NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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July 30, 2019

LETTER OPINION

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Re: *Willberg Teddy Chapilliquen v. Sara Patricia Chapilliquen*
Case No. CL-2018-11016

Dear Counsel:

This cause is before the Court for entry of a Final Decree of Divorce and associated request by Plaintiff, Mr. Willberg Teddy Chapilliquen, for an award of attorney's fees against Defendant, Ms. Sara Patricia Chapilliquen. This case presents the unusual

circumstance wherein the attorney for Defendant, Mr. Randall Sousa ("Sousa"), through pervasive neglect of his professional duties to his client, coupled with obstructive noncompliance with this Court's orders compelling discovery and dishonesty at trial about compliance therewith, has caused Defendant to be placed in a position where the award of attorney's fees against her may seem merited, when the actual cause of her predicament is the conduct of her counsel. On the one hand, Plaintiff is entitled to his attorney's fees in remedial application of this Court's authority under Rule 4:12(d) of the Supreme Court of Virginia and deterring sanctions under Virginia Code § 8.01-271.1. On the other hand, it would be inequitable to apply such remedy to Defendant herself, which would merely serve unfairly to compound the damage Sousa has done to adjudication of the merits of his client's cause. Instead, this Court finds that justice in implementation of the legal authority enabling the award of attorney's fees and sanctions against a party or her counsel calls for the award of Plaintiff's attorney's fees and a monetary sanction to be paid only by counsel for Defendant in consequence of his willful and negligent thwarting of the orders of this Court compelling discovery and his prevarication in support of an oral motion at trial. Consequently, Mr. Randall Sousa, counsel for Defendant, is hereby sanctioned $11,000.00, personally, and pursuant to Rule 4:12(d) of the Supreme Court of Virginia and Virginia Code § 8.01-271.1, which sum shall be paid to Plaintiff as further directed in the Final Decree of Divorce.

BACKGROUND

This case comprehends a contested divorce action filed by Plaintiff on July 24, 2018. Defendant, represented by Sousa, answered and counterclaimed on August 30,

2018, but did not pray for spousal support. At the time of such answer, the parties had been married for 24 years, owned a single family home in joint name, and Plaintiff owned his own small trucking business. Early in the litigation and by affidavit, Defendant asserted that she never earned money for herself, was supported by Plaintiff during the marriage, and had to resort to a loan from her son to fund her attorney's fees. By letter of September 18, 2018, Plaintiff made an offer to settle, which included the payment of spousal support at the rate of $600.00 per month for 8 years, for a total of $57,600.00. This offer went unanswered by Sousa, nor did he ever amend Defendant's counterclaim to include a prayer for spousal support.

On October 2, 2018, the parties entered into a Domestic Relations Case Scheduling Order ("Scheduling Order") signed by another judge of this Court, which set the equitable distribution trial date for June 11, 2019, for two days duration. The Order required among other conditions, that the parties exchange exhibit and witness lists, no later than 15 days before trial, and that discovery be completed by no later than 30 days before trial. Plaintiff timely complied with such conditions while Sousa never filed his lists prior to trial nor propounded discovery timely on behalf of Defendant.

On February 8, 2019, another judge of this Court entered an order compelling "Defendant remit to Plaintiff full and complete responses to Plaintiff's Interrogatories and Request for Production of Documents by February 15, 2019." Award of attorney's fees pursuant to said order was reserved for future consideration by the judge presiding over the final divorce hearing. On April 26, 2019, another judge of this Court entered yet another order compelling Defendant "provide full and complete discovery responses without further objection by no later than . . . May 3, 2019."

On April 12, 2019, Plaintiff timely designated an expert to provide testimony about the value of Plaintiff's business and historical cash-flow thereof, among other topics. By letter dated May 14, 2019, Plaintiff proposed a new settlement offer, which withdrew the previous offer containing agreed spousal support, but offered to deem the marital home be valued using the 2018 tax assessment value of $466,350.00. The new settlement offer, like the previous one, went unanswered by Sousa. On May 17, 2019, another judge of this Court granted Plaintiff's Motion to Compel Appraisal of the Marital Home to take place on May 28, 2019. By the time of trial of the divorce and equitable distribution thereunder, neither Defendant nor Sousa had complied with any of these orders.

