
IN THE
Supreme Court of Virginia

RECORD NO. 051769

FORD MOTOR COMPANY, et al., *Appellants,*

v.

BERTA BENITEZ, *Appellee.*

BRIEF AMICUS CURIAE

Submitted by the Virginia Trial Lawyers Association
in Support of Appellee

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THE VIRGINIA TRIAL LAWYERS ASSOCIATION'S
BRIEF *AMICUS CURIAE*

This brief *amicus curiae* is submitted by Virginia Trial Lawyers Association (“VTLA”) in support of Appellee with respect to Assignments of Error 1-3.

ASSIGNMENTS OF ERROR

The VTLA addresses Assignments of Error 1-3 identified by Appellants, which state:

- I. The lower court erred in awarding sanctions against Robert L. Wise without any findings and any basis to conclude that the allegedly sanctionable pleading was interposed for any improper purpose.
- II. The lower court erred in awarding sanctions against Robert L. Wise personally based upon the lower court erroneously and prematurely requiring defendants to show facts of record in support of Defendants’ affirmative defenses, even though discovery was not complete and Plaintiff had not yet designated any liability experts to support her case or formulated her theory of liability.
- III. The lower court erred in awarding sanctions against Robert L. Wise personally for pleading affirmative defenses to avoid having them deemed waived pending the full course of discovery.

QUESTIONS PRESENTED

The VTLA addresses two questions, both of which are addressed in the text of the Appellants’ brief, but neither of which is identified in the Appellants’ articulation of the

questions presented. The two questions VTLA addresses that VTLA believes are presented in this appeal are:

1. Are lawyers excused from complying with *Virginia Code* § 8.01-271.1 when pleading an affirmative defense in a responsive pleading?
2. If lawyers must comply with Section 8.01-271.1 when pleading an affirmative defense, then do lawyers violate Section 8.01-271.1 if they plead an affirmative defense without any basis to support the assertion of the affirmative defense?

I. STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

For VTLA's purposes in addressing the questions presented above, VTLA feels the statement of the case can be summarized below:

Appellee, Ms. Benitez, was not the owner or driver of the car involved in this case; she was a front-seat passenger in the car when she was injured in a collision in northern Virginia. Ms. Benitez's lawyers filed a Motion for Judgment alleging she was injured when the airbag in vehicle in which she was riding activated. She asserted product liability (warranty and negligence) claims against two of the Appellants, Ford Motor Company ("Ford") and Koons Ford, Inc. ("Koons"). The third Appellant herein, Robert L. Wise, Esq., filed a Grounds of Defense on behalf of Ford and Koons. In the Grounds of Defense, Mr. Wise pled 13 affirmative defenses for his clients.

Prior to the time that Mr. Wise pled those 13 affirmative defenses, the facts pertinent to this case had already been the subject of substantial investigation and discovery in a previous action. The Appellants concede that years earlier, on September 24, 2002, "Benitez previously filed a similar action against Ford and Koons arising from

the same motor vehicle accident.” Brief of Appellants at 7. That earlier action had remained pending for more than a year. The earlier action was eventually nonsuited on November 5, 2003, but not before virtually all of the fact witnesses had been deposed by the defense. In the previous action, defense counsel for Ford and Koons had deposed: a) the Plaintiff, b) the driver of the car in which the Plaintiff was a passenger, c) the other two passengers who were in the car with the Plaintiff, d) the owner of the car in which the Plaintiff was a passenger, e) the driver of the other car that collided with the car in which the Plaintiff was riding, f) a nurse retained by the other driver’s insurance carrier to meet with the Plaintiff to verify her injuries, and g) the police officer who investigated the collision.

