

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0070

L. WALKER ALLEN, II

VERSUS

ROBERT C. LOWE, JEFFREY M. HOFFMAN,
LOWE, STEIN, HOFFMAN, ALLWEIS & HAUVER, LLP,
SUSAN TAYLOR MARTIN AKA SUSAN TAYLOR ALLEN,
ELIZABETH MARTIN ARMSTRONG, JOHN DOE, AND
THE JOHN DOE COMPANY, INC.

Judgment Rendered: DEC 22 2016

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2013-15920

Honorable Robert J. Burns, Judge Ad Hoc

John A. Hollister
Mandeville, LA

Attorneys for Appellant
Plaintiff – Lange Walker Allen, II

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Attorneys for Appellee
Defendant – Susan Taylor Martin

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Attorneys for Appellees
Defendants – Robert C. Lowe, Jeffrey
M. Hoffman, and Lowe, Stein,
Hoffman, Allweiss and Hauver, LLP

BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

Holdridge, J. concurs.

WELCH, J.

The plaintiff/appellant, Lange Walker Allen, II, appeals a July 21, 2015 judgment granting two motions to tax attorney's fees and costs under La. C.C.P. art. 863 in favor of the defendants/appellees, Robert C. Lowe, Jeffrey M. Hoffman, Lowe, Stein, Hoffman, Allweiss & Hauver, LLP, and Susan Taylor Martin. For the following reasons, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

This matter reviews a judgment awarding sanctions under La. C.C.P. art. 863. The genesis of this action is a contempt judgment issued against Mr. Allen on December 19, 2012, during a domestic proceeding between he and his ex-wife, Ms. Martin. The contempt judgment arose out of Mr. Allen's refusal to deliver the executed title for a 2008 Toyota Land Cruiser to Ms. Martin pursuant to the terms of a consent judgment between the parties. See Allen v. Allen, 2013-0996 (La. App. 1st Cir. 12/29/14), 2014 WL 7368574, 1, writ denied, 2015-214 (La. 05/22/15), 171 So.3d 922. Following review by this court, the contempt judgment was determined to be properly issued by the trial court and all appeal remedies associated therewith have been exhausted. *Id.*

While pursuing appellate review of the contempt judgment, Mr. Allen filed the underlying civil suit essentially collaterally attacking the validity of the contempt judgment. On December 20, 2013, Mr. Allen filed the instant civil action naming as defendants: Ms. Martin, Mr. Lowe, Mr. Hoffman, Lowe Stein, who were Ms. Martin's attorneys in the domestic proceeding (referred to collectively herein as the "Lowe Defendants"), Elizabeth Martin Armstrong (Ms. Martin's daughter), and two unidentified defendants.¹ Both the petition and amended petition filed in this matter were signed by Mr. Allen's attorney of record.

¹ It is unclear from the record before us what action if any was taken by Mr. Allen in pursuing his civil conspiracy claims against Elizabeth Martin Armstrong, or the unidentified defendants, John Doe, and The John Doe Company, Inc.

Mr. Allen, an attorney, also was listed as an attorney of record in the pleadings filed in this matter.

Mr. Allen's suit asserted that during the domestic proceeding, in particular, the contempt proceeding, the defendants entered "into an informal *ad hoc* partnership, joint venture, or civil conspiracy..." to deprive him of money and property. Mr. Allen's suit sought recovery under three distinct theories of recovery: (1) 42 U.S.C. § 1983; (2) the Louisiana Unfair Trade Practices Act, La. R.S. 51:1401, *et seq.* ("LUTPA"); and (3) intentional tort claims alleging that the Lowe Defendants actions violated the Louisiana Rules of Professional Conduct.

