For Opinion See 483 S.E.2d 220

Supreme Court of Virginia.
Tina Marie LAKE, Appellant,
v.
NORTHERN VIRGINIA WOMEN'S MEDICAL CENTER, INC., Thomas H. Gresinger, M.D., and Wayne C. Codding, Appellees.
No. 961088.
October 22, 1993.

From the Circuit Court of Fairfax County

Opening Brief of Appellant Tina Marie Lake

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***1** TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Nature of the Case

This case is an abortion malpractice case brought by injured appellant Tina Marie Lake ("Ms. Lake") against the alleged owners/operators and medical director of the abortion clinic where the abortion was performed.

Identification of Appellees and their Counsel

Appellees are:
1. Northern Virginia Women's Medical Center, Inc. (hereafter "Women's Medical Center" -- the alleged owner/operator of the abortion clinic named "NOVA Women's Medical Center" (hereafter "the clinic" or "the abortion clinic").
2. Dr. Thomas Gresinger, the Medical Director of the abortion clinic, and an officer and one of two shareholders in both:
***2** a) Women's Medical Center (the corporation sued that admitted it is the true owner/operator of the abortion clinic); and
b) Fairfax Square Medical Associates, Inc. (hereafter "Fairfax Square") (the corporation *not* sued that ten (10) days before the second trial was revealed by Women's Medical Center and the other Clinic defendants to be the true owner/operator of the abortion clinic instead of Women's Medical Center).
3. Wayne Codding (hereafter "Mr. Codding"), an accountant and an officer and the other sole shareholder in both of the above corporations.

Ms. Lake claims that Dr. Gresinger is liable in his role as Medical Director of the Clinic; and she claims that Dr. Gresinger and Mr. Codding each should be held liable by virtue of a piercing of the “corporate veil” of Women's Medical Center.

In this brief, Ms. Lake will refer collectively to these defendants/appellees as “the Clinic defendants”.

Counsel for the Clinic defendants, as well as Fairfax Square, the corporation not sued) has been and is Mark A. Barondess (“Mr. Barondess”) of the law firm of SANDGROUND, BARONDESS & WEST.

By stipulation and agreement of counsel for Ms. Lake and former defendant Dr. Joel Match (the abortion doctor who performed the abortion), Dr. Match is not a party to this appeal.

***3** *Material Proceedings*

Ms. Lake initiated this case in early 1992 by medical malpractice Notice of Claim.

Ms. Lake filed suit in later 1992 in Warren County, Virginia, where she resided/resides. The Circuit Court of Warren County transferred the case to Fairfax County Circuit Court.

Trial by jury was scheduled to commence in January, 1994. The parties engaged in expansive discovery. However, during a deposition of Mr. Codding in the final three (3) days of discovery, the Ms. Lake's counsel became ill and Ms. Lake was unable to complete discovery. She non-suited the case and re-commenced it in 1994.

The parties entered into a Consent Order which incorporated into the re-filed case the expansive discovery from the non-suited case. Ms. Lake also engaged in substantial discovery in the re-filed case.

The jury trial of the re-filed case was scheduled to commence on December 11, 1995.

On December 1, 1995, ten (10) days before trial, the Clinic defendants and their counsel filed a motion to dismiss, advising the trial court and Ms. Lake's counsel ***4** for the first time that the correct owner-operator of the abortion clinic: 1) was/is *not* the Clinic defendants, including Women's Medical Center; 2) instead was/is Fairfax Square. (App. 296-298) The motion to dismiss contended that Fairfax Square was/is an “indispensable party” and that the trial of the case could *not* go forward without that party. (App. 296-298)

The motion to dismiss was heard on December 8, 1995, three (3) days before trial. At the hearing Ms. Lake made the following motions, each of which the trial court denied:
1. that the trial court grant leave to amend the motion for judgment to add the new party (Fairfax Square).
2. that the trial court grant a continuance.
3. that the trial court grant a nonsuit in its discretion.

During the course of the hearing, the Clinic defendants reversed their previous written stipulation in the motion to dismiss that Fairfax Square was an indispensable party and that the parties could not proceed to trial without it; and moved that the trial proceed against the existing defendants without Fairfax Square. (App. 136-137) The trial court granted this motion, ruling that trial against the existing defendants only must proceed on the following day (December 11) (App. 137) At that point Ms. Lake's ***5** counsel advised the court again that:
1. she could not proceed to a 2-3 week trial, with all of its attendant costs (and the later probability of multiple trials against defendants), without the indispensable target defendant which had been concealed from her until ten (10) days before trial.

2. she had advised opposing counsel of same earlier in the week immediately upon review of the motion to dismiss, in order to mitigate any potential prejudice caused by the Clinic defendants.

(App. 138-140; 144-145)

The Clinic defendants then moved for a dismissal with prejudice, and the trial court granted the motion and entered the dismissal with prejudice. (App. 145) The Court acknowledged Ms. Lake's request to file a motion for sanctions and indicated that the motion could be heard during the next twenty-one days.

Ms. Lake then filed a motion for reconsideration of the December 8 rulings, which the trial court denied summarily without oral argument or consideration of the voluminous documents later produced by Ms. Lake as a part of her motion for sanctions (attached to Ms. Lake's counsel's affidavit) against the Clinic defendants and their counsel.

Ms. Lake then filed her motion for sanctions. Due to the busy calendar of the trial judge, the trial court (by various judges) entered a series of orders suspending the December 8 order pending resolution of the motion for ***6** sanctions.

On January 26, 1996, counsel argued the motion for sanctions, without any rulings except for the trial court's continuing the hearing for re-argument on February 23 so that the Clinic defendants could have time to review the voluminous records attached to Ms. Lake's counsel's Affidavit (that the trial court made no substantive rulings, and that no evidence was presented at the January 26 hearing, is noteworthy because the court reporter present at the January 26 hearing was unable to produce any part or all of the transcript; *see* the reporter's affidavit; App. 318).

