

IN THE UTAH COURT OF APPEALS

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John F. Fay,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellant,	)	
	)	Case No. 20081012-CA
v.	)	
	)	
<u>Todd Rodgers</u> ; Global Travel	)	F I L E D
Network, Inc.; and Does 1-10,	)	(February 4, 2010)
	)	
Defendants and Appellee.	)	2010 UT App 20

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Third District, Salt Lake Department, 060900141  
The Honorable Robert P. Faust

Attorneys: James L. Mouritsen, Salt Lake City, for Appellant  
David Maddox, South Jordan, for Appellee

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Before Judges Davis, Voros, and Bench.<sup>1</sup>

BENCH, Senior Judge:

This action arises out of Plaintiff John F. Fay's receipt of a purportedly fraudulent telephone solicitation on behalf of Defendant Global Travel Network, Inc. (Global), wherein Fay was told he had "won" a free vacation. Fay reported the solicitation and was referred to Defendant Todd Rodgers. In June 2005, Fay entered into a settlement agreement with Global for an all-expenses-paid vacation. Rodgers signed the settlement agreement on Global's behalf. In January 2006, after Global failed to reimburse the claimed travel expenses, Fay filed a complaint against Global and Rodgers, alleging fraud and breach of contract arising out of the telephone solicitation and settlement agreement. In his complaint, Fay alleged that Rodgers is Global's principal, yet admitted that Global's "organizational structure [was] unknown" to him.

In January 2008, Rodgers moved for dismissal of the claims against him, arguing that he is an employee of Global and cannot

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<sup>1</sup>The Honorable Russell W. Bench, Senior Judge, sat by special assignment pursuant to Utah Code section 78A-3-102 (2008) and rule 11-201(6) of the Utah Rules of Judicial Administration.

be personally liable for the company's actions. Fay contested the motion to dismiss. The district court granted Rodgers's motion, dismissing the claims against him. Rodgers then moved for rule 11 sanctions. The district court granted the motion, concluding that Fay had brought claims against Rodgers without a factual basis. See generally Utah R. Civ. P. 11(b)(3). The district court then imposed sanctions against Fay for the amount of Rodgers's reasonable attorney fees.<sup>2</sup> See id. R. 11(c) (allowing sanctions against attorneys or parties); id. R. 11(c)(2) (permitting reasonable attorney fees as a sanction).

Fay first challenges the district court's factual findings. In reviewing the imposition of rule 11 sanctions, "we grant considerable deference to the trial court's factual findings," Archuleta v. Galetka, 2008 UT 76, ¶ 7, 197 P.3d 650, "review[ing] the[m] . . . under the clearly erroneous standard," Pennington v. Allstate Ins. Co., 973 P.2d 932, 936 (Utah 1998) (internal quotation marks omitted). "A factual finding is deemed clearly erroneous only if it is against the clear weight of the evidence" when viewed in the entirety of the record. Id. at 937 (internal quotation marks omitted). "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding[]," Utah R. App. P. 24(a)(9), and "demonstrate that the evidence is legally insufficient to support the finding," Pennington, 973 P.2d at 937. In challenging the district court's factual findings, Fay does not marshal the evidence, arguing that he is exempt from his marshaling burden because the district court's findings are "so conclusory [and] lacking in requisite detail" that they are legally inadequate.

The district court found that Rodgers is an employee of Global and, in that capacity, was working on Global's behalf to reach a settlement agreement with Fay but was never a party to the contract. The district court also found that Fay should have known that Rodgers was an employee of Global and had no reasonable evidentiary support for his belief that Rodgers was Global's principal.<sup>3</sup> These findings sufficiently reveal the district court's reasoning, and upon review of the record, it is apparent which evidence the court relied upon in reaching its findings. Although Fay has failed to meet his marshaling burden, we nonetheless elect to address the record evidence in support of

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<sup>2</sup>In imposing sanctions against Fay, the district court noted that Fay is an attorney and, although represented by counsel at the time of the rule 11 motion, he had initially represented himself.

<sup>3</sup>The district court also noted that Fay had not asserted any legal theories under which Rodgers might be personally liable.

the district court's factual findings because it is relevant to whether Fay's conduct is sanctionable. See generally Utah County v. Butler, 2008 UT 12, ¶ 12, 179 P.3d 775 (concluding that appellant made the "patently false" assertion that there was no evidence to marshal despite "abundant evidence in the record supporting the trial court's finding," yet deciding to review the findings nonetheless "in order to elucidate [a legal] standard by applying it to specific facts").

Fay should have known that Rodgers was an employee of Global and not its principal before he filed his complaint in January 2006. In his complaint, Fay admitted that Global's "organizational structure [was] unknown" to him; however, Fay could have easily discovered Global's basic organizational structure and identified its principal by performing a brief search on the Utah Department of Commerce website. Further, in a letter to Fay, dated February 24, 2005, Rodgers is identified on company letterhead as Global's "Western District Manager." From this title, it can be reasonably inferred that Rodgers is an employee. That Rodgers is not Global's principal was also indicated by a February 22, 2005 letter, sent to Fay from Global's legal counsel, David R. Maddox. In this letter, Maddox identifies himself as Global's legal counsel and discusses Global separately and distinctly from Rodgers. Rodgers's employee status was confirmed three days after Fay filed his complaint when Fay received a letter from Global's president, Scott Nichols. In that letter, Nichols tendered the amount of Fay's travel expenses and apologized for the delay, explaining that Rodgers "does not have signatory privileges on the corporate bank account." Additionally, depositions taken in September 2007 explained Global's corporate structure and confirmed that Nichols is Global's principal and Rodgers is an employee. The district court's findings are also supported by the settlement agreement itself wherein the parties to the agreement are identified as Fay and Global. In contrast, Rodgers is identified as the person through whom Global is acting, signing the agreement "for Global." (Emphasis added.)