In January 2014, the Lowe Defendants removed the claims against them to the United States District Court for the Eastern District of Louisiana, and filed a motion to dismiss. During the seven months the motion to dismiss was pending, Mr. Allen made no attempt to file an opposition or otherwise support his claims. In September of 2014, the federal district court dismissed Mr. Allen's 42 U.S.C. § 1983 and LUTPA claims for failure "to state a claim that is plausible on its face." See F.R.C.P. Rule 12(b)(6); **Allen v. Lowe**, 2014-204 (E.D. La. 09/09/14), 2014 WL 4450359, 2. The federal district court set a briefing schedule on the issue of attorney's fees to allow Mr. Allen an opportunity to be heard on the issue. However, the federal district court declined to exercise its supplemental jurisdiction to consider Mr. Allen's intentional tort claim against the Lowe Defendants, and this claim was remanded to the state court.

Notably, on October 14, 2014, while awaiting the judgment on the issue of attorney's fees from the federal district court, following the remand of the intentional tort claim against the Lowe Defendants back to state court, Mr. Allen filed a motion to disqualify in the domestic proceeding, which sought to have the Lowe Defendants disqualified as counsel for Ms. Martin. Mr. Allen's motion asserted the pendency of his civil conspiracy suit as a ground, noting that the

nature of the conspiracy claims renders the action “similar to ordinary criminal cases in which it is notorious that co-defendants cannot be represented by the same counsel because the first and foremost defense of each is always the assertion that “The other guy did it.”

In March of 2015, the federal district court ruled on the issue of attorney’s fees. In granting the Lowe Defendants attorney’s fees, the federal district court found that Mr. Allen’s 42 U.S.C. §1983 and LUTPA claims were objectively “groundless and brought in bad faith.”² See Allen v. Lowe, 2014-204 (E.D. La. 3/9/15), 2015 WL 1021695, 1. The court noted that it had “no difficulty” concluding that Mr. Allen’s 42 U.S.C. § 1983 claim was frivolous and awarded the defendants attorney’s fees under 42 U.S.C. § 1988. Similarly, the federal court granted the Lowe Defendants attorney’s fees related to Mr. Allen’s LUTPA claims, noting that under La. R.S. 51:1409, attorney’s fees are available when the LUTPA action “was groundless and brought in bad faith or for purposes of harassment.”

Notably, in the order awarding attorney’s fees, the federal district court characterized Mr. Allen’s civil suit as a litigation tactic in the domestic proceeding with the objective of collaterally attacking the contempt judgment and creating a conflict of interest to prevent the Lowe Defendants from representing Ms. Martin. The federal court summarized its findings on the matter as follows:

...[T]he Court has little difficulty concluding that this action was brought in bad faith or for purposes of harassment. Indeed, it appears that Plaintiff brought this suit as a litigation tactic in the divorce proceeding. In this suit, Plaintiff alleges that Defendants were engaged in a conspiracy with their client, Ms. Martin. After this suit was filed, Plaintiff sought to disqualify Defendants from representing Ms. Martin in the divorce proceeding, arguing that this lawsuit had created a conflict of interest between Ms. Martin and Defendants. As explained above, Plaintiff, himself an attorney, could not have reasonably believed that this lawsuit had merit. **Therefore, in the absence of any other evidence, the Court concludes that Plaintiff**

² We note that the September 9, 2014 and March 9, 2015 orders signed by United States District Judge Jane Triche Milazzo are contained in the appeal record before this court. See La. C.E. art. 202, 902.

brought this suit in an effort to create a conflict of interest so that he could seek disqualification of his wife's divorce attorneys. This is not a legitimate legal reason. Accordingly, the Court finds that this action was brought in bad faith and for the purposes of harassment and that Defendants are entitled to attorney's fees under LUTPA.

In the end, this case is rather simple. A state court judge orally ordered Plaintiff to turn over the title and keys to an automobile, on the record, and in the presence of counsel. Plaintiff disobeyed the order, so the state court judge held Plaintiff in contempt. **Plaintiff disagreed with the contempt order and challenged it through every available process. Dissatisfied with the result in the available processes, Plaintiff decided to file a frivolous suit against opposing counsel.** When opposing counsel moved to dismiss that suit, Plaintiff did nothing. Now, faced with the prospect of another award against him, Plaintiff's interest in this suit is suddenly renewed. Unfortunately for Plaintiff, the suit remains as frivolous as it was the day it was filed. Therefore, the Court will award Defendants reasonable attorney's fees incurred in the defense of Plaintiff's claims.