On February 23, 1996, the trial court heard Ms. Lake's motion for sanctions (as well as the Clinic defendants' counter-motion for sanctions -- alleging no basis for Ms. Lake's motion for sanctions; the counter-motion was denied). After consideration of Ms. Lake's counsel's affidavit, attached records and memoranda, the trial court denied sanctions, ruling that:
1. in order to impose sanctions, the trial court must find “contempt of court”, which it did not in this case.
2. this case is not “a Section 8.01-271.1 case” (for sanctions).
3. there is no known standard for assessing sanctions in a case such as this.
***7** 4. Ms. Lake's only remedy is to report the conduct of Mr. Barondess (counsel for the Clinic defendants) to the Virginia State Bar disciplinary authorities.

(App. 384-391)

On May 23, 1996, Ms. Lake timely filed her Petition for Appeal.

Neither the Clinic defendants nor Mr. Barondess filed any response to the Petition for Appeal, nor did they request that any documents or other items be designated or made a part of the Appendix.

On September 10, 1996, this Court granted an appeal to Ms. Lake, notifying her counsel of same by certificate dated September 11, 1996.

ASSIGNMENTS OF ERROR

Regarding Concealment of the Indispensable Party

1. The trial court erred in not granting Ms. Lake's (Appellant's) motion to continue the trial.

2. The trial court erred in not granting Ms. Lake's (Appellant's) motion to continue the trial for additional time for the Court and the parties to investigate and discover matters relating to the concealed, newly-identified indispensable party.

3. The trial court erred in not granting Ms. Lake's motion for leave to amend to add as a new party-defendant ***8** the true owner-operator of the abortion clinic (Fairfax Square Medical Associates, Inc.) that Defendants had concealed.

4. The trial court erred in not granting Ms. Lake's motion for nonsuit.

5. The trial court erred in forcing Ms. Lake to proceed to trial without the new corporate defendant that had been concealed, particularly in light of the agreement of all counsel that the new party is a "necessary and indispensable party".

6. The trial court erred in dismissing with prejudice Ms. Lake's case against the defendants.

7. The trial court erred in denying the motion for reconsideration, particularly without consideration of oral argument or other discovery or evidence regarding the concealed indispensable party defendant.

Regarding Sanctions

8. The trial court erred in holding that the only remedy for the conduct in question is to report the Clinic defendants' counsel to the Virginia State Bar disciplinary authorities.

9. The trial court erred in holding that contempt of court is the only ground for awarding sanctions against parties or counsel.

***9** 10. The trial court erred in holding that there was no contempt of court in this case.

11. The trial court erred in finding that Section 8.01271.1 did not govern, and offered no remedies for, the egregious conduct in this case.

12. The trial court erred in not finding that the conduct in question was governed by, and was sanctionable under, Section 8.01-271.1.

13. The trial court erred in not complying with Section 8.01-271.1, which required an award of sanctions for written and oral pleadings not well-grounded in fact or law.

14. The trial court erred in not assessing sanctions against the Clinic defendants (Appellees) and their counsel.

15. The trial court erred in holding that there is no legal standard in Virginia for assessing monetary sanctions for improper conduct under the circumstances in this case.

QUESTIONS PRESENTED

1. Where the Clinic defendants and their counsel knew since 1988 that they were not the true owners/operators of the abortion clinic; knew from the commencement of the first of two cases that Ms. Lake had sued them in-

stead of the correct owner/operator; and falsely admitted that they were the correct owners/operators and concealed the true owner/operator from the court and Ms. Lake until ten (10) days before the second of two cases: whether the trial court erred in denying all of Ms. Lake's requested relief (i.e., for leave to amend to add the correct owner/operator; for continuance of the trial; for a discretionary nonsuit; for sanctions) and in dismissing the case with prejudice, and denying the motion for reconsideration). (Assignment of Error nos. 1-7)

2. Whether the trial court erred in holding that sanctions cannot be imposed upon parties or counsel without contempt of court. (Assignment of Error no. 9)

3. Whether the trial court erred in finding that the Clinic defendants' and their counsel's failures to raise the dispositive issue of ownership/operation of the abortion clinic in accordance with the deadlines set forth in two (2) Status Conference Orders (and other conduct) did not constitute contempt of court. (Assignment of Error no. 10)

4. Whether the trial court erred in finding that the conduct of counsel for the Clinic defendants -- including his filing of pleadings he knew to be false -- was not governed by Section 8.01-271.1. (Assignment of Error nos. 11-12)

5. Whether the trial court erred in finding that the conduct of counsel for the Clinic defendants -- including his filing of pleadings he knew to be false -- was not a violation of Section 8.01-271.1. (Assignment of Error nos. 12-14)

6. Whether the trial court erred in finding that the conduct of counsel for the Clinic defendants -- including his filing of pleadings he knew to be false -- did not mandate sanctions under Section 8.01-271.1. (Assignment of Error nos. 13-14)

7. Whether the trial court erred in holding that the only remedy for counsel's egregious conduct was to report him to the Virginia State Bar disciplinary authorities. (Assignment of Error nos. 8, 10, 11-15)

8. Whether the trial court erred in finding that the governing law does not provide a method for assessing an appropriate amount of sanctions. (Assignment of Error no. 15)

STATEMENT OF FACTS

While the facts of the substantive medical malpractice case are in dispute, this case was disposed of by a dismissal not on the merits prior to jury trial; to put it another way, Ms. Lake was prevented from presenting the merits of her case.

Even the facts forming the bases for a) the dismissal not on the merits and b) Ms. Lake's motion for sanctions are largely, and perhaps completely, not in dispute; however, the Clinic defendants may dispute the import and interpretation of these facts.

Basic Alleged Facts of the Substantive Abortion Malpractice Case

On April 13, 1991, Tina M. Lake arrived at the Women's Medical Center abortion clinic as a healthy young woman in her “twenties” seeking a possible abortion. An abortion was performed that day by defendant Joel W. Match, M.D. In her lawsuit Ms. Lake and her experts alleged, among other things, that:

1. Dr. Match's education, training and surgical skills were sub-standard; Dr. Match had attended medical school

at Autonomous University of Guadalajara, Mexico, and failed all three (3) attempts to become Board-certified.

2. Dr. Match was an apparent agent of the Clinic or, even if an independent contractor, one subjecting the Clinic to vicarious liability.