Collectively, this evidence demonstrates that before filing suit, Fay should have been aware that Rodgers was merely an employee of Global. Therefore, Fay did not have any reasonable basis for a belief that Rodgers was Global's principal. Throughout the course of the litigation, Fay was repeatedly alerted about Rodgers's employee status. Fay nevertheless persisted in pursuing his claims against Rodgers, even opposing Rodgers's motion to dismiss. Accordingly, we conclude that the district court's factual findings are supported by the clear weight of the evidence.

Fay next claims that the district court incorrectly concluded that he violated rule 11(b)(3). Rule 11(b)(3) requires a person filing a claim to certify that "the allegations and other factual contentions have evidentiary support." Utah R. Civ. P. 11(b)(3). "Rule 11[(b)(3)] does not call for the imposition of sanctions whenever there are factual errors." Morse v. Packer, 2000 UT 86, ¶ 28, 15 P.3d 1021 (internal quotation marks omitted). Rather, "the misstatements must be significant," concerning "critical" facts, where "the surrounding circumstances indicate that counsel did [not] conduct a reasonable inquiry." Id. (internal quotation marks omitted). Further, "[r]ule 11 does not impose a duty to do perfect or exhaustive research [but asks] whether the research was objectively reasonable under all the circumstances." Id. (internal quotation marks omitted).

The district court concluded that Fay had violated rule 11(b)(3), reasoning that "[Fay] clearly had no factual support for his claims against Rodgers." The district court further observed that it was "not dealing with a simple case of factual errors or misstatements, which are clarified upon reflection or through the discovery process." Instead, this was a "case where [Fay] had absolutely no legal or factual basis for involving Rodgers in this action and asserting claims against him." In light of the district court's factual findings and the supporting record evidence, we conclude that the district court correctly determined that Fay violated rule 11(b)(3) by filing a claim without a factual basis. See generally id. ¶ 26 (stating that whether rule 11 has been violated is a legal conclusion, reviewed for correctness); see also Archuleta v. Galetka, 2008 UT 76, ¶ 7, 197 P.3d 650 ("[W]e grant . . . some deference to the trial court's application of the facts when reaching its legal conclusion of whether rule 11 has been violated.").

Fay also challenges the amount of attorney fees awarded to Rodgers, arguing that Rodgers failed to mitigate his damages under the doctrine of avoidable consequences. See generally Mahmood v. Ross, 1999 UT 104, ¶ 31, 990 P.2d 933 ("[U]nder the doctrine of avoidable consequences the nonbreaching party [to a contract] has an active duty to mitigate his damages, and he may not . . . aggravate the injury occasioned by the breach." (internal quotation marks omitted)). This doctrine is not applicable here.

Under rule 11, when Fay filed his claim against Rodgers, it was Fay who had "an affirmative duty . . . to make a reasonable investigation . . . [into] the facts," see Morse, 2000 UT 86, ¶ 28 (internal quotation marks omitted), and certify that his "factual contentions ha[d] evidentiary support," see Utah R. Civ. P. 11(b)(3). This was a duty owed not to a party but to the

court. See generally id. R. 11(b) (requiring an attorney or litigant to certify to the court that the submission conforms with the rule's subsections). The district court concluded that Fay had violated this duty, and to "deter repetition of such conduct," see id. R. 11(c)(2), and "control[ Fay's] abuse[] of the judicial process," see Archuleta, 2008 UT 76, ¶ 7, the district court imposed a sanction against Fay for the amount of Rodgers's reasonable attorney fees. Fay does not otherwise challenge the reasonableness of the amount of attorney fees awarded to Rodgers, and "[w]e decline to overturn the court's valuation of a reasonable fee" absent an abuse of discretion. Pennington v. Allstate Ins. Co., 973 P.2d 932, 939 (Utah 1998).

Rodgers requests attorney fees under rule 33 of the Utah Rules of Appellate Procedure, alleging that Fay's appeal is frivolous. See Utah R. App. P. 33(a). "[A] frivolous appeal . . . is one that is not grounded in fact." Id. R. 33(b). "[S]anctions for frivolous appeals should only be applied in egregious cases. . . . [yet] should be imposed when an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing." Porco v. Porco, 752 P.2d 365, 369 (Utah Ct. App. 1988) (internal quotation marks omitted). We conclude that Fay's appeal is frivolous because it has no basis in fact. In addition to his conduct below, Fay has ignored abundant record evidence that supports the district court's findings and conclusions--specifically illustrated in Fay's willful failure to marshal the evidence.

Accordingly, we affirm and remand to the district court for calculation of Rodgers's reasonable attorney fees incurred on appeal.

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Russell W. Bench, Senior Judge

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WE CONCUR:

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James Z. Davis,  
Presiding Judge

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J. Frederic Voros Jr., Judge