IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
No. 31,607

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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Wendy F. Jones

THERESE BERNIER, individually and as Trustee of the Therese Bernier Trust,

Plaintiffs,

v.

HAROLD BERNIER, deceased, by WILLIAM DOUGLAS BERNIER, substituted representative,

Defendant.,

REPLY BRIEF

Civil Appeal from the First Judicial District Court
County of Santa Fe No. D-0101-CV-02007-01046
The Honorable Barbara Vigil

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STATEMENT OF RULE 12-313 PAGE/WORD COUNT COMPLIANCE:

This Brief is longer than the 15 pages permitted. Counsel used NeoOffice Writer 2012 by Sun Microsystems for Mac OS X, with a proportionally spaced Times New Roman typeface. The body of the document consists of 4,157 words total.

STATEMENT OF CITATION TO THE TRANSCRIPT

The written transcripts are cited by date, page, and line reference. Transcripts recorded on CD are cited by date and the time in the proceeding at which the argument or evidence was adduced.

INTRODUCTION TO REPLY ARGUMENT

This case asks the Court to consider whether a pleading on which a litigant has prevailed can be construed as a document without good grounds to support it. Defendant obtained a novel judgment for $ 56,575.44 [RP 852] in attorney fees as a Rule 1-011 NMRA sanction based on an astonishing theory of agency liability that is so plainly faulty that Defendant cannot seriously defend it on appeal. Defendant was also awarded $3,141.82 in costs [RP 686], although in this case no depositions were taken and no discovery was served.

The fatal flaw in Defendant's Answer Brief is that it nowhere mentions that Mrs. Bernier won the relief she requested. The record is clear: Mrs. Bernier sued for replevin and won replevin. [RP 363-64] Judge Hall awarded Mrs. Bernier the return of her stock certificate, which was the primary purpose of bringing her replevin action. *See Novak v. Dow*, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970) (holding the primary purposes of a replevin action is the immediate return of the plaintiff's property; the secondary purpose is damages). Having prevailed in that action, it strains the imagination to conceive of any way in which the signer of Mrs. Bernier's pleadings could have had no belief that there were good grounds to support them, as Rule 1-011 requires.

Defendant's Answer Brief fails to acknowledge that Mrs. Bernier prevailed. Incredibly, Defendant argues that Mrs. Bernier did not prevail. [AB 15-18] De-

fendant's Answer Brief entirely fails to address that the renewed summary judgment motion granted Mrs. Bernier the replevy of her stock certificate. The district court's entry of sanctions in this case is the very essence of an abuse of discretion and must be reversed.

1. Under New Mexico Law, Rule 1-011 Sanctions Cannot Logically Apply to Pleadings Filed By a Party Who Prevailed on the Claim Alleged.

New Mexico Rule of Civil Procedure 1-011 NMRA specifically provides:

> A. Signing of Pleadings, Motions, and Other Papers; Sanctions. Every pleading, motion and other paper of a party represented by an attorney, shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address and telephone number. **The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading, motion or other paper is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or other paper had not been served.** If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. **For a willful violation of this rule an attorney or party may be subjected to appropriate disciplinary or other action. Similar action may be taken if scandalous or indecent matter is inserted.** A "signature" means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

[Emphasis added] The rule "was designed to encourage honesty in the bar when bringing and defending actions [and] ought to be employed only in those rare cases in which an attorney deliberately presses an unfounded claim or defense." *Rivera v.*

Brazos Lodge Corp., 111 N.M. 670, 674, 808 P.2d 955, 959 (1991). Unlike federal Rule 11, which provides for an objective inquiry, New Mexico's Rule 1–011 creates a less stringent standard of subjective good faith, requiring inquiry into the subjective "knowledge, information and belief" surrounding the filing. *Rivera*, 111 N.M. at 674, 808 P.2d at 959.