Following the nonsuit of the earlier action, Plaintiff refiled her action against Ford and Koons on April 24, 2004. On December 8, 2004, Mr. Wise filed on behalf of Ford and Koons the Grounds of Defense which included the affirmative defenses (such as contributory negligence and assumption of the risk) for which Mr. Wise was eventually sanctioned. It is undisputed that at the time that Mr. Wise signed and filed the affirmative defenses all of the information obtained in the earlier nonsuited action was available to Mr. Wise.¹

Following some discovery in the refiled action, Ms. Benitez moved to strike affirmative defenses which it believed Mr. Wise had no good-faith basis to assert, claiming their assertion violated *Virginia Code* § 8.01-271.1. The Circuit Court

¹ Although the parties did not reach an agreement to incorporate the discovery from the prior litigation into this action, the information obtained during the previous discovery in the earlier nonsuited action clearly was known to and available to the parties and their counsel in this action. None of the fact witnesses deposed in the first case were ever redeposed by defense counsel prior to trial of the refiled action.

conducted a hearing on the motion, at which hearing defense counsel admitted to a lack of any basis for some of the defenses. Defense counsel claimed there was a good-faith basis for some of the other defenses, but was not able to articulate any reasonable good-faith basis for the ones which were the subject of the trial court's imposition of sanctions. Finding that there was no basis to plead several of the affirmative defenses Mr. Wise pled, the Circuit Court granted the motion to strike in part and asserted sanctions pursuant to Section 8.01-271.1 against Mr. Wise personally for pleading certain affirmative defenses without any good-faith basis for them.

Koons and Ford filed a "Motion to Reconsider Order Awarding Sanctions." Although the Circuit Court's sanctions were against Mr. Wise personally, this motion was not identified as Mr. Wise's motion.² The Circuit Court denied that motion. This appeal followed.

II. STATEMENT OF FACTS

VTLA accepts Appellee's Statement of Facts as accurately summarizing the relevant portions of the record. Of particular importance is the fact that Ms. Benitez was not the owner or driver but a passenger in the vehicle in which she was riding when the air bag deployed. VTLA also believes it is important that this was a refiled action and in the previous action involving the same parties and issues substantial discovery had been conducted, including depositions of Ms. Benitez and substantially all fact witnesses. *See* detailed discussion *supra* in Statement of the Case and Material Proceedings. Thus, this

² The signature on this motion is scrawled. VTLA cannot tell whether one of Mr. Wise's colleagues or whether Mr. Wise himself signed this on behalf of Ford and Koons.

is not a case where the Defendants and their counsel had had little or no opportunity to inquire into the facts. To the contrary, the Defendants and their counsel had previously made extensive inquiry into the facts and yet, as defense counsel in effect admitted at the sanctions hearing, they had not developed any good faith basis for many of the defenses that were pleaded in the refiled action.

This Court's decision depends heavily on the Circuit Court's questions and defense counsel's answers in the hearing conducted by the Circuit Court. Those questions and answers have been reproduced faithfully in the transcript of that hearing, *see* J.A. 75-129, as have the relevant pleadings and motions. No repetitive quotation of those materials is necessary.

III. PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

A. Summary of VTLA's Position

VTLA offers no comment on the sometimes acrimonious and heated assertions the parties and their counsel have made with respect to each other in the briefs. Rather, VTLA focuses on the pure legal questions before the Court.

The fundamental premise underlying much of the Appellants' argument appears to be that lawyers are excused from the obligations imposed by *Virginia Code* § 8.01-271.1 when they assert affirmative defenses in a responsive pleading. They conclude it would be "new law" if this Court were to decide otherwise. This is incorrect. Section 8.01-271.1 directly repudiates the Appellants' position. The statutory language is plain and unambiguous, and therefore it must be applied exactly as the General Assembly wrote it.

According to Section 8.01-271.1 itself, lawyers *always* are bound by Section 8.01-271.1 when they sign and file any pleading, motion, or other paper, including an answer or grounds of defense. The answer to the first question presented, therefore, is no. Lawyers are not excused from complying with Section 8.01-271.1 when asserting an affirmative defense in a responsive pleading.

The second question presented to the Court inquires about the standard for complying with Section 8.01-271.1 when asserting an affirmative defense in a responsive pleading. The issue is whether there should be some more lenient standard for certain pleadings such as an answer or grounds of defense. Again, the General Assembly already has supplied the answer in the statute itself. The standard for complying with the statute is the same in all situations. The standard is clearly a flexible and minimal one. Exactly what the statutory standard requires or how it applies in a particular case varies depending upon the circumstances, but the legal requirements set forth in the statute apply to all pleadings. In the language of the statute, a lawyer asserting an affirmative defense in a pleading must certify that “to the best of his knowledge, information and belief, formed after reasonable inquiry,” the affirmative defense the lawyer pled is “well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” *Virginia Code* § 8.01-271.1.