Allen v. Lowe, 2015 WL 1021695, 3. [Emphasis added.]

Remand and Dismissal of Suit in State Court

Following the remand of the matter to state court, the Lowe Defendants filed an exception of no cause of action seeking dismissal of the remaining intentional tort claims against them. Ms. Martin, making her initial appearance in the matter, also filed a peremptory exception raising the objection of no cause of action seeking dismissal of the 42 U.S.C. § 1983 action, the LUTPA claims, and the intentional tort claims. A hearing on the exceptions was held on February 25, 2015. Ms. Martin also requested attorney's fees on the grounds that Mr. Allen's claims under 42 U.S.C. § 1983 and LUPTA were frivolous, groundless, and brought in bad faith. See 42 U.S.C. § 1988(b); La. R.S. 1409(A). In a judgment signed March 25, 2015, the trial court sustained the exceptions and dismissed all claims against the Lowe Defendants and Ms. Martin with prejudice.

Additionally, the March 25, 2015 judgment stated that Mr. Allen's claims were frivolous, unreasonable, groundless, brought in bad faith, and/or for purposes of harassment. The trial court found that Mr. Allen's claims against Ms. Martin

satisfied the criteria for allowing her to recover attorney's fees and litigation expenses pursuant to 42 U.S.C. § 1988, La. R.S. 51:1409, and the Louisiana Code of Civil Procedure. Likewise, the trial court found that the Lowe Defendants were entitled to attorney's fees under the Louisiana Code of Civil Procedure in connection with the remaining claim for intentional tort. However, no award of sanctions was imposed, and the trial court directed the defendants to file a rule to tax costs.

Mr. Allen filed an appeal challenging the March 25, 2015 judgment, wherein he asserted that the order setting the February 25, 2015 hearing was not served on either Mr. Allen or his counsel of record as required by La. C.C.P. art. 1313(C); thus, the judgment was a nullity. **Allen v. Lowe**, 2015-0983 (La. App. 1st Cir. 12/23/15), 2015 WL 9466853, 3. In an opinion rendered on December 23, 2015, this court, on its own motion, raised and sustained an exception of no cause of action, and dismissed Mr. Allen's suit against the defendants with prejudice. *Id.* at 6-8.

Defendants' Motion to Tax Attorney's Fees and Costs

During the pendency of Mr. Allen's appeal with this court challenging the March 25, 2015 trial court judgment sustaining the exceptions of no cause of action, the defendants filed separate motions to tax attorney's fees and costs. Ms. Martin's motion to tax sought recovery of attorney's fees and costs incurred in defending against the 42 U.S.C. § 1983, LUTPA and intentional tort claims under 42 U.S.C. § 1988, La. R.S. 51:1409, and La. C.C.P. art. 863, respectively. The Lowe Defendants sought recovery for attorney's fees incurred in defending against the intentional tort claim under La. C.C.P. art. 863. Both Ms. Martin and the Lowe Defendants filed memorandums in support and exhibits attached thereto setting forth the grounds upon which their claims for attorney's fees and costs rested.

The trial court issued a rule to show cause order setting the Lowe Defendants' motion to tax for hearing on July 1, 2015. The rule to show cause was served on counsel for Mr. Allen by the sheriff. The rule to show cause explicitly invited Mr. Allen to show cause "why the Court should not grant the requested relief, including but not limited to the award of attorney fees pursuant to Louisiana Code of Civil Procedure article 863." Mr. Allen filed an opposition with attached exhibits to the Lowe Defendants' motion to tax, wherein he raised two arguments contesting the award of sanctions against him. First, he argued that he did not receive notice of the February 25, 2015 hearing on the defendants' exception of no cause of action, where the court found that Mr. Allen was subject to sanctions. Second, Mr. Allen argued that his civil suit was founded on the good faith belief that the contempt proceedings amounted to an abuse of process and cited two Louisiana Supreme Court disciplinary decisions as support for his civil action.

