161 S.E.2d 86 (1968). To hold that Robinson made such a claim in bad faith is an abuse of discretion.

C. Assignment of Error No. 3

1. Standard of Review

The issue of whether a litigant's due process rights were violated is one of law which requires a review *de novo*. *Henderson v. Commonwealth*, 285 Va. 318, 329, 736 S.E.2d 901, 907 (2013) (citing *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 335, 689 S.E.2d 679, 684 (2010) and *United States v. Neeley*, 420 Fed. Appx. 228, 231 (4th Cir. 2011). Also, the interpretation of a statute is a pure question of law that must be reviewed *de novo*. *Ainslie* at 352.

2. Applicable Law

The right to a trial on the merits is a fundamental right protected by the Constitution of Virginia. Va. Const. Art I. § 11 (2016); *Supinger v. Stakes*, 255 Va. 198, 202, 495 S.E.2d 813, 815 (1998). While the power to decide a case summarily exists for claims where no material fact exists or when a claim is not brought in good faith, a trial on the merits should be the primary vehicle for determining the rights of a party unless extraordinary circumstances exist. *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 618, 611 S.E.2d 600, 604 (2005).

Furthermore, and important to this assignment of error, one must remember that a Court speaks through its orders and those orders are

considered to reflect what transpired during the proceedings. *McMillion v. Dryvit Sys.*, 262 Va. 463, 469, 552 S.E.2d 364, 367 (2001); *Waterfront Marine Constr. v. North End 49ers Sandbridge Bulkhead Groups*, 251 Va. 417, 427 n. 2, 468 S.E.2d 894, 900 n. 2 (1996).

Regarding withdrawal of appeals, the process is clearly stated in the code. A party may move for a withdrawal of appeal by filing a written motion with the circuit court hearing the appeal. Va. Code § 16.1-106.1(A)(2). After movant files a notice of withdrawal, the non-movant may file an objection to the notice and have his objection heard. Va. Code § 16.1-106.1(C). The Court shall then allow the withdrawal or sustain the objection. *Id*. If the Court allows the withdrawal, subject to subsections E and F of Va. Code §16.106.1, "the circuit court shall enter an order disposing of the case in accordance with the judgment or order entered in the ***district court***. *Id*. (Emphasis added).

The law clearly states that a court of record may grant relief to the non-withdrawing party in sections E & F of the code. However, the code limits the relief that may be granted by stating the court may grant, "additional relief…which has ***accrued*** since the appeal was noted, including but not limited to attorney's fees provided for by contract or statute". Va. Code § 16.1-106.1(E) (2016). While the precise remedies

that may be awarded are not exhaustively listed by the statute, the category of remedies does not include direct or summary verdict for the non-moving party. As such, the legal maxims of *expressio unius est exclusio alterius* and *noscitur a sociis* and the rule of *ejusdem generis* must be used along with other statutory construction devices to define the limits of legislative intent. *Surles v. Mayer*, 48 Va. App. 146, 164, 628 S.E.2d 563, 571 (2006).

The legal maxim *expressio unius est exclusio alterius* means the expression of one thing excludes others. Black's Law Dictionary, 403 (Abridged 6th Ed. 1991). The maxim assists the interpreter of a statute when the legislature uses the word "including". By using the maxim, the interpreting court determines what is included and excluded from the statutory group of things. *Id*. Importantly, the maxim requires the exclusion of all remedies not specifically mentioned by statute. *Id*. Nevertheless, when the legislature uses the terms, "including, but not limited to", the maxim is inapplicable. *Id*.

In contrast, the rule of *ejusdem generis* means "of the same class, kind, or nature". Black's Law Dictionary, 357 (Abridged 6th Ed. 1991). The rule is used to interpret the boundaries of a class when a statute names a class of things and then the class is followed by general words. *Surles* at

164. Furthermore, the maxim *noscitur a sociis* requires a Court to interpret a "unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it." Black's Law Dictionary, (Unabridged 10th Ed. 2014). In other words, "if a statute provides an illustrative list of…things to which the provision should apply, an unremunerated…thing must be similar in nature to those expressly listed". *Surles* at 165. Finally, statutory language must be interpreted by viewing the statute as a whole and giving each part its proper meaning so as to ensure nothing is added or omitted via interpretation. *Porter v. Commonwealth*, 276 Va. 203, 230, 661 S.E.2d 415, 427 (2008).

3. <u>Application & Analysis of the Law</u>

The Trial Court in its orders do not state the grounds upon which it entered judgment against Robinson and for the Allens on the Allens' counterclaim. Unlike, the Trial Court's order as to sanctions which specifically states it is pursuant to Va. Code § 8.01-271.1, the Trial Court included no statutory or case law references for its decision.

Robinson can only assume that the Court relied upon the Allens' argument during the hearings where they cited Va. Code § 16.1-106.1(E) on the withdrawal of appeals as the precedent upon which the Court could enter judgment for the Allens. However, Robinson urges this Court to

interpret the code per the maxims and rules of statutory construction stated in its section on applicable law. Any other interpretation would create a contradictory result based upon the arguments the Allens have made with respect to the perfection of the counterclaim.

The Allens successfully argued that the appeal Robison filed and perfected caused the counterclaim to be appealed as well. However, if this is the law of the commonwealth, then by extension, the Trial Court lacked the ability to enter judgment on the Allens' counterclaim once the appeal was withdrawn. If the counterclaim appeal is tied to Robinsons appeal because the case as a whole is appealed, then Robinsons' withdrawal of the appeal must also involve the withdrawal of the Allens' counterclaim. To hold otherwise is contradictory in nature. Either the counterclaim is appealed because it is part of a whole case appeal and subject to withdrawal when plaintiff withdraws its appeal or it is separate in which case it must be appealed and such appeal must be perfected in its own right. It cannot be both tied to plaintiff's claim and not tied to plaintiff's claim at the same time. To rule as such is unjust and inequitable because it allows the defendant the benefit of plaintiff's diligence without any consideration for receiving that benefit.

