

APPEAL NO. 34495

COPY

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

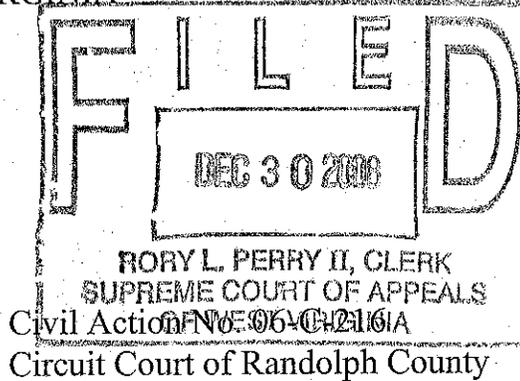
BARBARA WARNER and
ROY WARNER,

Appellants,

v.

LEROY WINGFIELD, JR. and
SUSAN WINGFIELD,

Appellees.



FROM THE CIRCUIT COURT OF RANDOLPH COUNTY
WEST VIRGINIA

APPELLEES' BRIEF

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INACCURACIES IN APPELLANTS' STATEMENT OF THE CASE

1. The true Appellant, Attorney Erika H. Klie, incorrectly asserts in her Introduction that the subject fence was on the property line between the two properties. The fence, as her client, Barbara Warner, admitted at page 62 and 63 of her deposition transcript, is on the Wingfields' property on the other side of a row of evergreens which is on the property line.

2. Ms. Klie inaccurately refers to the fence between the Warners' and Wingfields' properties as being a "spite fence." In fact, the fence was erected by the Wingfields upon their property for the purpose of keeping Mrs. Warner and her lawnmower off their property. She had refused to stop mowing portions of the Wingfields' front lawn, only a few feet from their door.

3. Ms. Klie inaccurately refers to the paint sprayed upon the fence as "offensive material." Actually, no words, pictures, designs or symbols were painted on the fence, simply differing colors of paint in squiggles.

4. Ms. Klie claims that she attempted to settle this case just prior to commencing the depositions of the Wingfields. Instead, when she made her proposal, the deposition of Mrs. Warner had just concluded and she had refuted each and every allegation set forth in the Complaint filed on her behalf; hence, the filing by the Wingfields of motions for summary judgment and Rule 11 sanctions.

5. Ms. Klie claims to have filed a notice of voluntary dismissal on the twenty-first day of the notice period required by Rule 11 prior to the filing of a motion for sanctions. However, the mere filing of a such a notice was ineffective because an answer and a motion for summary judgment had already been filed in the civil action. Thus, it was necessary for her to obtain either consent or a court order for the dismissal pursuant to Rule 41(a)(1)(ii) or (a)(2), W.V.R.C.P. However, as the basis for the requested sanction was that the allegations set forth in the Complaint were completely false, the Wingfields and their counsel would not consent to a dismissal without prejudice. Contrary to Ms. Klie's claims, the issue was not her mistake or inadvertence, the problem with the dismissal was that she wanted to retain the right to reinstate the same false allegations at some future date. Any claim, as asserted by her counsel at the motion hearing before this Court, that Ms. Klie is a young attorney who did not correctly follow Rule 41(a)(1)(ii), is refuted by the fact that she had previously dismissed Count 3 of the Complaint in this case after obtaining opposing counsel's consent as required by to Rule 41(a)(1)(ii), W.V.R.C.P.

TABLE OF AUTHORITIES

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BARBARA WARNER and
ROY WARNER,

Appellants,

v.

Civil Action No. 06-C-216
Circuit Court of Randolph County

LEROY WINGFIELD, JR. and
SUSAN WINGFIELD,

Respondents.

APPELLEES' BRIEF

I.

**STATEMENT OF THE KIND OF PROCEEDING AND NATURE
OF THE RULINGS OF THE CIRCUIT COURT**

This appeal has been brought in the names of Barbara and Roy Warner as appellants when, in fact, they have no interest in pursuing this appeal. The true party is their former attorney, Erika H. Klie, who was discharged as counsel by the Warners, and upon whom a sanction was imposed by the circuit court for her serious and inexcusable violation of Rule 11(b), *West Virginia Rules of Civil Procedure*.

The underlying civil action was commenced by one neighbor (Warner) against the other (Wingfield) on October 10, 2006, with the filing of a complaint alleging invasion of privacy, trespass, assault, outrageous conduct and interference with a right of way. In short, the Warners have an underground utility easement through the front yard of the Wingfields' home. The Warners had apparently mowed the grass on that lot for some years prior to the Wingfields'

construction of their home. Because the Warners insisted that they needed to "maintain" that easement by mowing across the Wingfields' lawn, the Wingfields erected a fence to keep them out. The Warners then sued, asserting very serious, but unfounded, claims against the Wingfields in an attempt to force them to remove the fence.

When discovery revealed the totally fallacious nature of the claims, with the Warners admitting that the things alleged in the complaint never occurred, the Wingfields filed a motion for summary judgment on March 12, 2007. The Warners, represented by Attorney Erika H. Klie, did not file a response. Summary judgment was granted to the Wingfields at a hearing on April 17, 2007, and confirmed by order entered August 21, 2007.