Of course, what constitutes a “reasonable inquiry” that will support the pleader’s conclusion that “to the best of his knowledge, information and belief” the pleading is “well grounded in fact” and law will vary, depending upon the specific situation. A lawyer retained by a defendant who has little access to or control over much of the evidence the day before her response to a lawsuit is due should ordinarily be entitled to

rely solely on his client's version of the facts and plead those responses accordingly the following day. Likewise, a lawyer hired by a plaintiff with limited access to or control over the evidence shortly before her statute of limitations runs should ordinarily be entitled to believe her client's version of the facts and make all allegations in the pleading which can be made in good faith "to the best of his knowledge, information and belief" based on that inquiry. In both cases, given the lack of time to inquire further and the limited access to and control over the evidence, it is reasonable to rely upon and make allegations supported by the information provided by the clients.

The statutory good-faith pleading requirement is thus a minimum standard or outer limit that should be flexibly and cautiously applied in order to sanction only truly frivolous pleadings, but at the same time to protect and guard against unjustly and denying litigants the ability in good faith to assert, preserve, and conduct discovery regarding claims and defenses. The statute should not be used to foreclose pleadings or defenses which are asserted in the reasonable belief following reasonable inquiry that they are well-grounded in fact and law. In this regard, the VTLA vigorously agrees with the reliance of the Virginia Association of Defense Attorneys upon this Court's sound admonition in *Gilmore v. Finn*: "The threat of a sanction should not be used to stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case." *Gilmore v. Finn*, 259 Va. 448, 466, 527 S.E.2d 426, 435 (2000) (quoting *Oxenham v. Johnson*, 241 Va. 281, 286, 402 S.E.2d 1, 3 (1991)).

In no case, however, does a lawyer comply with Section 8.01-271.1 when he files a pleading asserting defenses which he essentially concedes he has no basis for, **and which the extensive information already available indicates are not well-grounded.**

B. Virginia Code § 8.01-271.1 Applies Without Exception to All Lawyers Filing Any Pleading

In this case, the Court is called upon to interpret and apply *Virginia Code* § 8.01-271.1 to answer the questions presented. Here, the exercise is a simple one, for the statute directly and unambiguously answers the questions.

Virginia Code § 8.01-271.1 provides in relevant part:

Every pleading, written motion or other paper of party represented by an attorney shall be signed by at least one attorney of record in his individual name

The signature of an attorney . . . 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 is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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 on the person who signed the paper . . . an appropriate sanction, which may include an order to pay to the other party . . . a reasonable attorney's fee.

Virginia Code § 8.01-271.1.

The General Assembly's language in Section 8.01-271.1 is unambiguous and mandatory, and therefore the Court must apply the plain meaning of those words. See *Alcoy v. Valley Nursing Homes, Inc.*, 272 Va. 37, 41-42, 630 S.E.2d 301, 303 (2006). That is, when interpreting a statute, the Court must determine the General Assembly's intent from the plain meaning of the words it used in the statute. See *Britt Constr., Inc. v. Magazzino Clean, LLC*, 271 Va. 58, 62, 623 S.E.2d 886, 888 (2006); *West Lewinsville Heights Citizens Ass'n v. Board of Supervisors*, 270 Va. 259, 265, 618 S.E.2d 311, 314

(2005). If the language of a statute is unambiguous, the Court is bound by the plain meaning of that language. *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003); *Woods v. Mendez*, 265 Va. 68, 74-75, 574 S.E.2d 263, 266 (2003). Here, the General Assembly used plain, declarative language, and the only task left for the Court is to apply it.

