

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 0663

APRIL MARKIEWICZ, WIFE OF/AND
MARK MARKIEWICZ

VERSUS

SUN CONSTRUCTION, L.L.C., PENN MILL LAKES, L.L.C.,
AND COOPER ENGINEERING, INC., A PROFESSIONAL
ENGINEERING CORPORATION

CONSOLIDATED WITH

NUMBER 2017 CA 0664

JANET SHEA, WIFE OF/AND ALPHONSE SHEA

VERSUS

SUN CONSTRUCTION, L.L.C., SUNRISE CONSTRUCTION
AND DEVELOPMENT, L.L.C., PENN MILL LAKES, L.L.C.,
COOPER ENGINEERING, INC., A PROFESSIONAL
ENGINEERING CORPORATION

CONSOLIDATED WITH

NUMBER 2017 CA 0665

PATRICIA GRANT, WIFE OF/AND RICHARD GRANT; ET AL.,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED

VERSUS

SUN CONSTRUCTION, L.L.C., PENN MILL LAKES, L.L.C.,
SUNRISE CONSTRUCTION AND DEVELOPMENT, L.L.C.,
AND COOPER ENGINEERING, INC., A PROFESSIONAL
ENGINEERING CORPORATION

Judgment Rendered: DEC 21 2017

JW
MA
DM

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Numbers 2006-16084, 2008-10737, 2008-11536

Honorable Reginald T. Badeaux, Judge

* * * * *

Louis R. Koerner, Jr.
New Orleans, LA

Attorney for Appellant
Louis R. Koerner, Jr.

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and
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Attorneys for Appellees
Plaintiffs – Patricia Grant, et al.

* * * * *

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

WELCH, J.

Louis R. Koerner, Jr., a former attorney of record for the plaintiffs, appeals a trial court judgment that prohibited and enjoined him from participating in the active management of the underlying litigation, including discovery, but reserved Mr. Koerner's right to recover an appropriate fee upon the conclusion of the underlying litigation for the services that he rendered through the date of his withdrawal. The plaintiffs have answered the appeal seeking damages against Mr. Koerner for a frivolous appeal. We affirm the judgment of the trial court in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.2(A)(6), (7), (8), and (10), and we grant the answer to appeal.

The underlying litigation herein arises out of several consolidated lawsuits involving a drainage project and the subsequent flooding of Penn Mill Lakes Subdivision in St. Tammany Parish, Louisiana. The plaintiffs, who are homeowners in the subdivision, filed suit against various entities involved in the drainage project and their insurers seeking to recover damages resulting from the flooding. Mr. Koerner was one of the attorneys representing the plaintiffs. However, pursuant to a motion filed on November 4, 2016, and an order signed by the trial court on November 15, 2016, Mr. Koerner withdrew as an attorney of record for the plaintiffs, and all further notices and pleadings were to be served on the plaintiffs' other attorneys of record.

The plaintiffs subsequently filed a rule to show cause requesting that Mr. Koerner be ordered to turn over the contents of their files and all work-product, including discovery responses and exhibits. The plaintiffs also alleged that even though Mr. Koerner had withdrawn as an attorney of record and no longer represented any of the plaintiffs, he had indicated to the other attorneys of record for the plaintiffs that he intended to attend and actively participate in depositions in the case to protect his interest. After a hearing on February 13, 2017, the trial court

signed a judgment in favor of the plaintiffs, ordering Mr. Koerner to turn over all of the file contents and work product, including discovery responses and exhibits, presently in his possession. The judgment also prohibited and enjoined Mr. Koerner from “participating in the active management of [the underlying] litigation in anyway whatsoever including discovery, effective November 4, 2016[,] reserving unto Mr. Koerner his right to recover an appropriate fee upon the conclusion of [the underlying litigation] from [the other attorneys of record] for services rendered through the date of his withdrawal, November 4, 2016.” From this judgment, Mr. Koerner has appealed and the plaintiffs have answered the appeal, seeking damages for a frivolous appeal.¹

As previously noted, a motion to withdraw as attorney of record was filed by (or on behalf of) Mr. Koerner on November 4, 2016, and the order granting the motion was signed by the trial court on November 15, 2016. Furthermore, the record before us does not reflect that Mr. Koerner filed a petition for intervention in the underlying suit.² Since Mr. Koerner is neither an attorney of record for a party nor an intervening third person with an interest in the underlying litigation, he is not entitled to actively participate in, proceed with, or interfere with any aspect of the underlying suit, including its discovery proceedings. See La. C.C.P. arts. 1091 and 1422, *et seq.*; Rules of Professional Conduct—Rule 1.16(a)(3); **Saucier v. Hayes Dairy Products, Inc.**, 373 So.2d 102, 105 (La. 1978); **Scott v. Kemper Ins. Co.**, 377 So.2d 66, 70 (La. 1979). As such, we cannot say that the

¹ On appeal, Mr. Koerner challenges that part of the trial court judgment prohibiting him from participating in the management of the case, including discovery. There has been no challenge—either by Mr. Koerner or the plaintiffs—to that part of the judgment reserving unto Mr. Koerner his right to recover an appropriate fee upon the conclusion of the underlying litigation from the other attorneys of record for services rendered through the date of his withdrawal.