Trial in this matter was had on June 11, 2019. On such date, neither Sousa nor Defendant were in the courtroom at the appointed hour. The Court was informed by counsel for Plaintiff that Sousa had stopped in briefly to state he "had a mess" in the courtroom of another judge of this Court. Upon further inquiry the Court discovered that Sousa had set two multi-day equitable distribution divorce cases before two separate judges at the same time and date. Sousa sought a continuance of this cause on June 7, 2019, from another judge of this Court, without properly noticing the matter, which caused his motion to be removed without prejudice. Apparently, despite practicing in the Fairfax courthouse for a period of time, Sousa had not familiarized himself with the fact that continuance motions need not be docketed but may instead be addressed to a calendar control judge, and even by phone, on any day of the week the courthouse is open upon proper notice to opposing counsel. It was not until June 11, 2019, the morning of trial, that Sousa sought a continuance from yet another judge of this Court through the Court's accessible calendar control procedure. At such appearance, Sousa never informed the

calendar control judge that he had docketed two trials for the same day, nor did he make this circumstance known to the undersigned trial judge. The calendar control judge denied Defendant's continuance.

Aware that the morning of June 11, 2019, Sousa began his other trial with another judge, and that Plaintiff had engaged the services of an Spanish language interpreter, this Court's clerk communicated with the other judge's courtroom and determined the other matter had been shortened by the circumstantial posture of that case so that perhaps trial of this cause could proceed before the undersigned judge with about 30 minutes delay. When Sousa had not yet arrived after an hour, this Court opted to begin the noticed trial, whereupon Sousa appeared shortly thereafter, and trial had to be recommenced. Sousa then moved the Court for a continuance on the ground in the main that he was unprepared to proceed, which motion was denied. Plaintiff in turn moved for an order limiting the testimony and evidence Defendant could present inasmuch as Sousa neglected to comply with the Scheduling Order by not filing a witness and exhibit list, and failed to abide by the two orders compelling answers to discovery requests. The Court interpreted the Scheduling Order as allowing the Defendant to testify,[1] but because Sousa had failed to answer relevant discovery with other than objections, in derogation of two court orders, the Court ruled Defendant could not present evidence other than in rebuttal.

The Court proceeded with the *ore tenus* portion of the trial establishing the elements necessary to the entry of a divorce decree, in order to accommodate Plaintiff's

[1] Judges of this Court have taken reasonable differing case-dependent views as to whether a litigant who does not list him or herself in compliance with the Scheduling Order may testify. It is the view of the undersigned judge that a *party* may generally be allowed to give testimony even if not listed on the witness list as the potential for the giving of such evidence is implicit, but that such decision is entirely a matter of the discretion of the presiding judge.

corroborating witness and limit the cost of the interpreter that Plaintiff had engaged for the testimony of his witness. At the conclusion of such evidence, and when the interpreter was excused because she was due in another courthouse in the afternoon, Sousa revealed he had not engaged an interpreter for his client and asked whether the interpreter could stay. When asked about whether he would pay for the interpreter and informed of her predicament, Sousa said he would take care of the matter in his own way and that trial could proceed without the interpreter despite his earlier representation that this client needed an interpreter for purposes of the proceedings.

Trial continued with a restricted set of evidence which did not address the current earnings of the parties, the value of Plaintiff's trucking business, the valuation of the marital home with the exception of the Plaintiff's bare unchallenged assertion the home was worth $580,000.00, or many of the other statutory factors normally treated in the confines of a contested equitable distribution proceeding. It was the Plaintiff's apparent tactical choice not to present further or additional evidence of these matters, as the Court had not restricted Plaintiff's ability to present evidence, but had only limited Defendant's presentation of evidence. Therefore, the ability of Defendant to present evidence in rebuttal was also limited by the scope of the direct evidence placed before the Court.