In plain, declarative language, the General Assembly mandated that “every” pleading and motion must be signed by a lawyer. See *Virginia Code* § 8.01-271.1. This includes a grounds of defense or an answer, because they are pleadings. See Rule 3:5 and Rule 3:8(a), *Rules of the Supreme Court of Virginia*. The General Assembly further provided in Section 8.01-271.1 that every such signature on a pleading is the lawyer’s certification that after reasonable inquiry he has formed the belief that to the best of his knowledge, information, and belief the pleading is “well grounded in fact” and law. The statute further clearly and unambiguously provides that if a pleading “is signed or made in violation of this rule,” the court “shall” impose a sanction on a lawyer who signed the pleading in violation of the statute. *Id.* Thus, a “violation” of the statute will support imposition of sanctions. If a lawyer complies with two of the three statutory requirements, but violates the third requirement, the lawyer clearly has committed a “violation” of the statute and sanctions should be imposed.

The answer to the first question presented herein, therefore, is no. Lawyers are not excused from complying with Section 8.01-271.1 when asserting an affirmative defense in a responsive pleading. They must and do certify by their signatures that the affirmative defense is well grounded in fact, to the best of his knowledge, information and belief, formed after reasonable inquiry.

C. A Lawyer Violates Section 8.01-271.1 If She Signs and Files a Pleading That Is Not Well-Founded in Fact and Law to the Best of Her Knowledge, Information and Belief Formed After Reasonable Inquiry; The Appellants' Argument Otherwise Misinterprets the Statute

On pages 20-22 of the Appellants' brief, the Appellants claim that lawyers freely can file pleadings that they do not believe are well-founded in fact so long as they satisfy at least one of the other three requirements of Section 8.01-271.1. This startling claim arises from a significant misreading of the statute.

The Appellants begin by observing correctly that Section 8.01-271.1 requires lawyers to certify three things when filing a pleading: (i) they have read the pleading, (ii) the lawyer signing the pleading believes after reasonable inquiry that the pleading is well-founded in fact and law, and (iii) the pleading is not filed to harass, to cause unnecessary litigation or for some other improper purpose. Appellants also correctly observe that the "and" here is conjunctive. The General Assembly indeed did require lawyers to certify all three things when they sign and file a pleading. After making these two observations, however, the Appellants' argument then departs widely from the statute.

The Appellants claim a circuit court must find that a lawyer disobeyed all three of the General Assembly's instructions in Section 8.01-271.1 before it can sanction the lawyer. See Appellants' Brief at 20-22. According to Appellants, a circuit court cannot sanction a lawyer who violates one or two but fewer than all three of the subparts of Section 8.01-271.1. Accordingly, the Appellants attack the Circuit Court's decision in this case, because the Circuit Court's findings only addressed Mr. Wise's violating one rather than all three of the General Assembly's instructions.

This is an unsound and insupportable reading of the statute. The express language of Section 8.01-271.1 plainly requires an attorney to meet all three requirements, not just one or two out of three. An attorney (1) must read the pleading, (2) must have the belief formed after reasonable inquiry that it is well grounded in fact and law, *and* (3) must not be filing it to harass or for some other improper purpose. He violates Section 8.01-271.1 if he fails to do all three of these things. By the same token, he violates the statute if he violates any one or more of its requirements. There is no indication in the statute that complying with only **some** or even **most** of statutory requirements provides immunity from sanctions for failing to comply with all of the requirements. To the contrary, the statute expressly authorizes sanctions upon a “violation” of the statutes requirements. The language of the statute is clear and unambiguous.

According to the Appellants’ argument, so long as a lawyer reads a pleading (thereby satisfying one of the requirements), he would be free to sign a pleading he knows is false just to harass the other side. Indeed, he could openly announce that to the circuit court judge. According to the Appellants’ argument, the circuit court judge would be barred from sanctioning him pursuant to *Virginia Code* § 8.01-271.1, because the circuit court judge could not find that the lawyer violated all three of the instructions in the statute. Likewise, according to the Appellants’ argument, a lawyer could candidly announce to a circuit court judge that he signed a false pleading about a topic he knows nothing about, without even bothering to read it. So long as there is no evidence before the circuit court judge that the lawyer specifically did it to harass the other side, the circuit court judge will not be able to sanction him.