² While Mr. Koerner maintains that he is an intervenor in the underlying litigation, the record before us does not contain a petition for intervention. Mr. Koerner did not dispute, either at the trial court hearing or in oral argument before this Court, that at the time the trial court held the hearing on the plaintiffs’ rule to show cause, he had not filed a petition for intervention. Furthermore, according to Mr. Koerner’s appellate brief, when he filed his motion for devolutive appeal and the plaintiffs filed their answer to appeal, a petition for intervention had not yet been filed.

trial court erred or abused its discretion in prohibiting and enjoining Mr. Koerner from participating in the active management of the underlying litigation, including discovery, effective November 4, 2016. Therefore, the February 13, 2017 judgment of the trial court is affirmed.

In the plaintiffs' answer to appeal, they maintain that Mr. Koerner's appeal had no basis in fact or law and was taken for the sole purpose of harassing and causing injury or damage to the other attorneys of record for the plaintiffs by causing additional expenses to defend the appeal. As such, the plaintiffs argue that Mr. Koerner's appeal was frivolous and that they are entitled to damages, including attorney fees. See La. C.C.P. arts. 2133 and 2164; Uniform Rules—Courts of Appeal—Rule 2-19.

Damages for frivolous appeal are appropriate only when an appeal presents no serious legal issue or question, *i.e.*, the appeal lacks any basis in law or fact; 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 or where the proposition advanced is so opposed to rational thinking that it is evident beyond any doubt that it is being deliberately professed for ulterior purposes. See **Guarantee Systems Const. & 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; **Roland v. Roland**, 519 So.2d 1177, 1179 (La. App. 1st Cir. 1987).

In Mr. Koerner's appellate brief, he maintains that there are six issues presented for review, most of which are not briefed. Essentially, his entire argument on appeal is that he is an intervenor in the underlying litigation and as such, he should be allowed to fully participate in all aspects of the underlying litigation so that he can protect both his fee and the interests of his former clients. In making this argument, he contends that he should be allowed to fully participate in the underlying litigation to assure the plaintiffs' success on the merits because,

without his participation, the interests of the plaintiffs will be compromised and prejudiced since the other attorneys for the plaintiff may not have “the intellectual or professional capacity” to appropriately represent the plaintiffs and because he has a fiduciary duty to the plaintiffs to ensure that they are adequately represented. Mr. Koerner further contends that he should not be prohibited from participating in the underlying litigation since he is entitled to attorney fees not only for the time expended prior to his withdrawal, but also for his substantive role as intervenor to ensure that the other attorneys of record for the plaintiff “do not forfeit that which he has worked so hard to accomplish.”

Based on our review of the record, Mr. Koerner’s appellate briefs, and the arguments contained therein, we agree that this appeal has no basis in the law or fact. It is evident from Mr. Koerner’s appellate briefs that he is disgruntled about the fact that he is no longer an attorney of record for the plaintiffs; however, he must still act within the bounds of professionalism. Mr. Koerner suggests, throughout his briefs, that he is the only attorney with the legal ability to represent the interests of the plaintiffs and ensure their success and that the other attorneys of record lack the intellectual and professional capacities to represent the plaintiffs. These insinuations are not only unsupported by the record, but they are also unprofessional, inappropriate, discourteous, and insulting. In addition, as noted above, Mr. Koerner’s appeal is based entirely on the argument that he is an intervenor and thus, entitled to participate in the underlying litigation to protect his interest and that of the plaintiffs. However, contrary to Mr. Koerner’s characterization of himself as an intervenor, Mr. Koerner has not filed a petition for intervention in this matter.³ Furthermore, Mr. Koerner is not an attorney of record for the plaintiffs; therefore, he is precluded by law and the rules of professional conduct from undertaking any action on their behalf or to protect their

³ See footnote 2.

interests. Accordingly, this appeal lacks any basis in fact or law and we find damages for frivolous appeal are warranted herein.

The appellate court, when operating under the provisions of La. C.C.P. art. 2164, should take into account every legitimate item of damages that the plaintiff has suffered by reason of an unwarranted appeal. **Roland**, 519 So.2d at 1179. Attorney fees for protecting a judgment on appeal are an element of damages for frivolous appeal. **Roland**, 519 So.2d 1179-1180. After a thorough review of the record and assessment of the time and effort imposed on the plaintiffs' other attorneys of record in preparing a response to Mr. Koerner's appeal, including preparing for and attending oral arguments before this Court, we find an award of attorney fees in favor of the plaintiffs and their attorneys of record the amount of \$3,000.00 to be an appropriate award for damages in defending this frivolous appeal.

All costs of this appeal are assessed to the appellant, Louis R. Koerner, Jr.

AFFIRMED; ANSWER TO APPEAL GRANTED.