To obtain sanctions against Mrs. Bernier under Rule 1-011, Defendant had the burden to show that Mrs. Bernier or her attorney signed a pleading, motion or other paper that was filed in the district court, and that, when Mrs. Bernier or her attorney signed the pleading, motion or other paper, Mrs. Bernier or her attorney subjectively knew that the pleading, motion or other paper was not supported by good grounds, or that Mrs. Bernier or her attorney filed the pleading, motion, or other paper to delay the proceedings. Defendant established none of these requirements as a matter of evidence. The sole grounds for entry of sanctions against Mrs. Bernier was based upon Ronald's alleged conduct, which Defendant never even attempted to prove, but only alleged in argument. [*See, e.g.* Tr. 2/24/10 10:15:50 ff; RP 937; Fact #28]

The logical interrelation of the three elements of a claim for Rule 1-011 sanctions means that the absence of any one element is fatal to the claim. Where a false, misleading or vexatious pleading, motion or other paper is not signed by a party or attorney, a motion for Rule 1-011 sanctions fails. Where there were good

grounds to bring a pleading, motion or paper (as evidenced by a party prevailing on those claims), Rule 1-011 sanctions fail. Where there is no proof that the party or attorney subjectively knew that the pleading, motion or other paper was groundless, or intended by the filing to delay the proceedings, then Rule 1-011 sanctions fail. The record in this matter is devoid of any admissible evidence – as opposed to counsel's argument - that Mrs. Bernier, her agent, or her attorney subjectively knew that any pleading, motion or other paper was groundless, or that they intended by the filing to delay the proceedings.

Second, by its own finding of fact, the district court acknowledges that Mrs. Bernier had no responsibility for allegedly sanctionable conduct of Ronald. [RP 1039; finding #34] There was no proof of Ronald's alleged wrongful intent in bringing the case, only argument *ad hominem* by Defendant's counsel. It is patently wrong as a matter of law and logic for the district court to find - on the strength of some fatuous agency theory - that Mrs. Bernier must pay Rule 1-011 sanctions for the alleged conduct of Ronald, where no evidence of that conduct was ever adduced. Defendant's Answer Brief advances an agency theory of sanctions that does not meet even the most basic standard of logical cogency, legal sufficiency or due process.

Third, even if evidence of Ronald's wrongdoing existed, and even if Mrs. Bernier could be found liable for Ronald's actions as her agent, the Rule 1-011

sanctions awarded by the district court far exceeds Ronald's actual involvement in the case. Ronald signed a verification to the Complaint for Replevin [RP 8] (on which Mrs. Bernier prevailed) and signed affidavits in support of summary judgment on the replevin action [RP 42, 247]. The award of all of Defendant's claimed attorney fees from the beginning to the end of the case as a Rule 1-011 sanction - including Defendant's claimed fees for answering a renewed summary judgment motion that Mrs. Bernier won, fees Defendant allegedly incurred during a separate proceeding that unsuccessfully attacked Mrs. Bernier's competency, and Defendant's fees for a pending appeal before this Court in which Defendant has not prevailed – grossly exceed the bounds of reason and common sense.

The primary purpose of a replevin action is the immediate restoration of plaintiff's property. *Novak*, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970). Mrs. Bernier unquestionably accomplished this. [RP 363] An award of sanctions that indisputably sanctions a party for bringing a case that was most successful is the every essence of an abuse of discretion, and cannot stand.

2. Defendant Adduced No Evidence of Ronald Bernier's Alleged Improper Acts.

Evidence of any sanctionable action by Mrs. Bernier, her son Ronald, or her attorney, is simply absent from the record in this case. The first time Defendant made any allegation of sanctionable conduct was well after the trial on damages had concluded, and the case was – for all intents and purposes – over. [RP 455-

460] Defendant's motion for Rule 1-011 sanctions nowhere specifically identifies any baseless pleading, motion or other paper filed on behalf of Mrs. Bernier. [RP 455 - 479] Defendant first mentioned that Ronald was the target of the sanction motion at the February 24, 2010 hearing on the motion for sanctions, but adduced no evidence of wrongdoing. [Tr. 2/24/10; 10:15:50 ff]

Defendant's "agency theory" of liability was fleshed out for the first time in his proposed findings of fact and conclusions of law after this Court vacated the initial award. [RP 931] Defendant's counsel's argument at the hearing and Defendant's proposed findings and conclusions are evidence in the record and are inadequate to sustain the award. Assertions and arguments of counsel are not evidence." *Muse v. Muse*, 2009–NMCA–003, ¶ 51, 145 N.M 451, 200 P.3d 104.