The rule advocated by the Appellants would not merely strain the General Assembly's plain words in Section 8.01-271.1; such a rule would flatly contradict those plain words. The General Assembly requires that lawyers certify three things. Lawyers do not obey the General Assembly when they certify less than all three. Circuit courts accordingly are permitted to sanction lawyers when they comply with less than all three of the requirements. The Court should reject the Appellants' argument.

D. What Constitutes a "Reasonable Inquiry" and a Good-Faith Basis Sufficient to Satisfy Section 8.01-271.1 May Vary, But Filing a Pleading Without Any Basis For It Will Always Violate Section 8.01-271.1

The standard for complying with Section 8.01-271.1 is the same in all situations, and the General Assembly provided that standard in the statute itself. In the language of the statute, a lawyer asserting an affirmative defense in a pleading must certify that "to the best of his knowledge, information and belief, formed after reasonable inquiry" the affirmative defense the lawyer is pleading is "well grounded in fact" and law. That is the standard in all cases, for all lawyers, and with all pleadings.

Of course, what constitutes "knowledge, information or belief, formed after reasonable inquiry" supporting allegations in a pleading will vary depending upon the situation. But that is no criticism of reasonableness as a standard. Reasonableness is a standard that courts apply every day in the Commonwealth in a variety of areas of law. It provides flexibility to the courts to decide what is acceptable given any particular situation.

The Virginia Supreme Court has previously recognized in a different context that determining whether a particular course of conduct satisfies a reasonableness standard

depends on the particular circumstances involved, and requires a flexible and fact-specific inquiry. *See, e.g., Howe v. Jones*, 162 Va. 442, 446, 174 S.E.2d 764, 765 (1934) (“It comes back to this: Drivers on highways must use reasonable care and reasonable care is a flexible standard.”). So too, whether a lawyer could have had, at the time of filing, a reasonable belief following reasonable inquiry that his pleading was well-grounded in fact and law is a flexible standard and depends upon the particular circumstances.

In this case, defense counsel was not forced by an absolute fixed-deadline to file allegations or have them barred forever, nor was he confronted with a situation where little or no information was available. Rather, in this case there was no absolute fixed-deadline, and there was extensive information already available which was **contrary** to any asserted belief that the defenses were well-grounded in fact and law. In this regard, the situation presented in this case is very similar to the situation addressed by the Virginia Supreme Court in *Flippo v. CSC Associates*, 262 Va. 48, 547 S.E.2d 216 (2001). In *Flippo*, the Court reviewed the information known to the pleader, including the allegedly fraudulent letter, and concluded that the attorney could not have formed a reasonable belief that a fraud claim was warranted. Similarly, in this case, the information known to defense counsel affirmatively supports the conclusion that the pleader could not have formed a reasonable belief that the defenses were well grounded in fact and law.

In any individual case, what constitutes a good-faith and reasonable “knowledge, information and belief, formed after reasonable inquiry,” that a pleading is well grounded in fact and law will vary depending upon the particular facts and circumstances involved.

VTLA submits that the factors that courts should consider and are pertinent to whether the good-faith pleading requirements have been satisfied by counsel will often include: a) the amount of time legally available for the inquiry into the facts and law; b) whether the pleader was subject to a deadline which would be absolutely preclusive if the allegation or claim was not asserted in the pleading at issue; c) the extent to which the relevant facts and evidence were available or unavailable to the pleader and his counsel; d) whether the information already available was contrary to the assertions in the pleading; e) special difficulties that may apply to obtaining information from the represented party (problems with memory, communication, recall, etc.); f) the nature of the claims or defenses (are novel or cutting-edge issues involved, etc.), and g) other facts and circumstances that may be pertinent. Where the parties have already had an extensive opportunity to investigate and even conduct formal discovery regarding the facts, the trial court should take that into account in determining whether claims or defenses were asserted in compliance with the statute.

Likewise, the statute should not be used to enable litigants or the trial court to conduct a pretrial “inquisition” at a very early stage of the proceedings. Such an approach would enable litigants to use the good-faith pleading statute in an unintended and unsound manner that could unfairly probe the thought processes and trial strategy of opposing counsel.