At the July 1, 2015 hearing on the motions to tax costs, counsel for Mr. Allen appeared and notified the trial court that he and his client were not aware until the day before that "there were two separate motions [to tax], which is why there's only been one opposition filed; although I think that the same opposition would apply to both of the motions." Mr. Allen's counsel then proceeded to argue, challenging the amounts of attorney's fees claimed by both Ms. Martin and the Lowe Defendants. Following argument by counsel, the trial court granted the motions to tax and provided oral reasons for his ruling. The judgment, rendered and signed on July 21, 2015, awarded Ms. Martin \$8,415.00 in attorney's fees and \$416.79 in costs. The Lowe Defendants were awarded \$14,155.00 in attorney's fees and \$460.15 in costs.

Mr. Allen filed a motion for new trial from the July 21, 2015 judgment, and after a hearing, which neither Mr. Allen nor his counsel attended, the motion for new trial was denied. The defendants filed a motion for sanctions, which was

granted. The sanctions associated with the failed motion for new trial are the subject of a concurrent appeal before this court. See **Lowe v. Allen**, 2016-0492 (La. App. 1st Cir. 12/16/16), ____ WL ____.

In the instant appeal, Mr. Allen seeks review of the trial court's July 21, 2015 judgment granting the defendants' motions to tax and awarding Ms. Martin and the Lowe Defendants attorney's fees and costs associated with defending against Mr. Allen's civil suit. Mr. Allen prays that this court reverse and set aside the trial court's July 21, 2015 judgment and dismiss the defendants' "Motion for Sanctions" at their cost.

ASSIGNMENTS OF ERROR BY APPELLANT

Mr. Allen asserts that the trial court's judgment violated established jurisprudence holding that sanctions under La. C.C.P. art. 863 should only be awarded in extreme cases, and, if there is even the slightest justification for a party's position, sanctions are precluded. Mr. Allen avers that sanctions are inappropriate where a litigant advocates a novel theory or where a litigant's claims ultimately prove to be without merit.^{3 4}

LAW AND DISCUSSION

STANDARD OF REVIEW

A trial court's determination regarding the imposition of sanctions is subject to the manifest error or clearly wrong standard of review. **Connelly v. Lee**, 96-1213 (La. App. 1st Cir. 5/9/97), 699 So.2d 411, 414, writ denied, 97-2825 (La. 1/30/98), 709 So.2d 710. Once the trial court finds a violation of La. C.C.P. art.

³ All assignments of error and issues for review must be briefed. The court may consider as abandoned any assignment of error or issue for review which has not been briefed. Uniform Rules, Courts of Appeal, Rule 2-12.4(B)(4). Mr. Allen failed to brief the reasonableness or amount of fees awarded; therefore, we do not consider that portion of the trial court's ruling herein.

⁴ In the concurrent appeal, **Lowe v. Allen**, 2016-0492 (La. App. 1st Cir. 12/16/16), ____ WL ____, we found that Mr. Allen received reasonable notice under La. C.C.P. art. 863(E) and was provided a reasonable opportunity to oppose the sanctions under consideration herein.

863 and imposes sanctions, the determination of the type and/or the amount of the sanction is reviewed on appeal utilizing the abuse of discretion standard. *Id.*

Sanctions

Louisiana Code of Civil Procedure article 863 imposes an obligation on litigants and their attorneys to make an objectively reasonable inquiry into the facts and law. **Sanchez v. Liberty Lloyds**, 95-0956 (La. App. 1st Cir. 4/4/96), 672 So.2d 268, 271, writ denied, 96-1123 (La. 6/7/96), 674 So.2d 972. Subjective good faith will not satisfy this duty of reasonable inquiry. *Id.*

In order to impose sanctions, a trial court must first find that one of the affirmative duties imposed by La. C.C.P. art. 863(B) has been violated. La. C.C.P. art. 863(D). Under the provisions of La. C.C.P. art. 863(B), an attorney certifies that he has read the pleading, and that to the best of his knowledge, information, and belief formed after reasonable inquiry, he certifies all of the following: (1) the pleading is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) each claim, defense, or other legal assertion in the pleading is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law; (3) each allegation or other factual assertion in the pleading has evidentiary support or, for a specifically identified allegation or factual assertion, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) each denial in the pleading of a factual assertion is warranted by the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.⁵ A violation of any one of these duties fatally infects the