Appellees Gresinger and Codding have owned (e.g., as sole shareholders in corporations) and operated abortion clinics throughout the United States, including the corporation (Women's Medical Center) which Ms. Lake alleged to be the owner of the abortion clinic (NOVA Women's Medical Center) where her April 13, 1991, abortion was performed; and the corporation (Fairfax Square) which the Clinic defendants revealed ten (10) days before trial to be the actual owner/operator of such abortion clinic.

The corporations are mere alter egos of Dr. Gresinger and Mr. Codding, and the veil of the corporations should be pierced so that these persons suffer individual liability reflective of the reality of the corporations.

Dr. Gresinger is usually, as in this case, the Medical Director of the abortion clinic; as such, he prescribes the policies and procedures for the running of the clinic, including the medical and nursing care at the clinic.

3. During the abortion (under general anesthesia), Dr. Match lacerated and badly perforated Ms. Lake's uterus, and lacerated an artery and blood vessels, and she began hemorrhaging.

4. While in the recovery room of the Clinic -- under the care and responsibility of the nurses and Clinic -- she passed unusually large blood clots, she complained of unbearable pain (despite extra doses of strong pain medications), and she exhibited signs of shock.

The Clinic nurses told her that she had had a “really rough time” because she had been “farther along” (in her second trimester, when the law provides that only a hospital, and not the Clinic, can perform an abortion).

Despite her condition, and in violation of written Clinic procedures requiring that a person in Ms. Lake's condition receive emergency medical care, she was discharged at the pre-designated time by the Clinic and told by its nurses to simply go home and “put your feet up”.

5. As her condition continued to worsen on her ride home to Front Royal, her female friend drove directly to Warren Memorial Hospital emergency room at speeds exceeding ninety (90) miles per hour during a pouring rain. When she arrived at the hospital, and was removed by nurses from the back seat, she was unconscious and in a rigid fetal position.

Unable to control massive bleeding from the damaged uterus and surrounding artery and blood vessels, the hospital surgeon removed her uterus to save her life.

6. An otherwise healthy, strapping young woman, she is unable to bear children and continues to suffer from depression.

(*See*, e.g., App. 1-32)

Facts Relating to the Concealed Indispensable Party (Fairfax Square) and Sanctions

1. The Clinic defendants and their counsel reveal ten (10) days before the December, 1995 trial what they had known since 1988 -- that a concealed indispensable non-party that each has an interest in is the true owner/op-

erator of the abortion clinic -- thus reversing their years-old judicial admissions that the Clinic defendants were the true owners/operators of the abortion clinic, and causing Ms. Lake's case to be dismissed with prejudice

On December 1, 1995, ten (10) days before the second scheduled trial, Women's Medical Center and the other Clinic defendants reversed their previous admission that Women's Medical Center was the owner/operator of the Clinic where Ms. Lake's abortion was performed on April 13, 1991 (App. 197-202), and stated for the first time, after years of litigation, that instead Fairfax Square, a non-party, was the true owner/operator. (App. 294-299)

The Clinic defendants' counsel, Mr. Barondess (as well as the Clinic defendants), had actual knowledge since 1988 that Fairfax Square, and not Women's Medical Center, was the true owner/operator. (App. 172).

Mr. Barondess:

1. in fact was the “Assistant Secretary” -- a corporate officer -- of Fairfax Square (the concealed true owner/operator), and had signed and filed the county land-records document in 1988 which identified Fairfax Square as the sole owner/operator of the abortion clinic. (App. 172)

2. admitted that since the filing of the medical malpractice Notice of Claim in March, 1992, he had known that Ms. Lake had not stated a claim against the correct owner/operator of the abortion clinic. (App. 367-368)

3. also was the corporate counsel for both corporations -- Fairfax Square, the true owner/operator, and Women's Medical Center, the alleged-and-falsely-admitted owner/operator.

4. was litigation counsel for the Clinic defendants in the non-suited and re-filed cases. (*See* multiple pleadings in Appendix)

In the Clinic defendants' motion to dismiss, it falsely asserted that Women's Medical Center did not exist as a legal entity. (App. 298) On each occasion when Ms. Lake's counsel called the State Corporation Commission to inquire about the corporation, its officers, etc. -- on March 2, 1992 (before Ms. Lake filed the Notice of Claim); on November 2, 1992 (before Ms. Lake filed the Motion for Judgment); and on December 4, 1995 (after the Clinic defendants filed their motion to dismiss) -- the Commission advised that: 1) Women's Medical Center has been an existing corporation since 1973 (except for the period 1985-1986, when it was terminated); and 2) the sole officers of Women's Medical Center have been Clinic defendants Gresinger and Codding.

a. Ms. Lake alleges from the beginning that the Clinic defendants owned/operated the abortion clinic.

In March, 1992 -- less than one (1) year after the April 13, 1991, incident -- Ms. Lake filed her medical-malpractice Notice of Claim (App. 173); in November, 1992, she filed her Motion for Judgment. (App. 177) Both pleadings targeted Women's Medical Center as the owner/operator of the Clinic where Ms. Lake's abortion was performed on April 13, 1991.

b. From the beginning the Clinic defendants admit that they own and operate the abortion clinic, and avoid and conceal that Fairfax square is the true owner/operator

After service of 1992 Motion for Judgment, Women's Medical Center and its alleged shareholders/officers, defendants Gresinger and Codding, successfully challenged venue without mentioning that they had been sued wrongly. (App. 180-185) At the same hearing, the Clinic defendants were ordered to answer all discovery (Interrogatories and Requests for Production served with the Motion for Judgment) within twenty-one (21) days.

(App. 184)

This discovery required, among other things, that the Clinic defendants state all facts supporting any defenses or affirmative defenses, and all facts supporting any denial of allegations, such as any denial that Women's Medical Center was the owner/operator of the clinic; and otherwise required responses which would have revealed, if answered truthfully and fully, the true owner/operator of the abortion clinic. (App. 187-196) Instead, the Clinic defendants filed only objections to the discovery (avoiding any substantive answers) as well as a demurrer to the complaint.