VTLA submits that trial courts should be sensitive to these concerns. In many cases, the trial court may prefer to defer decision of motions for sanctions until after the completion of discovery or even after trial in order to avoid these dangers and problems. The trial courts should also be sensitive to the difficulty of obtaining information before a

lawsuit has even been filed, and to the absolutely preclusive effect of statutes of limitations and other deadlines. These and many other considerations and factors can be taken into account by trial courts in the sound exercise of their powers and discretion.

It is important to note that the statutory language does not even require that a lawyer pleading a claim or defense must presently have in his possession or control anything like jury-submissible evidence or proof regarding his claim or defense. Rather, the statutory requirement is quite properly much more forgiving and flexible; what the statute requires is that the lawyer must certify that “to the best of his knowledge, information and **belief**, formed after reasonable inquiry, it is well grounded in fact” and law. *Virginia Code* § 8.01-271.1 (emphasis added). Indeed, this “reasonable belief” standard is exactly the standard that the Virginia Supreme Court has articulated and emphasized. In its 2001 *Flippo* decision, for example, the Court held:

In reviewing a trial court's award of sanctions under Code § 8.01-271.1, we apply an abuse of discretion standard. In applying that standard, we use an objective standard of reasonableness in determining **whether a litigant and his attorney, after reasonable inquiry, could have formed a reasonable belief** that the pleading was well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for an improper purpose. *Gilmore v. Finn*, 259 Va. 448, 466, 527 S.E.2d 426, 435-36 (2000).

Flippo v. CSC Associates, 262 Va. 48, 65-66, 547 S.E.2d 216, 227 (2001) (emphasis added). It should be noted that the standard is not even whether all or most attorneys would have formed the belief the pleading was well grounded, but rather is whether an attorney “after reasonable inquiry, could have formed a reasonable belief that the pleading was well grounded in fact” and law.

Clearly, this “reasonable belief” standard will be violated only in extreme and egregious cases. The present case, however, appears to involve one example of such an extreme situation. This is not a case where the Defendants had little or no prior opportunity to inquire into the facts at the time that they asserted their affirmative defenses. Rather, the parties had previously conducted extensive investigation and formal discovery regarding the facts. Despite this extensive investigation and discovery regarding the facts, the defendants asserted defenses for which they admitted they lacked any basis and which they had been urged to withdraw.

In no case does a lawyer who has no basis to believe that a pleading is well grounded in fact and law comply with Section 8.01-271.1. The statute expressly requires that a lawyer must have some level of “knowledge, information and belief” formed “after reasonable inquiry” that his pleading is “well grounded in fact.”

In some cases, lawyers will indeed face circumstances that favor a flexible and lenient application of the statutory standard. For example, occasionally defendants will find themselves very end of their deadline to respond to a lawsuit before hiring a lawyer. In that situation, the only source of information available to the defense lawyer on short notice may be his client herself, and the client may have limited access to or control over the evidence. Likewise, potential plaintiffs sometimes find themselves near the end of their statute of limitations when they are hiring a lawyer. In that situation, the only source of information readily available to the plaintiff’s lawyer may be the potential plaintiff herself, and she may understandably have limited and incomplete information. Lawyers on the eve of a client’s deadline simply may not have an opportunity to make factual inquiries apart from the assertions of their clients. Those lawyers’ careful

questioning of their clients and subsequent reliance on their clients may well be sufficient to support a reasonable belief following reasonable inquiry that the pleading is well-grounded in fact and law. To be sure, when the only source of information on short notice is the client, the information provided by the client may well of necessity be sufficient to support a lawyer's certification regarding the pleading. Likewise, even in the absence of complete and directly probative information, the limited information known to the lawyer may lead the lawyer to an understandable and reasonable belief, under the circumstances, that certain claims or defenses are well-grounded in fact and law.