⁵ Although Allen did not sign the original and amending petition, La. C.C.P. art. 863(D) permits a court to sanction either the attorney who made the certification or the represented party, or both, if the trial court determines that a certification was made in violation of Article 863(B). See **Carrollton Presbyterian Church v. Presbytery of South Louisiana of Presbyterian Church (U.S.A.)**, 2014-1214 (La. App. 1st Cir. 3/9/15), 172 So.3d 1, 8, writ denied, 2015-0682 (La. 5/22/15), 171 So.3d 257.

entire certification. **Connelly v. Lee**, 96-1213 (La. App. 1st Cir. 5/9/97), 699 So.2d 411, 414.

Among factors to be considered in determining whether reasonable factual inquiry has been made are (1) the time available to the signer for investigation; (2) the extent of the attorney's reliance on his client for the factual support for the document; (3) the feasibility of a prefiling investigation; (4) whether the signing attorney accepted the case from another member of the bar or forwarding attorney; (5) the complexity of the factual and legal issues; and (6) the extent to which development of the factual circumstances underlying the claim requires discovery. The factors for determining whether reasonable legal inquiry was made include (1) the time available to the attorney to prepare the document; (2) the plausibility of the legal view contained in the document; (3) the pro se status of the litigant; and (4) the complexity of the legal and factual issues raised. **Sanchez**, 672 So.2d at 272; **Connelly**, 699 So.2d at 414.

Louisiana Code of Civil Procedure article 863 is intended to be used only in exceptional circumstances; thus, where there is even the slightest justification for the assertion of a legal right, sanctions are not warranted. **Tubbs v. Tubbs**, 96-2095 (La. App. 1st Cir. 9/19/97), 700 So.2d 941, 945. The article does not empower a trial court to impose sanctions simply because a particular argument or ground for relief is subsequently found to be unjustified; failure to prevail does not trigger an award of sanctions. **Carrollton Presbyterian Church v. Presbytery of South Louisiana of Presbyterian Church (U.S.A.)**, 2014-1214 (La. App. 1st Cir. 3/9/15), 172 So.3d 1, 8, writ denied, 2015-0682 (La. 5/22/15), 171 So.3d 257. Advocating new or novel legal theories does not trigger a sanction award under article 863. **Lafourche Parish Council v. Breaux**, 2002-1565 (La. App. 1st Cir. 5/9/03), 845 So.2d 645, 648. Article 863 seeks to strike a balance between the need to curtail abuse of the legal system and the need to encourage creativity and

vitality in the law. **Penton v. Clarkson**, 93-0657, (La. App. 1st Cir. 3/11/94), 633 So.2d 918, 925, superseded by 1996 La. Acts. No. 9 on other grounds. The goal to be served by imposing sanctions is not wholesale fee shifting, but correction of litigation abuse. **Lafourche Parish Council**, 845 So.2d at 648. In determining whether a violation of La. C.C.P. art. 863 occurred, the trial court should avoid using hindsight and should test the signer's conduct at the time the pleading, motion or other paper was submitted. **Sanchez**, 672 So.2d at 272.

On appeal, Mr. Allen asserts that the trial court's "very hasty and summary conclusions" failed to consider the jurisprudence governing the granting of sanctions. However, Mr. Allen's characterization of the trial court's actions is not supported by the record. Further, Mr. Allen's brief to this court fails to set forth or discuss any legal justification for his civil suit or how the claims asserted therein were novel. He also states in the fact section of his appellant brief that duplicative fees under 42 U.S.C. § 1988 that the Lowe Defendants had already presented in the federal court action were included in the calculation of their award at the federal level, but provided no briefing on the issue, nor did he expressly challenge the reasonableness of the fees awarded by the court.