The trial court initially sustained the demurrer generally on the sole ground that the allegations should be stated separately and not collectively as to each defendant so as to more clearly indicate each allegation against each defendant (after Ms. Lake amended the complaint, all demurrers were overruled). (App. 210-213) Thus, although Women's Medical Center knew that it was not a proper defendant, it and the other Clinic defendants only asked the court to require Ms. Lake to itemize which allegations were against which defendants, and concealed the obvious defense that *no* allegations or cause of action could be successful against it because it had nothing whatsoever to do with this case and did not own/operate the clinic.

The Clinic defendants filed an answer to the amended complaint, which, despite their pre-existing actual knowledge of the true owner/operator:

1. affirmatively and falsely admitted that Women's Medical Center owned and operated the clinic where Ms. Lake's abortion was performed on April 13, 1991.

2. affirmatively concealed from Ms. Lake and the trial court what it had known for years, i.e., that Fairfax Square was the true owner/operator.

(App. 233-241; 197-204)

These specific allegations admitted by the Clinic defendants are as follows:

"2. Defendants in this case are NORTHERN VIRGINIA WOMEN'S MEDICAL CENTER, INC. [hereafter 'WOMEN'S MEDICAL CENTER']

[Admitted by all Clinic defendants, para. 1, Answer, App. 197].

5. In April, 1991, WOMEN'S MEDICAL CENTER:

a. was a corporation which operated a clinic that performed abortions [hereafter "THE ABORTION CLINIC"] in Fairfax, Virginia"

[Admitted by all Clinic defendants, para. 4a, Answer, App. 197-198].

13. DR. MATCH, with the aid of employees of WOMEN'S MEDICAL CENTER, and with the tools and facilities of WOMEN'S MEDICAL CENTER, performed an abortion procedure on MS. LAKE at THE ABORTION CLINIC in Fairfax, Virginia, on April 13, 1991.

[Admitted by all Clinic defendants, para. 12, Answer, App. 202].

(App. 233-241; 197-204)

2. Ms. Lake relies upon, and is damaged by, the false admissions that the Clinic defendants owned and operated the abortion clinic and that ownership/operation of the clinic is no longer in issue; the Clinic defendants' actions are sanctionable

Thereafter -- that is, after the beginning of the first or non-suited case -- Ms. Lake relied upon these admissions of the Clinic defendants that:

Dr. Match performed an abortion on Ms. Lake on April 13, 1991, at the facility of Northern Virginia Women's Medical Center, Inc. (the incorrect corporation sued), in Fairfax, Virginia, with the aid of the employees of Virginia Women's Medical Center, Inc.

These facts having been admitted, they were no longer at issue after the beginning of the first or non-suited case. Moreover, the Clinic defendants continued to corroborate, and never contradicted or sought to correct these false admissions of ownership/operation (until ten (10) days before the second scheduled trial date commencing on December 11, 1995).

After these early admissions of ownership/operation by the Clinic defendants, the following (and other) events transpired without the Clinic defendants' advising the Court or Ms. Lake of the true owner/operator of the abortion clinic:

1. Women's Medical Center appeared perhaps 10-15 or more times before this Court.

2. Women's Medical Center filed many pleadings in its name.

3. Women's Medical Center took or defended perhaps ten (10) depositions.

4. Women's Medical Center filed pleadings to bar further prosecution, without filing (until ten (10) days before the second trial) any pleading to bar prosecution based upon the dispositive defense that it had no relationship to this case and was not the true owner/operator of the clinic.

5. Women's Medical Center engaged in settlement negotiations.

6. Women's Medical Center responded to Ms. Lake's requests for production and actually produced under its own corporate name documents which only another non-party corporation (Fairfax Square) -- and not it -- could hold and control as the true owner/operator. These records included, among other records:

a. Ms. Lake's most private medical records (which Women's Medical Center, a corporation with no connection to Ms. Lake, could not have possessed except through violation of doctor-patient privilege).

b. The most private medical records of other abortion patients (identities redacted at Ms. Lake's suggestion) who had abortions on the same day, which records also could not have been held or controlled by Women's Medical Center or other non-owner/operator, and which was held by Women's Medical Center only through violation of the doctor-patient privileges of these approximately fifteen (15) other girls/women.

c. The true owner's/operator's policies and guidelines, and nursing manual.

7. On October 30, 1993, Ms. Lake served her formal discovery request upon Women's Medical Center request-

ing that it permit Plaintiff's counsel and a videographer to enter the clinic where the abortion was performed on Plaintiff on April 13, 1991, for purposes of inspecting, photographing and videotaping the premises, Ms. Lake's records, and other specific items.

The Clinic Defendants responded by objecting (not on grounds that Women's Medical Center did not own or operate the Clinic) to the requested entry upon “the premises of your defendant, Northern Virginia Women's Medical Center, Inc.”, thus further falsely admitting ownership/operation of the Clinic by the Clinic defendants and further concealing the true ownership/operation by Fairfax Square.

Subsequently, after the trial court overruled their objection and ordered the inspection and photography/videotaping, the Clinic defendants then re-confirmed their ownership/operation of the Clinic in late 1994 by Mr. Codding's and Mr. Barondess' personally directing and supervising the photographing and videotaping of this abortion clinic (where Ms. Lake's abortion was performed on April 13, 1991) which it had identified as “the premises of your defendant, Northern Virginia Women's Medical Center, Inc.” (Objection, para. 3).

8. In the re-filed case the Clinic defendants were nearly quiescent in their defense, reflecting in hindsight parties who knew that they possessed a dispositive issue in their favor and who nevertheless continued to conceal same from the trial court and Ms. Lake:

a. The Clinic defendants filed the same demurrer as in the non-suited case, once again without demurring on the obvious grounds that there could be no cause of action against Women's Medical Center because it did not operate/own the Clinic and had no relation to this case. (App. 186, 34-35)

b. They propounded no discovery.

c. They asked no questions of Ms. Lake at the only deposition of her in either the non-suited or re-filed case.

d. They did not object to, and did not respond to, Ms. Lake's request for supplementation of all prior discovery responses. (App. 282-283)

e. They did not meet their deadlines for filing lists of exhibits and witnesses, and in fact never even filed any such lists.

f. They filed their expert-witness designation two (2) weeks after the deadline, and then only quoted verbatim the designations filed by defendant Match. (284-287)

g. They filed no objections to any of Ms. Lake's large number of trial exhibits.

a. The Clinic defendants ignore both Ms. Lake's efforts to mitigate damages and her warning of sanctions

During this time that the Clinic defendants were saving time and expense in secret reliance upon their dispositive issue, Ms. Lake and her counsel continued to spend considerable time and money in what was an inevitably futile prosecution against those falsely-admitted to be the proper parties.