Review of the record demonstrates that Ronald's involvement was limited. He signed the verification for the Complaint for Writ of Replevin [RP 1; 8], an affidavit in support of summary judgment [RP 42], and an affidavit in support of the renewed Motion for Summary Judgment [RP 247]. He testified at trial. [Tr. 10/14/2009] In Defendant's answer [RP 17-22] and responses [RP 94-110; 262-273], Defendant never alleged that the Complaint or the motions were baseless or filed to delay the proceedings. Indeed, motions for summary judgment expedite proceedings. *See H-B-S Partnership v. Aircoa Hospitality Services, Inc.*, 2008-NMCA-013, ¶ 16, 143 N.M. 404, 176 P.3d 1136, *citing Wallace v. DTG*

Operations, Inc., 442 F.3d 1112, 1118 (8th Cir. 2006) (the rules of civil procedure, including summary judgment, secure the "just, speedy and inexpensive determination of every action.")

After Mrs. Bernier won her renewed Motion for Summary Judgment, and her stock certificate was returned to her, a half-day trial was held on damages. [Tr. 10/14/2009] Defendant participated in the trial, as did Beverly Kedzior and Ronald Bernier. At no time during the trial did Defendant allege or prove that Ronald's actions at any time during the litigation had been improper or sanctionable.

Judge Hall denied Mrs. Bernier's claim for money damages on the replevin action, and the parties agreed that there would be no appeal of the matter. Accordingly, no findings of fact or conclusions of law were entered. Defendant did not notify Judge Hall of an anticipated claim for sanctions, and never requested a finding that Mrs. Bernier would be responsible for Ronald's conduct for any reason.

The Findings of Fact and Conclusions of Law that Defendant cites in his Answer Brief in support of sanctions are not based on evidence in the record. The tautology is obvious: Defendant argues that the district court entered findings that Ronald Bernier engaged in sanctionable conduct, therefore the record is clear that Ronald Bernier engaged in sanctionable conduct. Defendant's argument is

essentially that the district court had discretion to sanction a party or agent and did so, therefore the court did not abuse its discretion. The circular argument and invective is transparent.

To date, Defendant has never set forth with particularity what pleading, motion or other paper Mrs. Bernier – or Ronald as her agent – filed that could properly be sanctioned. Throughout the Answer Brief, as he did at the hearing on this matter and in his proposed findings and conclusions, Defendant engaged in conclusory and *ad hominem* attacks on Ronald, accusing him of misusing the legal process by filing the suit at all. Defendant has no explanation for precisely how Ronald could have brought a groundless case on behalf of Mrs. Bernier when Mrs. Bernier was the only party plaintiff, and she prevailed.

Defendant cites federal case law interpreting federal rule of civil procedure 11 for the proposition that a prevailing party may be sanctioned. [AB 17] Defendant engages in no analysis about the material differences between federal Rule 11 and Rule 1-011 NMRA. The two rules are not subject to the same analysis, and the federal interpretive case law cannot be used to construe Rule 1-011 NMRA to arrive at Defendant's conclusion.

Defendant's claim is that - from the moment her complaint was filed - Mrs. Bernier's claims were utterly baseless and every pleading was interposed only to harass. Defendant never proved these allegations and never argued them to the

district court at any point when the district court could have done something about it. Only in oral argument on the sanctions motion and in proposed findings and conclusions after remand, did Defendant's attorney argue – as opposed to prove - that the basis for an award was Ronald's conduct. Prior to filing the motion for rule 1-011 sanctions, Defendant never argued, alleged, or proved that Ronald was the agent of Mrs. Bernier, that Ronald – not Mrs. Bernier – was behind the proceeding, and that nevertheless Mrs. Bernier should be held liable in damages for Ronald's alleged conduct.