During trial, Sousa moved the Court continue the hearing to the following day on the basis that he represented he had complied with the discovery orders and would like an opportunity to find proof of his production, and that therefore the Court should revisit its ruling limiting the ability of the Defendant to present evidence. The Court indicated it would be inclined to grant such continuance if Sousa was affirming, he had answered discovery as required. Sousa at first asserted such affirmation, but then indicated that if

it turned out his statement was untrue, he would simply withdraw it the next day. The Court indicated that if it continued the matter based on his representation which then turned out to be false, Sousa would be in contempt of Court. Sousa then equivocated in his further averments and the matter was not continued to the following day. The Court indicated to Sousa, however, that if he had documentary proof he had timely responded to discovery as directed, he could address the Court before entry of the final decree, with a post-trial motion for the Court to reconsider its ruling limiting the evidence. No such post-trial motion was ever tendered to the Court by Defendant or her counsel.

At the close of trial, counsel for the parties were further invited to submit competing proposed final orders for the Court's consideration in supplementation of closing argument. Plaintiff's counsel provided a professional, well-drafted order, which substantially meets the statutory requirements for a final decree. Sousa in contrast, provided the Court with his proposed order, which displayed an utter lack of knowledge of what language must be contained in a final decree. For instance, Sousa's proposed decree is devoid of requisite statutory notices, fails to dispose properly of the assets and debts of the parties, and includes two paragraphs of legal jargon stating definitional verbiage describing the general nature of an equitable distribution proceeding lifted verbatim from a letter opinion of another judge of this Court, without attribution to such authority.[2] Moreover, Sousa's proposed final order is not even final for it calls for the Court to continue the matter to November 2019 to take further evidence pertaining to the value of the marital home, despite the Court having made clear the only way the trial evidence

[2] *See Burchfield v. Burchfield*, No. CL-2019-744, 2019 WL 2407703, at *2-3 (Fairfax Cir. Ct. June 3, 2019).

would be reopened is if Sousa provided documentary proof he had complied with the discovery orders of this Court, proof which was never forthcoming.

ANALYSIS

In this cause, Plaintiff has rightly prayed for attorney's fees. Underlying such request in part, from the vantage point of Plaintiff, are the unnecessary efforts to which he was put by Defendant, through Sousa's repeated noncompliance with the discovery orders of this Court and failure to engage in or even respond to settlement offers. The initial threshold question to be determined by this Court, however, is whether Defendant is responsible for this course of conduct or whether her counsel, Sousa, is primarily to blame. Put simply, the question is whether Defendant directed her counsel's conduct or was instead the victim of his gross negligence. To determine this issue the Court considers the totality of the direct and circumstantial evidence shedding light on such question.

One measure of whether the actions undertaken by Sousa were directed by Defendant is to examine whether they were of the type that are discretionary in nature or instead are arguably a negligent abandonment of Defendant's rights on the part of Sousa. A second measure of relative responsibility for the conduct of the defense case rests with examination of the words of Sousa at trial. The Court proceeds to examine each of these considerations in turn.

Sousa undertook a number of actions that, when taken together, appear to disclose a disquieting pattern of inadequately representing the interests of Defendant. First, in the Counterclaim to Plaintiff's Complaint, Sousa failed to pray for spousal support

in this contested divorce action despite his knowledge that the parties' marriage was of 24 years duration, and that his client had never worked outside the home during that time, while her husband in contrast owned a small trucking business.[3]

Second, Sousa failed to respond to Plaintiff's offer of settlement of September 18, 2018, wherein Defendant was offered spousal support of $600.00 per month for 8 years. No counteroffer was made, nor did Sousa amend Defendant's responsive pleadings, effectively forfeiting the right to at least $57,600.00, if not the right to obtain undefined duration support from this Court. It belies logic that these are directives Sousa received from his client to abandon an important avenue of economic redress for Defendant and not even bother to respond to an offer of settlement with a counteroffer.