We find that the trial court complied with the procedures set forth in La. C.C.P. art. 863 for imposing sanctions. Here, as discussed above, following a contradictory hearing, the trial court awarded Ms. Martin and the Lowe Defendants attorney's fees and costs associated with defending against Mr. Allen's suit as well as the motion to tax and the hearing. See La. C.C.P. art. 863(D) & (E). Additionally, as required by La. C.C.P. art. 863(G), the trial court described the conduct determined to constitute a violation of the provisions of the article. In particular, the court reiterated its earlier finding that the defendants' claims were "frivolous, groundless, brought in bad faith, and brought for purposes of harassment." The trial court explained that the lawsuit herein asserts violations of

law by the defendants in connection with the earlier contempt ruling, a ruling which has been affirmed by both this court and the Louisiana Supreme Court. The trial court also pointed to the federal court's finding that the LUTPA and 42 U.S.C. §1983 claims were objectively groundless and brought in bad faith. Finally, in reaching its decision, the trial court considered the bills for legal services attached to the motions filed by the defendants and deemed them reasonable under the jurisprudentially established standard.

Based on a thorough review of the record and law, we find no manifest error in the trial court's finding that Mr. Allen's actions warrant sanctions under La. C.C.P. art. 863. First, there is sufficient evidence in the record to support the trial court's finding that Mr. Allen's civil conspiracy action was legally and factually groundless. See La. C.C.P. art. 863(B)(2) & (3). Mr. Allen's suit asserted three claims predicated on the factual assertion that the defendants conspired to deprive him of money and property in the civil proceeding. Yet, with regard to the 42 U.S.C. § 1983 claim, Mr. Allen alleged no facts in his petitions to suggest that there was a conspiracy between the trial court (a state actor) and the defendants in connection with the contempt proceeding, thus, his claim lacked the most critical component of a 42 U.S.C. §1983 claim – a state actor. As for the LUTPA claim, at the time that Mr. Allen filed this claim, this circuit had held that LUTPA is an act of the legislature and cannot be applied to regulate or define the practice of law, including the conduct of attorneys. **Thibaut, Thibaut, Garrett & Bacot v. Smith & Loveless, Inc.**, 576 So.2d 532, 537 (La. App. 1st Circ. 1990), writ denied, 580 So.2d 676 (La. 1991).⁶

⁶ The first circuit's opinion in **Thibaut, Thibaut, Garrett & Bacot** was later cited with favor by the Supreme Court in **Quality Environmental Processes, Inc. v. I.P. Petroleum Co.**, 2013-1582 (La. 5/7/14), 144 So. 3d 1011, 1026, which also rejected the application of LUPTA to disputes regarding the conduct of attorneys during litigation.

With regard to the intentional tort claims asserted by Mr. Allen, the law clearly provides that a claim by a non-client for an intentional tort claim against his adversary's attorney cannot be filed until after a bona fide termination of the underlying judicial proceeding in favor of the person asserting such a claim. See Montalvo v. Sondes, 93-2813 (La. 5/23/94), 637 So.2d 127, 131-132. As noted above, Mr. Allen's challenge of the contempt judgment was unsuccessful at every level of review and there was never a bona fide termination of the underlying action in his favor at any time to justify the filing of this claim.

We note that the only place in the record where Mr. Allen provides any justification for his civil suit is in his opposition to the motion to tax costs wherein he cited two cases in support of his position that a justifiable basis existed for filing suit. In his opposition, Mr. Allen contends that his "state court action, was at a minimum, a tort action for abuse of process" and cited in support **In re Harvin**, 2013-0685 (La. 5/24/13), 117 So.3d 907, and **In re Cresap**, 2006-1242 (La. 10/17/06), 940 So.2d 624. However, **In re Harvin** involved a disciplinary proceeding against a lawyer, and **In re Cresap** involved a disciplinary proceeding against a judge. Moreover, the instant matter is distinguishable from those cases and neither case suggests that a civil action exists under the facts or legal theories alleged by Mr. Allen. Therefore, Mr. Allen had not the "slightest justification" for his civil claims. The trial court was not manifestly erroneous in sanctioning Mr. Allen. See Carrollton Presbyterian Church, 172 So.3d at 15-16.