Next, while it is admitted that the statutory language allows a judge to enter those orders necessary to end the appeal in total, Robinson argues that the statute does not give the Trial Court the power to enter judgment for the Allens on their counterclaim. In fact, the statute states just the contrary and says the circuit court must reinstate the general district court ruling and may only award additional relief for damages that accrued after the notice of appeal is filed, not pre-existing claims like the Allens' counterclaim.

As stated prior, certain extraordinary situations do exist where a Trial Court may grant judgment without a trial on the merits. Nevertheless, the Allens' argument that Va. Code § 16.1-106.1 gives unfettered power to the Trial Court to enter judgment on a counterclaim without trial merely because a plaintiff withdraws its appeal as Va. Code § 16.1-106.1 allows is tantamount to an override of the constitutional rights guaranteed by Article I, § 11. An interpretation that overrides the clear constitutional mandate is strained at best.

Clearly, the legislature understands the constitutional rights litigants have and would not draft the withdrawal statute in such a way as to allow a court the power to violate the sacred right to a trial on the merits between litigants. Robinson contends that an interpretation that leads to such a

result is beyond both the textual reading of the statute and the legislative intent behind the statute on withdrawal of appeals. As such, Robinson urges the Court not to adopt such an interpretation. Instead, Robinson request this Court interpret the statutory language to require a circuit court to reinstate the general district court judgment and only allow the entry of additional relief that ***accrues*** since the time of the appeal *e.g.* the awarding of additional rent upon the withdrawal of an appeal by a tenant in unlawful detention of property.

4. <u>Conclusion</u>

The Trial Court was unclear in stating the reasons and analysis behind its decision to grant judgment on behalf of the Allens. However, even if the Court utilized Va. Code § 16.1-106.1, its use must conform with the due process protections guaranteed by the Virginia Constitution and statutory language enacted by the legislature. While extraordinary cases do exist, which create a compelling interest for a court of record to enter judgment without holding a trial on the merits, such cases must be narrowly tailored to specific instance. Holding that Va. Code § 16.1-106.1 gives blanket authority to enter judgment against a party withdrawing its appeal violates the narrowly tailored scrutiny that must be given to a statute when

due process rights are involved. For these reasons, Robinson argues the Court erred in granting the Allens judgment without a trial on the merits.

V. CONCLUSION

In summary, Robinson requests this Court overturn the judgment of the Trial Court because it errored in granting the Allens judgment on their counterclaim and awarding the Allens sanctions. Robinson argues that the statutory law on appellate jurisdiction required the Allens to take affirmative actions to note and perfect their appeal and that the Trial Court erred in not dismissing their counterclaim appeal for lack of subject matter jurisdiction. In the alternative, Robinson argues that the Trial Court misinterpreted and misapplied Va. Code § 16.1-106.1 when it entered judgement against Robinson after granting Robinson its appeal withdrawal.

Finally, Robinson argues that the Trial Court erred in granting the Allens sanctions for Robinson's counsel's violation of the good faith clause of Va. Code §8.01-271.1. Robinson argues that evidence of property damage did exist and that the lease agreement allowed for the recovery of such damage along with additional rental amounts. Furthermore, the Trial Court failed to consider the most important issue – whether, at the time of filing the notice of appeal, Robinson's counsel had actual knowledge no

basis existed at law or fact for his client's claim. Its failure to undertake such required analysis is an abuse of discretion.

VI. PRAYER FOR RELIEF

WHEREFORE, The Robert and Bertha Robinson Family, LLC humbly requests this Court overturn the judgment of the Trial Court as contrary to law specifically, Va. Code § 16.1-106.1(C), in the alternative, dismiss Douglas and Deborah Allens' counterclaim appeal for lack of subject matter jurisdiction, overturn the Trial Court's granting of sanctions, and finalize the case or remand the case to the Trial Court for further proceedings based upon this Court's ruling, and/or grant such other relief this Court deems just and proper.

Respectfully submitted,

THE ROBERT & BERTHA
ROBINSON FAMILY, LLC
BY COUNSEL

*Stephen D. Lofaso, Esq. /s/*_____
Stephen D. Lofaso, Esq. VSB# 76992
The Law Offices of Clay & Lofaso, PLLC
7430 Heritage Village Plaza, Suite 202
Gainesville, Virginia 20155
Ph: (703) 754-0503
Fax: (703) 754-0580
Email: filings@clay-lofaso.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, a PDF version of this brief has been filed through VACES and three paper copies delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via email. I further state and certify that I sent the forgoing Opening Brief for Appellant, consisting of 34 pages, by email, this 30th day of May, 2017 to:

Andrew P. Hill, Esq., VSB # 80474
McCarthy & Akers, PLC
302 W. Boscawen Street
Winchester, VA 22601
Ph: (540) 722-2181
Fax: (540) 722-2381
ahill@mccarthyakers.com
Counsel for Appellees

*Stephen D. Lofaso, Esq. /s/*_____
Stephen D. Lofaso, Esq. VSB# 76992
The Law Offices of Clay & Lofaso, PLLC
7430 Heritage Village Plaza, Suite 202
Gainesville, Virginia 20155
Ph: (703) 754-0503
Fax: (703) 754-0580
Email: filings@clay-lofaso.com
Counsel for Appellant