Third, knowing that on April 12, 2019, Plaintiff timely designated an expert to provide testimony about the value of Plaintiff's business, Sousa neither deposed such expert nor designated any expert of his own, despite asserting to this judge that Plaintiff's marital estate is worth "millions."[4] Inasmuch as Sousa sought a continuance at trial to do what he had not bothered to do during the time periods authorized by the Rules, it does not appear that his client had directed him to abandon her marital interest, if any, in Plaintiff's business.

Fourth, Sousa failed to respond to a second settlement proposal from Plaintiff dated May 14, 2019, which contained the favorable term to deem the marital home be

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[3] During cross-examination of Plaintiff's corroborating witness by Sousa at trial, such witness testified he had never seen more than three trucks in service at Plaintiff's business, where he is an employee.

[4] This assertion is of some doubt as evidence at trial established Plaintiff has considerable credit card debt and had to borrow money from a relative to afford a pleasure trip.

valued using the 2018 tax assessment value of $466,350.00. At the June 11, 2019 trial, Plaintiff testified unimpeded that the value of the marital home was now $580,000.00. The negative consequence of the failure to accept the first offer is potentially significant for Defendant, for she desires to remain in the marital home and purchase her husband's marital interest. Thus, if for instance, this Court were to determine each party to be entitled to a 50% share, and since the evidence shows the outstanding mortgage to be significantly below the 2018 tax assessment value of the home, if the Court accepts the Plaintiff's valuation Defendant would be deprived of in excess of $56,000.00 in value. Even if the Court were not to accept the value posited by Plaintiff as matter of the weight to be given his admissible testimony,[5] the alternative negative consequence to Defendant will be that the home will have to be sold unless the parties can agree as to its value post-judgment. Compounding the problem for Defendant, Plaintiff was reduced to compelling an appraisal of the home by court order, which request was granted by this Court on May 17, 2019. Thereafter, Sousa did not ensure the home was made available on the appointed day of May 28, 2019, for said appraisal to occur. It is unlikely that this course

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[5] This valuation evidence was admitted as the Court ruled it a matter of weight not admissibility.

> It is generally recognized that the opinion testimony of the owner of property, because of his relationship as owner, is competent and admissible on the question of the value of such property, regardless of his knowledge of property values. It is not necessary to show that he was acquainted with the market value of such property or that he is an expert on values. He is deemed qualified by reason of his relationship as owner to give estimates of the value of what he owns.

King v. King, 40 Va. App. 200, 212, 578 S.E.2d 806, 813 (2003) (quoting *Haynes, Executrix v. Glenn*, 197 Va. 746, 750, 91 S.E.2d 433, 436 (1956)).

of conduct by Sousa, respecting failing to ensure the proper valuation of the marital home, was knowingly approved by Defendant.

Fifth, Sousa failed to comply with orders to compel discovery issued by this Court on February 8, 2019, and April 26, 2019. Most glaringly, Sousa met Plaintiff's Interrogatory 21 with only objections that were overruled, and never supplemented the same with an actual factual answer. That request stated:

> The factors set forth below are derived from 20-107.3 Code of Virginia and are used by the Court in determining equitable distribution of marital property and/or monetary award. State all facts that you contend the Court should consider that relate to any one or more of the factors including in your answer a summary of the significant events, dates, occurrence, persons involved, and/or witnesses such events and communications the parties and witnesses relating to those events, and then it lists all the factors.

Sousa's failure to answer this interrogatory in the face of two court orders to do so ensured the evidence Defendant could present at trial was extremely limited. Sousa never communicated that he had a client who was unwilling to answer or obstreperous in her behavior towards her counsel. Instead, Sousa maintained Defendant had answered the interrogatories and maintained he had proof at his office. Thus, the failure to comply with the orders compelling discovery could hardly be laid at the doorstep of Defendant herself.