Second, we find no error in the trial court's determination that Mr. Allen's suit was filed for an improper purpose, to harass his former wife and her attorneys. La. C.C.P. art. 863(B)(1). As noted by the federal district court, the record supports a finding that Mr. Allen brought this action in an effort to collaterally attack the contempt judgment in the domestic proceedings as well as create a conflict of interest so that he could seek to have the Lowe Defendants disqualified

from representing Ms. Martin. Other than the thin justification offered for filing this suit in his opposition to the motion to tax costs at the trial court, Mr. Allen has made no effort to present any argument to this court to justify the filing of this suit against the Lowe Defendants and Ms. Martin at any point in these proceedings.

We find it notable that after being sanctioned by the federal district court for bringing groundless and bad faith 42 U.S.C. § 1983 and LUTPA claims against the Lowe Defendants, Mr. Allen persisted with pursuing these same claims against Ms. Martin in state court. Likewise, Mr. Allen persisted in pursuing his intentional tort claims against the Lowe Defendants in state court after two appellate courts found no error in the contempt proceeding.

Based on the above, we find no error in the trial court's award of sanctions against Mr. Allen under La. C.C.P. art. 863.

ANSWER TO APPEAL

Ms. Martin and the Lowe Defendants filed an answer to the appeal requesting that this court award them damages for frivolous appeal under La. C.C.P. art. 2164. The defendants certify that they expended approximately \$12,500.00 in attorney's fees and costs in defending against Mr. Allen's appeal. An appeal is not automatically deemed frivolous simply because it lacks merit. Louisiana Civil Code of Procedure article 2164 is penal in nature and must be strictly construed. **Nungesser v. Nungesser**, 558 So.2d 695, 701 (La. App. 1st Cir.), writ denied, 560 So.2d 30 (La. 1990). Under La. C.C.P. art. 2164 an appellate court may award damages for frivolous appeal when there is no serious legal question, when the appeal is taken solely for the purpose of delay, or when it is evident that appellant's counsel does not seriously believe in the position he advocates. See **Guarantee Systems Construction & Restoration, Inc. v. Anthony**, 97-1877 (La. App. 1st Cir. 9/25/98), 728 So.2d 398, 405, writ denied, 98-2701 (La. 12/18/98), 734 So.2d 636.

In this case, defendant raised one assignment of error, which failed to have a basis in law or fact, and which was scantily briefed. We can find no basis for the appeal other than Mr. Allen's desire to delay the termination of his action against the defendants. We thus conclude that damages for frivolous appeal are appropriate in this case. The appellate court, operating under the provisions of La. C.C.P. art. 2164, should take into account every legitimate item of damages which plaintiff has suffered by reason of an unwarranted appeal taken only for purposes of delay. **Samford v. Samford**, 297 So.2d 465, 468 (La. App. 2nd Cir. 1974). Attorney's fees for protecting a judgment on appeal are an element of damages for frivolous appeal. **Roland v. Roland**, 519 So.2d 1177, 1179-1180 (La. App. 1st Cir. 1987).

After a thorough review of the record and assessment of the time and effort imposed on the defendants' attorneys in preparing a response to Mr. Allen's appeal and motions therein, we award attorney's fees and costs in the amount of \$3,000.00 to Ms. Martin and \$3,000.00 to the Lowe Defendants.

CONCLUSION

For the foregoing reasons, the judgment of the trial court signed July 21, 2015, in favor of Robert C. Lowe, Jeffrey M. Hoffman, Lowe, Stein, Hoffman, Allweiss & Hauver, LLP, and Susan Taylor Martin is affirmed. We further grant the answer to appeal filed by Robert C. Lowe, Jeffrey M. Hoffman, Lowe, Stein, Hoffman, Allweiss & Hauver, LLP, and Susan Taylor Martin and award them \$3,000.00 each in attorney's fees and costs in connection with this appeal. All costs of this appeal are assessed against the appellant, Lange Walker Allen, II.

AFFIRMED; ANSWER TO APPEAL GRANTED.