Defendant's agency theory is a red herring. Even assuming that Mrs. Bernier could be held liable for for Rule 1-011 sanctions due to Ronald's conduct as her agent, Defendant never proffered evidence to support either his agency theory or his claim for sanctions. Defendant's attorney argued that Ronald was responsible for bringing a baseless action. [Tr. 2/24/2009] Defendant's proposed finding of fact and conclusions of law on remand are replete with allegations and invective. [RP 931-944] However, neither counsel's argument nor Defendant's proposed findings and conclusions contain facts or constitute evidence sufficient to support the award of sanctions. *Muse,* 2009–NMCA–003, ¶ 51.

Once the district court found that Mrs. Bernier – the party to be held liable - was not responsible [RP 1039, #34], the inquiry into sanctions should have ceased. Mrs. Bernier is the only party plaintiff herein. Defendant's Answer Brief and his

theory that a party can engage in no wrongdoing, but still be responsible for the conduct of another, evinces no fidelity to the simplest principles of logic and commonsense. The district court specifically found that Mrs. Bernier had no actual knowledge of the wrongfulness of a pleading, motion or paper, or knowledge of Ronald's allegedly sanctionable conduct. [RP 1039, #34] There was no basis for entry of Rule 1-011 sanctions.

Defendant's Answer Brief contains a litany of conclusory allegations against Ronald, which are derived wholly from Defendant's own proposed findings and conclusions, as adopted by the district court. [AB 7-14] Defendant treats his allegations and the district court's findings as self-authenticating. Defendant's approach is an example of "begging the question" - the logical fallacy whereby one assumes the point at issue. Begging the question consists in passing off as an argument what is really no more than an assertion of your position. Jamie Whyte, *Crimes Against Logic* 108 (2005). Defendant, rather than applying the law of agency to the facts adduced during the litigation, simply assumes that there was no basis for bringing the action, that Mrs. Bernier was not responsible for bringing the action, and that Ronald Bernier was. No evidence of record supports this theory or the district court's findings, and they must be reversed.

3. Defendant is Estopped to Demand Rule 1-011 Sanctions At the Conclusion of a Case in Which Mrs. Bernier was the Prevailing Party.

The fact that Mrs. Bernier prevailed on the primary objective of the case

(return of her stock) is dispositive that this case was properly grounded in law and in fact. The record does not support the district court's finding that anyone associated with Mrs. Bernier engaged in abusive motions practice, discovery abuse, malicious conduct, or meritless litigation. *See Rangel v. Save Mart, Inc.*, 2006-NMCA-120, ¶ 11-12, 140 N.M. 395, 142 P.3d 983 (stating the basis for Rule 1-011 sanctions). Indeed, Defendant never argued this until the oral argument on the sanctions motion, and no evidence was previously introduced to support such a claim. Even in the post-trial proceedings and the motion requesting fees under Rule 1-011, Defendant never articulated any particularized basis for a fee award, beyond conclusory allegations against Ronald.

Defendant now insists that he refrained from confronting the allegedly sanctionable conduct in an effort to save his client the costs of litigation. [AB 19] Such a justification is preposterous. The expressed purpose of Rule 1-011 is to deter baseless filings. *Rivera*, 111 N.M. at 674, 808 P.2d at 959. If, as Defendant now ardently insists, Mrs. Bernier's entire case was baseless from its inception, then Defendant chose to respond to the allegedly baseless filings instead of seeking to have them withdrawn or stricken. Certainly Defendant filed numerous motions and amendments to motions once it became clear that the district court was inclined to grant whatever relief Defendant requested. [*E.g.* RP 455-460; 479-484; 563-570; 571-593; 616-17; 674-678; 697-702; 816]

Throughout his Answer Brief [AB 1-4] Defendant contends that Mrs. Bernier failed to object to Defendant's motion for sanctions, and failed to adequately preserve her objections, because Ronald never denied that he did not have good grounds to file the replevin action against Defendant. Defendant's argument is bewildering, and Mrs. Bernier respectfully wonders if Defendant is facetious in advancing his Alice–in–Wonderland dissertation. The record facts are as follows:

Ronald is not a party to the instant action. Mrs. Bernier sought to add Ronald and Beverly as parties [RP 370], but Defendant resisted amendment of the pleadings to add both of them [RP 383], and the district court denied the amendment. [RP 403] Mrs. Bernier was at all material times presumptively competent to make her own decisions and to manage her own affairs. *Heights Realty, Ltd. v. Phillips*, 106 N.M. 692, 693, 749 P.2d 77, 78 (1988) (holding that the law presumes that every person is competent). She successfully obtained the item she sought from Defendant in a replevin action. [RP 363] The district court expressly found she was not responsible for filing vexatious, baseless or frivolous pleadings. [RP 1039, # 34]

Defendant attempts to shift the burden to Ronald to disprove Defendant's allegation that Ronald was the mastermind of the action. [AB 5-6] Defendant's agency argument proves nothing except that Ronald – a non-party - failed to

defend himself from allegations that were not made against him until Defendant's counsel's oral argument on the sanctions motion. [Tr. 2/24/2010; 10:15:55 ff] Defendant's argument reduces to a contention that Mrs. Bernier did not prove that she had good grounds to file her case for replevin against Defendant – a contention all the more specious since Mrs. Bernier was granted the item replevied. Defendant does not explain how Mrs. Bernier or Ronald were supposed to prove a negative in Plaintiff's proposed findings of fact and conclusions of law. Defendant – not Mrs. Bernier – had the burden of proof on the motion for Rule 1-011 sanctions. *See, e.g., State ex rel. Albuquerque Police Dept. v. One Black 1983 Chevrolet Van*, 120 N.M. 280, 282, 901 P.2d 211, 213 (Ct.App. 1995) (concerning discovery sanctions; noting that the party seeking sanctions has the burden of proof).

Mrs. Bernier's initial appeal pointed out that sanctions had been entered based on conclusory statements of blame, without any meaningful analysis or information from which Mrs. Bernier or her attorney could divine what they had done wrong or in what true amount Defendant might justly be compensated. This Court agreed with Mrs. Bernier, and remanded so that the district court could identify the offending conduct with particularity and enter a proper award if it was inclined to do so. Unfortunately, the findings and conclusions entered by the district court are no more supported by the record than the court's conclusory

statement that the case never should have been filed. [Tr. 2/24/2012; 10:52:11]

Defendant's theory of Mrs. Bernier's responsibility for Ronald's allegedly sanctionable conduct is like the rabbit hole of Alice in Wonderland - a portal into a realm in which down is up and up is down. The structure of Rule 1-011 requires three logically interrelated elements: (1) the signing of a pleading, motion or other paper; (2) by an attorney or party to the case; (3) with actual knowledge that the pleading or paper lacks a foundation in law or in fact, or intending to delay the proceedings. Rule 1-011 NMRA.

Defendant made many allegations against Ronald: that Ronald and Kedzior were adversaries; that Ronald was mismanaging Mrs. Bernier's finances; that Ronald wanted to hurt Kedzior, and used an action by his mother to do so. None of Defendant's allegations touched on the elements of Rule 1-011. Defendant offered no proof of Ronald's status as an agent or alter-ego. Allegations without proof are useless; allegations are not proof. *City of Evanston v. Evanston Fire Fighters Ass'n, Local 742, Intern.*, 545 N.E.2d 252, 263 (Ill.App. 1 Dist. 1989). Indeed, Defendant resisted Mrs. Bernier's effort to amend the pleadings to add Ronald as a party. [RP 370, 383, 403] The district court erred in awarding attorneys fees for the alleged conduct of a non-party where Defendant rejected Ronald's participation as a party.

The district court's finding that Mrs. Bernier was responsible for Ronald's

alleged actions because he was her agent is not supported by substantial evidence and must be reversed. *See Rangel*, 2006-NMCA-120, ¶ 11-12 (noting that a district court's Rule 1–011 decision is an abuse of discretion where the court bases its ruling on an erroneous view of the law); *see also Capco Acquisub, Inc. v. Greka Energy Corp.*, 2008-NMCA-153, ¶¶ 50-51 145 N.M. 328, 198 P.3d 354; *U.S. v. Koenig*, 856 F.2d 843, 850 (7th Cir. 1988) (holding that mere knowledge of another's independent action does not produce vicarious responsibility absent some manifestation of consent and the ability to control).