Immediately after a November 20, 1995, hearing (during which the trial court denied Ms. Lake's motion to strike the Clinic defendants' untimely designation of experts), Mr. Barondess advised this counsel in the hallway outside the courtroom of a “final”, “nuisance” offer of settlement; and then proceeded to advise this counsel that his Clinic defendants would be raising a dispositive issue. Ms. Lake's counsel responded that any such dispositive

issue would not be timely raised, and then requested the specific nature of the issue; Mr. Barondess responded that he would not reveal the dispositive issue until “3 days before trial”.

Later that day Ms. Lake's counsel sent a facsimile to Mr. Barondess which confirmed the above; objected to the un-timeliness of raising such an issue; and asked Mr. Barondess to reveal the dispositive issue (App. 121-122). Again, Mr. Barondess refused this counsel's request to identify this issue, until his filing of the motion to dismiss on Friday, December 1, 1995, the last possible day for the Clinic defendants to file any motion for hearing on the next Friday, December 8, the last business day before the December 11 trial.

Ms. Lake's counsel's facsimile admonished the Clinic defendants about their duty to mitigate the adverse consequences (e.g., Ms. Lake's continuing trial expenses) of their having concealed a dispositive issue, and stated that Ms. Lake would seek sanctions for such an untimely raising of a dispositive issue. (App. 122)

Ms. Lake's counsel first saw the Friday, December 1 motion to dismiss when he returned from Florida on Monday, December 4. This counsel immediately requested and was granted a hearing before Judge Stitt (who earlier in the year had been assigned the entire case and trial) on the following morning to discuss immediately the impact of such a motion upon the trial date one (1) week later and Ms. Lake's continuing expenditures on trial costs such as significant expert-witness payments. (App. 138)

However, Mr. Barondess objected to the time of the hearing; and because Judge Stitt's calendar did not permit a hearing at any other time before Friday, December 8, Ms. Lake's counsel's efforts to mitigate damages to the parties and the trial court were unavailing, and the matter was re-scheduled for December 8. (App. 138)

However, Ms. Lake's counsel did advise both opposing counsel on that Monday, December 4, that Ms. Lake could not proceed to try a 2-3 week case without the indispensable party and target-defendant, citing the huge costs of two (2) medical malpractice trials; the possibility of defense verdicts in each separate trial (by virtue of the present-defendants' “finger-pointing” at the absent set of defendants in each trial) that would not occur in one trial against all defendants. (App. 95; 138-140)

b. In one week's time, the Clinic defendants remake an admitted “indispensable party” -- without which there can be no trial -- into a dispensable party not necessary to trial

Notwithstanding the Clinic defendants' written admission and stipulation within their December 1 motion to dismiss that Fairfax Square was an “indispensable party” without which there could not be a trial, at the December 8 hearing the Clinic defendants, now armed with this counsel's candid statement that Ms. Lake could not proceed to trial without the correct corporate target defendant, reversed their admission and stipulation and successfully urged the trial court to require Ms. Lake to proceed to trial (without the party it just had called an “indispensable party” without which there could be no trial). (App. 294-300; 136-137)

c. The trial court denies Ms. Lake's motions for leave to add the concealed party, for a continuance, and for a nonsuit; and dismisses Ms. Lake's case with prejudice.

At the December 8 hearing:

1. the trial court denied Ms. Lake's motions for leave to add the new party; for a continuance; and for a discretionary nonsuit.

2. the trial court required Ms. Lake to go to trial without the concealed, correct corporate defendant, and dis-

missed with prejudice Ms. Lake's case when Ms. Lake's counsel stated that Ms. Lake could not afford -- financially or legally -- to proceed to a 2-3 week trial against the wrong corporate defendant and without the concealed correct corporate target-defendant, especially given the huge costs and the resultant necessity of multiple trials which could produce unnecessarily inconsistent and contradictory results adverse to Ms. Lake.

(App. 90; 140-145)

After the December 8 hearing the trial court summarily (without written opinion or comment) denied Ms. Lake's motion for reconsideration.

d. Ms. Lake's motion for sanctions -- and this Court's entire record for determining sanctions -- is comprised of Ms. Lake's evidence that was not objected to or rebutted

Ms. Lake then filed her motions for sanctions, which were argued on January 26, 1996, without any ruling or disposition. The motion was continued to February 23, 1996, so that the Clinic defendants could have the opportunity to review and respond to Ms. Lake's extensive memorandum, affidavit and book of documents (the Clinic defendants never produced evidence to rebut or contradict the Affidavit or the records).

Ms. Lake hereby incorporates by reference "Plaintiff's Counsel's Affidavit Supporting Motion for Sanctions" (App. 169-171) and the documents attached thereto (App. 172-339), which were filed prior to the January 26 hearing. This Affidavit and the documents were received into evidence by the trial court without objection -- including without objection to authenticity or substance -- and without substantive contradiction under oath; the only evidence offered by the Clinic defendants regarding the issues on this appeal was Mr. Codding's brief testimony at the December 8, 1995, hearing, which does not contradict Ms. Lake's evidence.

