

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0123

alp
GH
/MH

BARRY McCRANEY AND PEGGY SOUZA McCRANEY

VERSUS

JOHN DOE, MATT SMITH AND NEW ZION BAPTIST CHURCH

Judgment Rendered: SEP 21 2017

* * * * *

On Appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 2012-15166

The Honorable Reginald Badeaux, Judge Presiding

* * * * *

Joseph F. Myers
Covington, Louisiana

Attorney for Plaintiffs/Appellants,
Barry McCraney and Peggy Souza
McCraney

David J. Knight
Folsom, Louisiana

Attorney for Defendant/Appellee,
Matt Smith

Ryan N. Ours
Baton Rouge, Louisiana

Attorney for Defendant/Appellee,
New Zion Baptist Church

* * * * *

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

PENZATO, J.

This is an appeal by Appellants, Barry McCraney and Peggy Souza McCraney, of a judgment dismissing their case following a trial of the matter against Appellees, Matt Smith and New Zion Baptist Church. Appellants failed to timely file a brief within the time period provided by Rule 2-12.7 of the Uniform Rules of Louisiana Courts of Appeal. This court dismissed the appeal on May 3, 2017 after thirty (30) days passed from the mailing of the notice in accordance with Rule 2-8.6 of the Uniform Rules of Louisiana Courts of Appeal and no brief was filed. However, both Appellees timely answered the appeal requesting damages for a frivolous appeal. The answers to appeal are the only issue before this court.

FACTS AND PROCEDURAL HISTORY

We set forth the facts of the appeal only as it relates to the request for damages for a frivolous appeal by both Appellees in their answers to appeal. Appellants sued Matt Smith, New Zion Baptist Church, and John Doe, alleging that Matt Smith made harassing phone calls to them. Both Appellees filed answers denying the allegations. The matter was originally set for trial on March 9, 2015, but Appellants sought a continuance. The trial court granted the continuance and set the trial for the week of August 24, 2015. Counsel for Appellants withdrew from the case on August 12, 2015. Subsequently, new counsel enrolled and sought to continue the trial date. The second counsel for Appellants withdrew from the case on September 8, 2015. A third counsel enrolled for Appellants and sought a continuance of the November 23, 2015 trial date, which the trial court granted over the opposition of both Appellees. The matter was reset for trial on March 9, 2016. On that date, the trial court granted a previously filed motion to continue and set the trial for June 3, 2016. Two days prior to the June 3, 2016 trial date, Appellants filed a motion to continue trial. On the day of the trial, the trial court heard oral

arguments regarding the motion to continue. The trial court denied the continuance, but agreed to hold the transcript open to allow the Appellants to proffer any necessary depositions. Counsel for Appellants informed the trial court that he was not prepared to go forward with the trial, and on oral motion of Matt Smith, the case was dismissed with prejudice. The trial court signed a judgment on July 13, 2016, dismissing Appellants' case, with prejudice, and noting that Appellants declined at the trial to present any evidence in support of their case.

Despite having presented no evidence at the trial court, Appellants filed an appeal in this matter. The return day was extended in this matter until February 2, 2017. Therefore, both Appellees answered the appeal within the time delay provided by La. C.C.P. art. 2133, seeking damages for a frivolous appeal. As noted above, this court dismissed the appeal as no brief was filed on behalf of Appellants.

ANSWERS TO APPEAL

The only issue before this court is whether Appellees are entitled to damages for a frivolous appeal. Louisiana Code of Civil Procedure article 2164 provides that an appellate court may award damages, including attorney fees, for a frivolous appeal, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable. The courts have been reluctant to grant damages under this article, as it is penal in nature and must be strictly construed. *Cordon v. Par. Glass of St. Tammany, Inc.*, 2014-0475 (La. App. 1 Cir. 12/23/14), 168 So. 3d 633, 640, *writ not considered*, 2015-0167 (La. 4/17/15), 168 So. 3d 390, citing *Henkelmann v. Whiskey Island Preserve, LLC*, 2013-0180 (La. App. 1 Cir. 5/15/14), 145 So. 3d 465, 471. In order to assess damages for a frivolous appeal, it must appear that the appeal was taken solely for the purpose of delay or that counsel does not sincerely believe in the view of law he advocates. Furthermore, because appeals are favored in our

law, penalties for the filing of a frivolous appeal will not be imposed unless they are clearly due. *Cordon*, 168 So. 3d at 640.

The Notice of Appeal was filed on October 5, 2016. On February 2, 2017, Matt Smith filed an answer to the appeal claiming he had incurred attorney's fees and expenses in connection with the case. On February 10, 2017, New Zion Baptist Church filed an answer to the appeal seeking civil damages, attorney's fees, and all costs (trial and appellate). On March 3, 2017, this court notified the Appellants that because no brief had been filed, the appeal would be deemed abandoned pursuant to Rule 2-8.6 of the Uniform Rules of Louisiana Courts of Appeal if the Appellants' brief was not filed by a certain date. On March 27, 2017, Appellants sought an extension of time to file their brief, which was granted until April 12, 2017. On April 12, 2017, Appellants again sought to extend the time to file their brief, which this court denied on April 21, 2017. Prior to the denial, Smith filed an appellee brief, which mainly asserted his position as to damages for frivolous appeal. On May 3, 2017, this court dismissed the appeal as abandoned.

When an appellant does not file a brief specifying any error, it is difficult for a court to find that the party seriously believed in the merits of his position. *Voiron v. Voiron*, 2003-2823 (La. App. 1 Cir. 12/17/04), 897 So. 2d 697, 699, citing *Capital-Union Savings, F.A. v. Williams*, 528 So. 2d 187, 188 (La. App. 1 Cir. 1988). Furthermore, Appellants' abandonment of the appeal took place after Smith and New Zion Baptist Church answered the appeal seeking damages for frivolous appeal. See *Voiron*, 897 So. 2d at 699, citing *Muse v. Ross*, 26,554 (La. App. 2 Cir. 3/1/95), 651 So. 2d 364, 366; *Ecopour, Inc. v. McCloud*, 432 So. 2d 380, 381 (La. App. 1 Cir. 1983). On the record before us, we find that Appellants could not have possibly believed they could win the appeal when it was filed. They presented absolutely no evidence at the trial court, even though they were granted four continuances of the trial date, and the trial court agreed to hold the

transcript open to proffer any necessary depositions. The case had been pending since September 25, 2012, more than three years prior to the June 3, 2016 trial date and over a year from the original trial date of March 9, 2015. We agree with counsel for Matt Smith that Appellants' attempt to obtain a continuance based on needing more discovery was evidence that Appellants had insufficient evidence to carry their burden of proof. We therefore, find Appellants have filed a frivolous appeal. Damages are clearly due pursuant to Article 2164. Consequently, we render judgment in favor of Matt Smith and New Zion Baptist Church and award each of them damages in the amount of \$1,500.00.

We issue this memorandum opinion in compliance with Rule 2-16.1(B), Uniform Rules of Louisiana Courts of Appeal,.

CONCLUSION

For the above and foregoing reasons, the answers to appeal by Matt Smith and New Zion Baptist Church are hereby granted and we render judgment in favor of Matt Smith and New Zion Baptist Church and award each of them damages in the amount of \$1,500.00. All costs of this appeal are assessed against Barry McCraney and Peggy Souza McCraney.

DAMAGES AWARDED.