Sixth, Sousa failed to comply with the Scheduling Order in numerous respects. He failed to propound discovery on behalf of his client until *after* the discovery cutoff deadline, thereby leaving his client blinded to Plaintiff's evidence. Sousa failed to file a witness and exhibit list. This had the consequence of restricting the evidence Defendant could present to only the Defendant's testimony and rebuttal. However, because Sousa in parallel failed to answer discovery, as already noted, Defendant was further restricted from presenting

a case even though the Court ruled that the Scheduling Order alone did not prevent a party from testifying since such potential testimony is not unexpected. It strains credulity that Defendant would have asked her counsel to place her in such a precarious evidentiary posture.

Seventh, Sousa scheduled Defendant's case and a separate equitable distribution hearing for another of his clients, both for June 11, 2019, and with a time estimate for each of two days duration. While he did make two attempts at a continuance of the instant case, the first came on June 7, 2019, when the matter was taken off the docket because he did not follow proper procedure which would have afforded Plaintiff's counsel an opportunity to be heard. Sousa could have appeared as early as the same day for emergency afternoon calendar control by phone, or on June 10, 2019. Sousa did not make his next continuance request until the morning of trial on June 11, 2019, before a calendar control judge. At that time Sousa did not disclose he had two multi-day matters docketed concurrently for trial before two separate judges.[6] When the continuance was denied at calendar control, Sousa did not take steps to advise the undersigned judge's court clerk of his predicament or to ensure his client was timely directed to the proper courtroom. He further did not engage the services of a Spanish language interpreter despite representing the Defendant's ability to understand English was limited.

The Court observed Defendant's halting demeanor at trial. It appeared she knew little of what was befalling her, product of the behavior of Sousa, and certainly was not

[6] It is not unusual in the busy Fairfax courthouse to have firms schedule full day matters in separate courtrooms on the same day. When such circumstance is observed on the docket, it is generally assumed different lawyers of the firm will appear in the respective courtrooms. Thus, it was not for the docket clerk to question or assume that Sousa would be so careless as to schedule two multi-day trials for himself on the same day.

directing events. In sum, based on the Court's observations coupled with Sousa's troubling conduct in representation of Defendant, his efforts can best be characterized as sweeping her cause along in a river of neglect, not the product of Defendant's making.

Turning to Sousa's own words, the Court's above-stated impression is disturbingly accentuated. The Court engaged in the following colloquy with respect to Sousa's continuance request:

> [THE COURT:] Now with respect to, Mr. Sousa, I understand you may be busy and things happen to lawyers where, but if I excuse, if I discontinue a case because a lawyer comes in and says I'm unprepared, this is not in a posture, then that would become, the exception would become the rule. Then any lawyer who is unprepared for whatever reason, or any party who is unprepared for whatever reason would get an automatic continuance, and I'd have to do it for everybody. If I do it for you, I'd have to do it for everybody. Parties are supposed to be ready on the day of trial. . . .
>
> [THE COURT:] I'm just saying that as a practical matter, if one side comes ready and one side doesn't come ready, that is not a basis for a continuance. There, because if it were, then it would excuse preparation and it would, and ultimately the party is responsible that she is ready, her counsel is ready, she's given you the information she needs, everything is ready, and if not, to make a timely motion. And not the day before at the eleventh hour without stating all the grounds and then not on the day of trial, and I would note that you had two matters scheduled in the same courthouse, two trials. . . .

In relevant part, Sousa responded:

> [MR. SOUSA:] Your Honor, if I may make a representation.
>
> [THE COURT:] Sure, go ahead.
>
> [MR. SOUSA:] It's a question of equity. *I'm fine with it*, Your Honor. We'll move forward. *If I messed up and she wants to sue me, that's fine. It's accountability.* It's Virginia. *I'm accountable for myself.* But the truth is, it's not a matter of me not being, well, *I'm not prepared. No, I'm not prepared.* It's a matter of equity. *This matter is not prepared for trial. This matter is not prepared.* I'm prepared. *I'm prepared to go to two trials in a day* and take consultations all day after that. I'm prepared. But it's, the question is, and I'll move through this and I'll go through it in rebuttal and impeachment, and I