The Clinic defendants cannot now, on appeal, challenge these documents or the substantive facts therein, and are bound by such facts, including the following within the affidavit itself:

"All assertions and purported facts in such documents generated by or on behalf of Plaintiff are, to the best of this Counsel's information and belief, true and correct." (App. 169, para. 2)

"[T]he Clinic Defendants knew since no later than July 13, 1988, that the true owner and operator of "NOVA Women's Medical Center (the abortion clinic in question) was 'Fairfax Square Medical Associates, Inc.' " (App. 170, para. a)

"[A]fter investigation and the admissions/misrepresentations of the Clinic Defendants, Plaintiff and her counsel believed from April, 1991, through early December, 1995 (one week before the December 11, 1995 trial) ... that the true owner and operator ... was "Northern Virginia Women's Medical Center, Inc." (App. 170, para. b)

"[T]he Clinic Defendants ... admitted and misrepresented that it [Northern Virginia Women's Medical Center, Inc.] was the true owner and operator ..." (App. 170, para. c)

"[T]hroughout these cases the Clinic Defendants repeatedly represented itself [sic] as the owner and operator of the abortion clinic, and concealed the true owner and operator." (App. 170, para. d)

The "target Defendant" in these cases is Women's Medical Center, as a result of Dr. Match's insurer's insolvency, the owner's/operator's vicarious liability for Dr. Match's acts, and the possibly more problematic liability

of individual defendants Gresinger and Codding based upon a piercing of the corporate veil. (App. 170, para. e)

“As reflected in the transcript of the December 8, 1995, hearing on the Clinic Defendants' motion to dismiss, Plaintiff did not proceed [to trial] against such incorrect ‘target Defendant’ as soon as the Clinic Defendants revealed the correct ‘target Defendant’, Fairfax Square Medical Associates, Inc.; and Plaintiff never would have proceeded or continued to proceed against the incorrect ‘target Defendant’. (App. 170, para. f)

Virtually all of Ms. Lake's costs, and all of her counsel's “hundreds of hours” spent on this matter, “were proximately caused by the intentional and knowing concealment and misrepresentation by the Clinic Defendants regarding the correct owner/operator of the Clinic”. (App. 170-171, paras. g-h)

The attached listing of expenses [App. 288-291] is a partial listing of case expenses which were proximately caused by the Clinic defendants' actions. (App. 170-171, paras. g, i)

e. The trial court denies Ms. Lake's motion for sanctions, ruling that: sanctions require a finding of contempt of court; there was no contempt of court; 8.01-271.1 does not apply, and there was no sanctionable conduct if the tatute were to apply; there is no authority for determining the amount of sanctions; and Ms. Lake's only remedy under the law is to report Mr. Barondess to the Virginia State Bar.

At the February 23 hearing, the trial court denied Ms. Lake's motion for sanctions, on the bases that:

1. The imposition of sanctions requires a finding of contempt of court, which finding the trial court would not make.

2. The facts of this case did not present an “8.01-271.1 case”.

3. Even had the trial court found sanctionable conduct, it found no authority for what constitutes an appropriate method for determining the proper amount of sanction.

4. Ms. Lake's only remedy would be to report Mr. Barondess to the Virginia State Bar disciplinary authorities.

(App. 384-391)

ARGUMENT AND AUTHORITIES

1. Given the calculated and egregious conduct by the Clinic defendants and their counsel, the trial court's denial of any and all relief requested by Ms. Lake was an abuse of discretion

The trial court denied Ms. Lake's motions for continuance, for leave to amend to add the correct, “indispensable” (in the words of the Clinic defendants in their motion to dismiss) corporate defendant, and for nonsuit, and ordered Ms. Lake to proceed to the scheduled 2-3 week trial against a now obviously non-liable target defendant, even though these same Clinic defendants had ***30** concealed for years the correct target defendant with which they were intimately connected. Under these circumstances of a calculated, longstanding concealment by the Clinic defendants for their own improper gain, the denial of these motions was an abuse of the trial court's discretion.

2. Leave to amend should have been granted liberally, especially given the calculated and egregious conduct by the Clinic defendants and their counsel

Leave to amend should be liberally granted, especially under the egregious circumstances described above. In particular, the denial of Ms. Lake's motion for leave to amend was an abuse of the court's discretion (by Rule of Court) to add new parties “at any stage” “as the ends of justice may require”:

New parties may be added, by leave of court, on motion of the plaintiff by order of the court at any stage of the cause as the ends of justice may require.

Rule 3:14, Rules of the Supreme Court of Virginia.

3. The Clinic defendants rightly stipulated that Fairfax Square is an indispensable party-defendant without which there could not and should not be a trial

In their motion to dismiss, and during the initial part of the December 8, 1995, hearing on the motion to dismiss, the Clinic defendants admitted and stipulated (and at that hearing Ms. Lake's counsel agreed) that the correct, non-party corporate defendant was an indispensable, necessary ***31** party, and that the matter could not proceed to trial without such new party. However, near the end of that hearing -- only after Ms. Lake's counsel had made clear to the court that Ms. Lake could not proceed to a 2-3 week trial against the incorrect target defendant -- the Clinic defendants cynically reversed their stipulation and represented that Ms. Lake could and should proceed to trial without such new party.

4. Section 8.01-271.1 governs the Clinic defendants' conduct, and mandates sanctions against them

Section 8.01-271.1 of the Code of Virginia provides in pertinent part:

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 reasonable inquiry, it is well grounded in fact ... and (iii) it is not interposed for any improper purpose, such as ... to cause unnecessary delay or needless increase in the cost of litigation.

[The statute the provides that (ii) and (iii) above also govern oral motions of each counsel and party.]

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, 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 ... the amount of the ***32** 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.

In order to appreciate the baldness of the violations of this statute by the Clinic defendants and their counsel, this Court need look no further than the Clinic defendants' answers to the amended motion for judgment; counsel's statements to the chief judge (of the trial court) that his clients in this case were the owners of the clinic (App. 229-230); and their pleading stating and embracing that the premises of the Clinic were their premises.

5. The purposes and intent of the Virginia statute on sanctions demand the imposition of sanctions against the Clinic defendants and their counsel

In *Oxenham v. Johnson*, 241 Va. 281, 286, 402 S.E.2d 1 (1991), this Court reviewed “some of the policy considerations” in sanction cases:

[S]anctions can be used to protect courts against those who would abuse the judicial process ... [and] one purpose of Code Section 8.01-271.1 [is] reducing the volume of unnecessary litigation.

Ms. Lake contends that since 1992-3, all of her and her counsel's -- much less the court's -- efforts, time and expense in the two (2) cases against the Clinic defendants were inevitably and wholly futile and fruitless.