In other cases, reasonableness will require a more significant investigation prior to asserting or denying a fact in a pleading. If (as in this case) a body of information is already known to a lawyer about the matters in dispute, reasonableness would ordinarily require the lawyer to consult that body of information before making or denying an assertion in a pleading. The lawyer clearly should ask himself whether the extensive information already known provides any support for, or even is contrary to, the allegations he is considering filing. Again, what is reasonable is fact-specific depending on the particular case, and the circuit courts of the Commonwealth are well-equipped to make those determinations.

What always is unreasonable, and what always violates *Virginia Code* § 8.01-271.1, is to file a pleading which no reasonable lawyer could certify was, to the best of his knowledge, information and belief, following reasonable inquiry, well-grounded in fact and law. When the General Assembly says a lawyer must have knowledge, information, and a belief, formed after reasonable inquiry, that a pleading is "well grounded in fact" and law, the lawyer must have *some* grounds to make the actual

assertion.³ Moreover, what is always impermissible is for the lawyer to assert a claim or defense where an extensive body of information already known to him fails to support that claim or defense and actually supports the conclusion that the defense is **not** well-grounded in fact and law. While one can debate what constitutes enough grounds in any given case, one cannot legitimately maintain that *no* grounds is ever enough to meet the standard.

The answer to the second question, therefore, is yes. Lawyers violate Section 8.01-271.1 if they plead an affirmative defense without any basis to support it, and where the extensive information already known indicates that there is no support for the defense and indeed is contrary to its assertion.

³ Appellants erroneously claim that the Circuit Court's ruling effectively requires lawyers to have specific proof in their hands before making each allegation in a pleading. See Appellants' Brief at 24-25, 29. VTLA takes issue with this characterization of the Circuit Court's ruling. The Circuit Court, in effect, asked only for *some* reasonable and articulable basis for the affirmative defenses, and several times the defense in effect conceded it had none. Circumstantial, indirect, inferential, or suggestive supporting information would have been enough if the defense had identified it. Instead, the information available affirmatively indicated the defense lacked any basis for the defenses. Neither the Circuit Court nor the VTLA in this brief *amicus curiae* have made the demand for specific, detailed proof that Appellants criticize. As previously noted, all that the statute requires is that the attorney must certify that "to the best of his knowledge, information and belief, formed after reasonable inquiry," the pleading is well grounded in fact and law.

E. The Court Should Reject the Argument That an Unfounded Fear of Waiver Alone Is Enough To Permit the Assertion of an Affirmative Defense Without Any Basis; That Argument is Contrary to the Statute, and This Court Liberally Permits the Amendment of Pleadings

The Appellants come quite close to arguing in their brief that lawyers should be permitted to assert affirmative defenses despite not having any basis, for fear of waiver. See Appellants' Brief at 26-30. They say that if they do not plead every affirmative defense, they likely will waive them. They claim a fear that they may be surprised and later discover grounds supporting an affirmative defense they did not plead, and they will have waived it.

The Appellants' arguments about waiver of defenses are based on an unfounded fear. This Court's rules explicitly provide that leave to amend pleadings should be granted liberally. See Rule 1:8, *Rules of the Supreme Court of Virginia* (providing, "Leave to amend shall be liberally granted in furtherance of the ends of justice.") Moreover, unlike statute of limitations deadlines applicable to the assertion of claims, there is usually no absolute preclusive deadline applicable to the assertion of defenses. In a case in which new grounds of defense are discovered that had not been apparent at the start, counsel may seek leave to amend the pleadings to assert those defenses, and that leave must "be liberally granted" by the circuit courts.

Although it is true that many defenses are waived if they are **never** pleaded prior to trial, it is **not** true that they are automatically waived if not pleaded in the initial responsive pleading. Wide latitude is allowed for the assertion of affirmative defenses long after the initial responsive pleading is filed. For example, in *Herndon v. Wickham*, 198 Va. 824, 97 S.E.2d 5 (1957), the Virginia Supreme Court affirmed the trial court's

ruling allowing the defendants to amend their grounds of defense to assert a statute of limitations defense. In *Herndon*, the defendants did not move to amend until eleven days before trial, more than ten months after the defendants had filed their original grounds of defense which failed to raise any statute of limitations defense. The Supreme Court nevertheless held that the trial court properly allowed leave to amend.