> have a subpoena duces tecum out there that I'm going to bring up now, too, because it's out there, too. But it's about an equitable distribution. So the Court, *yes, and we can jump through here and I'm wrong here and I'm wrong there. . . .*

(emphasis added). To put it mildly, it is virtually unprecedented for an attorney in the opening stages of an equitable distribution proceeding to call on his client in effect to sue him for malpractice. Sousa further admitted at the close of trial that he had "dropped the ball." It appears to the Court that Sousa's statements were calculated to sway the Court to give him a continuance to fix his malfeasance without consequence. In the context of a divorce action between two adversaries armed with counsel, this Court should generally not make up for the professional deficiencies of one counsel to the detriment of the party with counsel who has not manifested such shortcomings. To do otherwise would mean the Court would step into the role of advancing the adversarial process in favor of only one party and risk harm to its duty to fairly and impartially preside as decision-maker in the cause.[7]

Sousa referred to being accountable for himself and this Court finds, having fixed responsibility for his ubiquitous negligence and consequent thwarting of this Court's orders, that the time has come to turn to determining the measure of such accountability this Court is authorized to exact. Certainly the Defendant has been harmed by her counsel's transgressions, but the power to impose financial accountability on Sousa in favor of his client is not within the ambit of this Court's authority in the context of a divorce

[7] The Court recognizes that there are instances where the Court must step in and ask questions or otherwise intervene pursuant to its obligations under the law such as, for example, in a child custody case where the Court is charged with determining the best interest of children or in certain criminal due process contexts. In most contested evidentiary proceedings, however, it is the view of the undersigned judge that the Court should tread lightly in correctively rewarding neglect by one party's counsel to the detriment of their adversary.

action. Sousa has suggested a path for his financial answerability to his client and in effect invited her to take it, something upon which the Court will not remark further except to state that one of a lawyer's primary duties is not to harm the viability of the claims of his client by counsel's own neglect.

Also negatively impacted by Sousa's conduct was Plaintiff, who had to engage in undue expense. Additionally, the Court's resources were unnecessarily taxed by Sousa's scheduling multi-day trials in two courtrooms, which caused delay in the conduct of trial. This Court could have subjected Sousa to the initiation of contempt proceedings. The Court's criminal contempt power does not, however, empower the Court to order attorney's fees or remedial monetary sanctions in favor of a party. *See* Va. Code § 18.2-457. While the Court could potentially fine and even jail Sousa upon further proceedings if he was found to be in criminal contempt, such direct punishment would serve no direct benefit to compensate Plaintiff for the unnecessary expenditure of attorney's fees which were the product of Sousa's willful and neglectful conduct in derogation of orders of this Court.

The Court could alternatively resort to its civil contempt power, application of which, however, may not neatly fit in the context of this case.

> Under well-established Virginia jurisprudence, *contempt only lies "for disobedience of what is decreed, not for what may be decreed*." [B]efore a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied. "[F]or a proceeding in contempt to lie," there "must be an express command or prohibition' which has been violated."

DHR, Inc. v. Hanback, 288 Va. 249, 255, 765 S.E.2d 9, 13 (2014) (internal citations omitted) (emphasis added). Sousa himself was not compelled *as a party* to comply with

the orders of this Court. Additionally, the civil contempt power, remedial in nature, might allow for compensatory attorney's fees but not empower the Court to address Sousa with a deterring sanction for his misrepresentation to the Court in support of his motion for continuance at trial, falsely stating he had complied with supplementation of discovery in purported obedience of the orders to compel. While Sousa's neglectful and willful thwarting of such orders is potentially within the ambit of the Court's remedial civil contempt power under the unusual circumstances of this case, the Court need not consider its inherent contempt power when the appropriate remedy is here more specifically addressed by Rule and statute.