6. Whether a court applies the correct objective test, or a subjective test, to determine if the Clinic defendants and their counsel had knowledge that their position was not well-grounded in fact or law, their conduct meets the test for sanctions ***33** The *Oxenham* Court also held that:

The duty of 'reasonable inquiry' arises each time a lawyer files a 'pleading, motion or other paper' or makes 'an oral motion'. Code Section 8.01-271.1. If [the sanctioned lawyer] had filed any paper or made any motion in the case after he knew, or reasonably should have known, that [his position was not well-grounded in fact], the court would have been justified in imposing a sanction against him.

Id. at 288.

Mr. Barondess admitted during the February 23, 1996, hearing that he had known since 1988 that the correct owner-operator of the Clinic was another corporation not sued, and that he had known since Ms. Lake filed her Notice of Claim in early 1992 that she had not sued the correct corporate entity.

In *Nedrich v. Jones*, 245 Va. 465, 472, 429 S.E.2d 201 (1993), this Court held that the test for determining whether an attorney or party violates Section 8.01-271.1 is not a subjective test of what was in his (their) mind(s), but rather an "objective standard of reasonableness" under the existing circumstances [citing *County of Prince William v. Rau*, 239 Va. 616, 620, 391 S.E.2d 290, 292 (1990)], that is, whether the attorney or party "could have formed a reasonable belief" that the pleading or motion was well-grounded in fact or warranted by existing law. Given Mr. Barondess' unique multiple ***34** roles as corporate counsel for both corporations, secretary of the correct corporation and litigation counsel for the existing defendant-corporation, and his longstanding (from 1988 to 1995) intimate affiliation with the Clinic defendants and the correct corporation, any suggestion that their pleadings were "reasonably" believed to be well-grounded in fact is naive at best.

Importantly, the Clinic defendants have admitted that their actions and positions taken were correct and not mistaken in any way. In other words, they still profess proper purposes and motives, and they still stand by all of their actions described herein.

Section 8.01-271.1 parrots Rule 11 of the Federal Rules of Civil Procedure, and federal decisions interpreting Rule 11 are persuasive.

The proper inquiry in ruling on a sanction motion is whether "a reasonable attorney in like circumstances would believe his actions to be factually and legally justified". *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987). If the actions of an attorney or party fail to meet this standard, an award of sanctions is mandatory. *Id.* Likewise, the express language of Section 8.01-271.1 is mandatory.

Where responses in a defendant's answer to a complaint have "no reasonable basis in law or fact", they merit ***35** sanctions. *Artco v. Lynnhaven Dry Storage*, 898 F. 2d 953 (4th Cir. 1990). The grounds for mandatory sanctions is even more compelling in the instant case where:
1. the counsel (Mr. Barondess and his firm) had been intimately familiar with the facts since several years before this litigation (he was "Assistant Secretary" of the concealed corporate owner/operator).
2. he had been counsel for both the corporation sued and the corporation not sued.
3. he gained his knowledge of the relevant facts *not* simply "shortly before he filed the answer".

4. his knowledge was based “not solely on knowledge gained from a cursory investigation of the facts” as in the case of an attorney “unfamiliar with the case”.

See Artco, supra.
7. Although the trial court erred in ruling that sanctions require a finding of contempt, the conduct of the Clinic defendants and their counsel nevertheless was in contempt of multiple court orders
Civil contempt sanctions are either compensatory or coercive. Compensatory civil contempt sanctions compensate a party for losses sustained because [the opposition] disobeyed a court's order. Coercive, civil contempt sanctions are imposed to compel a recalcitrant [opposition] to comply with a court's order.

Bagwell v. International Union. et al., 244 Va. 463, 423 S.E.2d 349 (1992).

The trial court erred in not recognizing that at least compensatory civil sanctions could and should have been levied: for example, the Clinic defendants' calculated ***36** decision to disregard the two (2) separate orders to bring dispositive motions (i.e., motions to dismiss) to the trial court's and Ms. Lake's attention deprived Ms. Lake of notice of this issue two (2) years before it was raised. The Status Conference Order in the first case required the Clinic defendants to have the motion heard at least “30 days” before the first trial, that is, by early December, 1993; and the Status Conference Order in the re-filed case required the dispositive motion to be heard “as far in advance as possible” of the second trial date, that is, as soon as the matter was re-filed in mid-1994.

As a direct result of the Clinic defendants' calculated and willful violation of these court orders, Ms. Lake and her counsel suffered two (2) years of unnecessary effort and expense.

As a further example of contempt and sanctionable conduct: on October 30, 1993, Ms. Lake served her formal discovery request that the Clinic defendants permit Plaintiff's counsel and a videographer to enter “the premises of NOVA Women's Medical Center” “where the abortion was performed on Plaintiff on April 13, 1991”, for purposes of inspecting, photographing and videotaping the premises, Ms. Lake's records, and other specific items. Defendants responded by objecting to the requested entry ***37** upon “these premises of your defendants”, further falsely admitting ownership/operation of the Clinic by the Clinic defendants and further concealing the true ownership/operation by Fairfax Square. Thus, when the trial court overruled their objection and ordered that the admitted owner/operator permit the request entry upon their admitted premises, and the Clinic defendants then directed and supervised the photographing and videotaping of Fairfax Square's premises in ostensible compliance with such order, the Clinic defendants again were in violation of a court order and misrepresented to the court and Ms. Lake that the premises of the abortion clinic where the abortion was performed indeed was owned/operated by them.

Notwithstanding the Clinic defendants' contempt of court orders, the trial court clearly erred in holding that sanctions require contempt of court -- that is, violation of a court order. In fact, Section 8.01-271.1 clearly mandates sanctions for any pleading which the attorney knew or should have known was not well-grounded in fact or law, whether or not the pleading had been court-ordered.

Moreover, Judge Stitt previously had levied a sanction against counsel for defendant Match in this case -- in the amount of $450.00 -- based upon that counsel's unilateral ***38** demand before his client's deposition that the deposition be limited in length of time; Judge Stitt's sanction was not based upon any finding that Dr. Match's counsel had violated some pre-existing court order or otherwise was in contempt of court. (App. 61-62)

8. The trial court erred in ruling that there is no standard(s) under the law by which a trial court can measure the appropriate amount of a sanction

In *Brubaker v. City of Richmond*, 943 F.2d 1363 (4th Cir. 1991), the Court discussed the method of determining the *amount of a sanction.* A court:
should bear in mind that the purposes of Rule 11 include 'compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets and facilitating court management'. The amount of a monetary sanction, however, should always reflect the primary purpose of Rule 11 -- deterrence of future litigation abuse. Accordingly, the district court should expressly consider the four factors adopted by this circuit in *In re Kuntsler:* '(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation [citations omitted].