4. Judge Hall Did Not Dismiss Mrs. Bernier's Cause of Action as Frivolous, Baseless or False.

Defendant's claim that Judge Hall "dismissed" the replevin action is incorrect. [AB 12] Judge Hall granted Mrs. Bernier's replevin, returning to her the Walgreen's Stock Certificate for which she had demanded replevy. [RP 363] This outcome disposed of "ninety percent" of the case, according to Judge Hall [Tr. 3-28-09 at 12:22-24; 13:16-25, 14:1-2]; Mrs. Bernier obtained exactly what she sought: the return of her stock certificate. *See Novak*, 82 N.M. at 34, 474 P.2d at 716, *citing Johnson v. Terry*, 48 N.M. 253, 149 P.2d 795, 796 (1944).

The case proceeded to a trial on Mrs. Bernier's claim for damages due to Defendant's unjust withholding of the stock certificate. Judge Hall found that the failure to deliver the stock certificate was not unjust. No damages were owing. Defendant cites no apposite precedent for his implicit proposition that Judge Hall's

finding against Mrs. Bernier on her claim for damages amounts to a dismissal of a frivolous, unfounded claim.

5. Mrs. Bernier Properly Stayed Execution Pending Appeal.

Defendant's repeated allegation that Mrs. Bernier wrongfully failed to pay the sanctions or to properly obtain a stay [AB 28-29] is spurious. Defendant ignores the fact that this Court vacated the initial sanctions award. [RP 958-964] Defendant also fails to cite the record showing that Mrs. Bernier posted a supersedeas bond, which was approved by the district court and by Defendant. [RP 847-48; 869]

6. Mrs. Bernier Preserved Her Objections to the Entry of Sanctions Against a Non-Party.

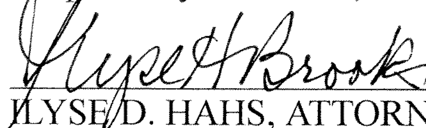
Defendant insists that the first time Mrs. Bernier raised the issue that sanctions could not be imposed against Mrs. Bernier for the actions of a non-party was in her docketing statement after remand. [AB 1-4] This is specious. Mrs. Bernier's Brief in Chief cited RP 1003, the initial page of Mrs. Bernier's Amended Proposed Findings of Fact and Conclusions of Law. Mrs. Bernier's proposed Finding #32 appears at RP 1009 of that document and the findings together adequately alerted the district court that Ronald was not a party to the action. At Finding #30, Mrs. Bernier noted her proposed amendment to add Ronald Bernier as a party. [*See also* Tr. March 18, 2009, page 16, lines 6-25; page 17, lines 1-3] Given Defendant's opportunism in filing ongoing amended motions for additional

fees [*e.g.* RP 455-460; 479-484; 563-570; 571-593; 616-17; 674-678; 697-702; 816], and given this Court's explicit instructions on remand, Mrs. Bernier cannot reasonably be required to have filed a motion for reconsideration to preserve her claim that the district court' findings of fact were not supported by substantial evidence, where the only support for such fees was counsel's argument and the district court's findings of fact.

CONCLUSION:

For the foregoing reasons, the Defendant's arguments in his Answer Brief are unavailing, and the district court's decision awarding Defendant all the fees and costs he allegedly incurred in defending this matter must be reversed. For all of the reasons stated herein, Rule 1-011 sanctions were improperly entered against Mrs. Bernier, and the costs awarded pursuant to Rule 1-054 were unrecoverable; there are no grounds to continue the injustice by granting Defendant's request for additional fees or costs on appeal.

Respectfully submitted,



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I certify that a true copy of the foregoing was sent via U.S. Mail and electonic service this 18th day of June 2012, to:

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