A general principle of note is that "equity will not suffer a wrong to be without a remedy." *Price v. Hawkins*, 247 Va. 32, 37, 439 S.E.2d 382, 385 (1994) (citing *Drummond v. Rowe*, 155 Va. 725, 730-31, 156 S.E. 442, 444 (1931)). While the Court has authority to right some of the wrongs occasioned by Sousa, such authority is by no means unbounded.

> In the absence of authority granted by a statute, such as Code § 8.01-271.1, or a rule of court, such as Rule 4:12, . . . a trial court's inherent power to supervise the conduct of attorneys practicing before it and to discipline an attorney who engages in misconduct does not include the power to impose as a sanction an award of attorneys' fees and costs to the opposing parties.

Nusbaum v. Berlin, 273 Va. 385, 400-01, 641 S.E.2d 494, 502 (2007).

There are thus two legal avenues that best empower this Court to award attorney's fees against Sousa and in favor of Plaintiff. First, having determined that Sousa is responsible for failing to comply with two successive orders of the Court compelling discovery, this Court has the authority pursuant to Rule 4:12 to award attorney's fees in favor of Plaintiff and against Defendant's counsel, Sousa.

> If a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 4:8, after proper service of the interrogatories, or (3) to serve a written response to a request for production or inspection submitted under Rule 4:9, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may — *without prior entry of a Rule 4:12(b) order to compel regarding this failure* - impose any of the sanctions listed in paragraphs (A), (B), and (C) of subdivision (b)(2) of this Rule. In lieu of any order or in addition thereto, the court shall require the party failing to act *or the attorney advising him or both to pay the reasonable expenses, including attorney's fees,* caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Va. Sup. Ct. R. 4:12(d) (emphasis added). Effective April 1, 2018, the Supreme Court of Virginia amended this Rule to no longer to require an order to compel before subjecting a party or their counsel to attorney's fees for failure to answer discovery, *where appropriate*. The clear directive from the Supreme Court is that the obligation to comply with discovery begins with receiving the lawful request rather than only at the point of an order to compel. In application of this Rule to the instant case it is apparent that the failure to comply with discovery requests alone provides the authority for the imposition of attorney's fees on an offending attorney. However, the Rule has significant safeguards for diligent and ethical lawyers. If the failure to comply was "substantially justified" or it would be "unjust" to impose the sanction, courts are in effect directed not to levy such sanctions on attorneys or their clients. A myriad of circumstances could apply to excuse sanctions from being applied to attorneys in most cases of failure to make discovery, such as for instance if the failure to comply is the product of the actions of their client or other circumstances out of counsel's control. Moreover, the imposition of Rule 4:12 attorney's fees on counsel rather than on the party the attorney represents is generally a rare circumstance largely dependent on at a minimum, extensive neglect of duty to his or her

client on the part of the lawyer.[8] In the instant case, such requisite neglect is evident from the conduct of Sousa which is thus not substantially justified to excuse his liability. In contrast, inasmuch as such conduct was the product of Sousa's making as already detailed, it would be unjust to apply consequent attorney's fees to Defendant herself.

A second line of authority for the imposition of attorney's fees *and an additional monetary sanction* against Sousa is Virginia Code § 8.01-271.1. Sousa made an oral motion for continuance at the June 11, 2019 trial date, in which he stated to the Court that he had complied with the Court's orders to compel and had supplemented discovery but needed a continuance to the next day in order to search for and bring documentary proof from his office. Plaintiff's counsel maintained credibly she never received any such supplement from Sousa. While the motion for a continuance was denied, the Court did allow Sousa to provide the Court such substantiation post-trial and imparted that in such event, the Court might consider reopening the evidence. No such post-trial filing was forthcoming and the Court thus infers the averred supplementation of discovery never transpired. The Court concludes that Sousa was untruthful to the Court in support of his motion and thus stands in violation of Virginia Code § 8.01-271.1.[9]

> *An oral motion made by an attorney* . . . in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . is not interposed for any improper purpose, such as . . . to cause unnecessary delay or needless increase in the cost of litigation.