The trial court erred in not recognizing or applying this test, and also erred in not permitting the requested discovery (or any evidence) of these factors. For example, there was no inquiry into Ms. Lake's counsel's fees or the Clinic defendants'/their counsel's ability to pay.

Significantly, it is appropriate for the court to award ***39** sanctions against counsel for an entire time period during which the pleading attorney knew or should have known that a claim was not "well grounded in fact" (until dismissal of the case). *Meadow Ltd. Partnership v. Heritage,* 118 F.R.D. 432 (1987((finding that the duty to inquire into facts is a "continuing duty" (*Id.* at 434; $10,000.00 sanction awarded for three-month period during which attorneys should have known that their position was not "well grounded in fact") (aff'd, *Fahrenz v. Meadow Farm Partnership,* 850 F.2d 207 (4th Cir. 1988).

Ms. Lake seeks sanctions for that time period after the Clinic defendants were required to respond truthfully and fully to her allegations and interrogatories about the correct owner and operator of this abortion clinic.

9. This egregious and stunningly successful misconduct, if authorized or condoned by this Court, foreshadows a new and ugly path for less-than-ethical defense lawyers that will deprive innocent victims of their just day in court

In a vigorous exercise of an increasingly popular litigation strategy which mirrors one contemporary political strategy -- "always attack, never defend" -- the Clinic defendants' explained their false admissions and concealment from the Court and Ms. Lake by charging in the trial court (in this Court they filed no response to the Petition for Appeal):
***40** 1. that Ms. Lake's counsel committed malpractice prior to 1993 by filing suit against Northern Virginia Women's Medical Center, Inc., for the acts/omissions at NOVA Women's Medical Center (rather than against Fairfax Square) prior to 1992, and that this action foreordained the dismissal of the case in December, 1995. (App. 142)

They also falsely maintained below:
2. that Mr. Barondess responded truthfully to the Chief Judge of the trial court when he admitted that his clients in this case were the owners of the clinic.
3. that the Clinic defendants honestly answered the allegations in the complaint when they admitted that the existing defendants owned and operated the clinic. (App. 368-369)
4. that when the Clinic defendants objected to Ms. Lake's counsel's viewing of "the premises of your defendants" (the abortion clinic), their reference to the clinic being owned by the existing defendants was truthful.
5. that the Clinic defendants complied with, and were not in contempt of, court orders requiring that they bring

dispositive issues before the court prior to thirty days before the first trial and “as soon as possible” before the second trial.

The Clinic defendants' tortuous attempts to explain to the trial court why they made various (mis)representations to the trial court and counsel nevertheless provide a “lowroad”-map for the less-than-ethical trial lawyer in Virginia.

If this Supreme Court of Virginia condones or authorizes these litigation tactics, or even appears to do so, it can rightly assume that these tactics will be practiced ***41** vigorously and successfully by a certain number of defense counsel throughout Virginia. The potential frequency and effect of such modelled conduct is dramatic.

Ms. Lake's counsel presently has a number of cases against corporate defendants having multiple similar corporate names for which it is difficult or unlikely for counsel to determine pre-suit if the correct variance of the names is known, much less employed at the inception of the suit. For example, a review of just Fairfax County records reveals more than eight (8) variations of “Hechinger” as a corporate defendant.

Ms. Lake's counsel suggests that this Court could take judicial notice of the increasing prejudice among jurors against even legitimate personal-injury plaintiffs such as Ms. Lake. However, if this Court acquiesces in the Clinic defendants' conduct, what will be added to this mix of obstacles to victim-redress is the perhaps insurmountable obstacle of deceptive conduct that can be, and was here, dispositive and unjust.

***42** *CONCLUSION*

Tina Marie Lake first suffered injuries and injustice at the hands of the Clinic defendants by their negligence; and secondly by their and their counsel's calculation, false admissions and concealment. Ms. Lake is without redress in either case. This appeal presents to this Court the question whether these defendants' winning by *any means* necessary, and at *any cost*, will go without redress and thus bear the imprimatur of this Honorable Supreme Court of Virginia.

Appellant Tina Marie Lake, by counsel, respectfully prays that this Supreme Court:

[Regarding the substantive case:]
1. reverse the trial court's dismissal of the case, citing the reasons therefor, and remand the case for trial against the existing defendants -- Northern Virginia Women's Medical Center, Inc., Dr. Thomas H. Gresinger, and Wayne C. Codding -- and the correct owners/operators of the Clinic (apparently Fairfax Square Medical Associates, Inc.).
2. permit addition of the correct corporate owner/operator as a party defendant, and, as a sanction, prohibit the defense of the statute of limitations.

[Regarding sanctions:]
3. reverse the trial court's denial of Ms. Lake's motion for sanctions.
4. find that the Clinic defendants and their counsel engaged in sanctionable conduct, including contempt of court and violation of Section 8.01-271.1 of the Virginia Code, and further:
***43** a. identify which person(s) and/or entity was guilty of sanctionable conduct.
b. specify the precise conduct found to be sanctionable, and its scope, severity and duration.
c. specify the effect of the sanctionable conduct upon the outcome of the case.
5. enter judgment for Ms. Lake on the issue of liability for sanctions.

6. award appropriate sanctions and/or remand the matter to the trial court (for resolution of any outstanding issues not resolved by this Court), ordering in the latter case:
a. that the trial court award sanctions for that conduct cited by this Court as sanctionable.
b. set forth the specific standard(s) which the trial court is to apply in determining the appropriate amount of monetary sanction.

Tina Marie LAKE, Appellant, v. NORTHERN VIRGINIA WOMEN'S MEDICAL CENTER, INC., Thomas H. Gresinger, M.D., and Wayne C. Codding, Appellees.
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