F. When Reviewing for Abuse of Discretion a Circuit Court’s Sanctioning a Lawyer Pursuant to Section 8.01-271.1, This Court Should Only Rely on the Evidence and Arguments Presented to the Circuit Court

The Appellants claim now, but VTLA does not see claimed in the record below, that Mr. Wise should not be sanctioned because he did not actually *assert* the thirteen affirmative defenses in the responsive pleading at all. They say, albeit inconsistently, that Mr. Wise merely *reserved* them and hence should not be sanctioned. See Appellants Brief at 4, 10 n.1, 18, 23; but see Appellants’ Brief at 11 (making note “of the thirteen affirmative defenses *asserted*”), 13 (arguing “that only affirmative defenses were raised that were believed, in good faith, would be supported by the evidence were *asserted* [sic]”); at 22 (denying “that the stricken affirmative defenses were *interposed* for any improper purpose”); see also J.A. 99 (defense counsel telling the Circuit Court in oral argument, “Yes, we did *plead* many of these affirmative defenses so that . . . they would not be waived)(emphasis added on “*asserted*,” “*interposed*,” and “*plead*”).

Of whatever merit this argument,⁴ or the other new arguments, they do not seem to appear anywhere in the record materials contained in the Joint Appendix. As *amicus*

⁴ If this argument had been preserved, VTLA would oppose it. We would not be here today if the defense had told the Circuit Court below that they were not actually asserting the affirmative defenses. We would not be here today if they had told the Circuit Court that they were merely stating their right under Rule 1:8 to seek leave of the court to amend their pleading in the future.

curiae, VTLA only advocates that here, like in all cases within this Court's appellate jurisdiction, the Court should insist on compliance with Rule 5:25. VTLA recommends that the Court require Appellants to identify where in the record those arguments were made before the Circuit Court and preserved.

IV. CONCLUSION

The Appellants make several valid points in their brief. Sanctions pursuant to Section 8.01-271.1 are serious, and should not be applied in such a way to stifle the good-faith assertion of claims or defenses. Indeed some of the motions that may be most deserving of sanctions are frivolous motions for sanctions themselves. VTLA strongly supports collegiality among all lawyers, just as it strongly supports the ethical duty of all lawyers to represent their clients competently and zealously within the bounds of the law. VTLA also believes that the good-faith pleading requirements must be flexibly and cautiously applied, with due consideration of all the attendant circumstances. Lawyers will and indeed often are ethically required to advance, protect, and preserve even doubtful and uncertain claims and defenses on behalf of their clients, as long as they have a reasonable belief there is support for those claims and defenses. VTLA hopes that lawyers and judges will not raise the issue of sanctions in most of those situations. If we are to remain strong advocates as well as friendly colleagues, and if the American advocacy system of justice is to remain sound, there is no other way.

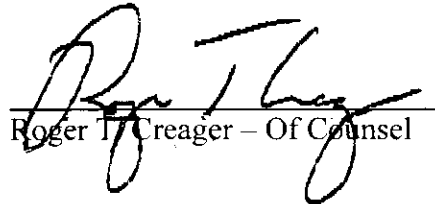
Virginia Code § 8.01-271.1 requires every lawyer signing any pleading to certify that the lawyer has read the pleading, that the lawyer believes after reasonable inquiry that the pleading has a factual and legal basis, and that the pleading is not filed for some

improper purpose. Pleading affirmative defenses with *no* grounds to support them directly violates Section 8.01-271.1. This is particularly true in a case where defense counsel had previously made extensive inquiry into the facts and yet, as defense counsel in effect admitted at the sanctions hearing, they had not developed any good faith basis for many of the defenses that were pleaded in the refiled action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2006, twenty copies of this Amicus Brief were filed with the Clerk's Office of the Supreme Court of Virginia, and three copies each were mailed to the following:

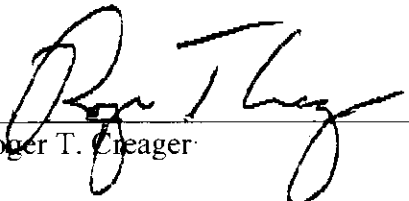
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