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[8] This Letter Opinion is not to be viewed as imparting that in fairly routine good faith discovery disputes nevertheless leading to entry of orders to compel this Court is of the view that attorney's fees should be awarded against a lawyer instead of the responsible party that counsel represents.

[9] Sousa's lack of candor with the tribunal also appears to be in derogation of the Virginia Rules of Professional Conduct. *See* Va. Sup. Ct. R. PT 6 2 RPC 3.3(a)(1).

Id. (emphasis added).

The remedy afforded by the aforesaid Code section is broader than that contained in Rule 4:12(d), for the Court is empowered to impose sanctions beyond just attorney's fees and costs product of discovery violations. "If a . . . motion . . . is . . . made in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who . . . made the motion . . . an appropriate sanction. . . ." Va. Code § 8.01-271.1. The statute is thus both remedial and also serves a deterrence function to police misconduct. Upon a violation thereof, the imposition of an appropriate sanction is thus mandatory and not merely discretionary, although still circumscribed in application by the abuse of discretion standard. *Ford Motor Company v. Benitez,* 273 Va. 242, 249, 639 S.E.2d 203, 206 (2007). Thus, the Court views the imposition of sanctions under Virginia Code § 8.01-271.1 in the context of this case to be both remedial but also to provide a measure of sanction and deterrence for Sousa's mendacious continuance motion, which Sousa had reason to know was not well grounded in fact.

The two lines of the Court's authority combine to authorize the Court to impose attorney's fees and a monetary sanction on Sousa in remedial compensation for his repeated violation of Rule 4:12 and orders to compel discovery, and also as a deterring sanction for his violation of Virginia Code § 8.01-271.1. In consequence thereof and in application of such Rule and Code section, the Court awards Plaintiff $11,000.00 in attorney's fees and sanctions against Sousa, which sum is a combination of attorney's fees for discovery violations and a monetary sanction for Sousa's untruthfulness to the Court in an oral motion.

CONCLUSION

The Court has considered the request by Plaintiff, Mr. Willberg Teddy Chapilliquen, for an award of attorney's fees against Defendant, Ms. Sara Patricia Chapilliquen, in the context of entry of a Final Decree of Divorce. This case presents the unusual circumstance wherein the attorney for Defendant, Mr. Randall Sousa, through pervasive neglect of his professional duties to his client, coupled with obstructive noncompliance with this Court's orders compelling discovery and dishonesty at trial about compliance therewith, has caused Defendant to be placed in a position where the award of attorney's fees against her may seem merited, when the actual cause of her predicament is the conduct of her counsel. On the one hand, Plaintiff is entitled to his attorney's fees in remedial application of this Court's authority under Rule 4:12(d) of the Supreme Court of Virginia and deterring sanctions under Virginia Code § 8.01-271.1. On the other hand, it would be inequitable to apply such remedy to Defendant herself, which would merely serve unfairly to compound the damage Sousa has done to adjudication of the merits of his client's cause. Instead, this Court finds that justice in implementation of the legal authority enabling the award of attorney's fees and sanctions against a party or her counsel calls for the award of Plaintiff's attorney's fees and a monetary sanction to be paid only by counsel for Defendant in consequence of his willful and negligent thwarting of the orders of this Court compelling discovery and his prevarication in support of an oral motion at trial. Consequently, Mr. Randall Sousa, counsel for Defendant, is hereby

sanctioned $11,000.00,[10] personally, and pursuant to Rule 4:12(d) of the Supreme Court of Virginia and Virginia Code § 8.01-271.1, which sum shall be paid to Plaintiff as further directed in the Final Decree of Divorce.

The Court shall enter an order incorporating its ruling herein, and THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

[10] Of this sum, $775.00 was previously ordered only against Defendant by an order of another judge of this this Court entered on April 26, 2019, by another judge, but now becomes a sanction for which Mr. Sousa is jointly obligated, albeit that the Plaintiff may collect this sum only once, from either Mr. Sousa or Defendant.