The Wingfields filed a motion for Rule 11 sanctions on March 28, 2007. Following several hearings, and for the reasons expressed in the circuit court's order of December 21, 2007, the Court found that Ms. Klie "utterly failed to make an 'inquiry reasonable under the circumstances' as required by Rule 11(b) of the *West Virginia Rules of Civil Procedure*." As the Judge John L. Henning determined, the "allegations made in the Complaint . . . were completely unfounded." (See 12/21/07 Order, p. 4-5)

Based upon the foregoing, as well as upon various other acts of recklessness by Ms. Klie, and because she fabricated her claims about the work she performed on the case, the circuit court ordered that, as a sanction, Ms. Klie reimburse the Wingfields for the legal fees which they were forced to incur in the amount of \$12,236.33. It is from that ruling that Ms. Klie has sought an appeal.

II.

STANDARD OF REVIEW

There is a three-prong standard for review of the findings of fact and conclusions of law of a circuit court's order imposing sanctions under Rule 11, W.V.C.P. First, the imposition of sanctions would be reviewed under an abuse of discretion standard; the underlying factual findings would be reviewed under a clearly erroneous standard; and questions of law and statutory interpretations would be reviewed *de novo*. *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996); *Watson v. Sunset Addition POA, Inc.*, LW 080320438 (March 19, 2008).

III.

STATEMENT OF FACTS

The complaint filed by Attorney Erika H. Klie on behalf of Barbara and Roy Warner on October 10, 2006, set forth five separate claims for damages against Leroy and Susan Wingfield. Those allegations and the actual evidence as sworn to by the Warners are as follows:

COUNT ONE: INVASION OF PRIVACY

Allegation: In Count 1 of the Complaint filed by Ms. Klie, entitled "Invasion of Privacy," she wrote "[The Wingfields] unreasonably intruded upon [the Warners'] seclusion by constantly spying on [the Warners], placing them under constant observation, and revealing private aspects of [the Warners'] life to the general public.

Evidence: In response to Interrogatory 4, asking the Warners to identify any individuals to whom "private aspects of [their] life" were revealed by the Wingfields, the Warners responded that "Plaintiffs do not know the identities of any such individuals." (Answer to Interrogatory No. 4, dated March 7, 2007) Also, when asked about this claim during the taking of their depositions, the Warners were unable to identify anyone to whom the Wingfields had revealed "private aspects of [the Warners'] life." (B. Warner, Depo. Tr. 56; R. Warner Depo. Tr. 11) Also, Mrs. Warner was unable to articulate any private aspects of their personal life about which the Wingfields may be aware. (B. Warner, Depo. Tr. 52-53) Finally, Mr. Warner stated that he does not believe that the Wingfields have ever spied upon him, placed him under constant observation, nor have they intruded upon his seclusion, all matters which were specifically alleged in the Complaint. (R. Warner, Depo. Tr. 11-12)

COUNT TWO: TRESPASS

Allegation: In Count 2 of the Complaint, entitled "Trespass," Ms. Klie wrote that the Wingfields have "unlawfully trespassed on the property of [the Warners] without permission and in doing so caused harm and/or damage to the land."

Evidence: The Warners stated in their depositions that they know of no time that the Wingfields ever trespassed upon their property or caused damage to their property. (B. Warner, Depo. Tr. 45 and 63; R. Warner Depo. Tr. 20)

COUNT THREE: ASSAULT

Allegation: Ms. Klie wrote in Count 3 of the Complaint that, "[o]n numerous occasions, the [Wingfields] threatened [the Warners] with imminent bodily harm."

Evidence: After admissions by the Warners that this allegation was simply untrue, and after demand by Defendants' counsel, Count 3 of the Warners' Complaint was dismissed by the Warners, pursuant to Rule 41(a)(1)(ii), WVRCP, three months after the Complaint was filed. Nevertheless, as no assault ever occurred, the claim should never have been asserted. (Order entered Jan. 24, 2007) (Ms. Klie refused, however, to dismiss the remaining allegations in the Complaint.)

COUNT FOUR: TORT OF OUTRAGE

Allegation: In Count 4 of the Warners' Complaint, entitled "Tort of Outrage," Ms. Klie wrote that the acts of the Wingfields alleged in the first three counts of the Complaint "were done in an outrageous manner and were so extreme as to be intolerable in a civilized society."

Evidence: There being no basis in fact for any of the foregoing allegations according to the Warners' own deposition testimony, there could never have been any conduct which could possibly support a tort of outrage.

COUNT FIVE: INTERFERENCE WITH RIGHT OF WAY

Allegation: In Count 5 of the Complaint, alleging "Interference with Right of

Way," Ms. Klie claimed that the Warners "have an existing right of way **on** the land of [the Wingfields]" (emphasis added) and that the Wingfields have interfered with their use of the right of way.

Evidence: The Warners have an easement through the subsurface of the Wingfields' property based upon a deeded water and sewer easement appurtenant to certain of the lots owned by them. Such a utility easement gives them no right to traverse the Wingfields' property or to mow the Wingfields' front lawn. The Wingfields' counsel explained that distinction to Attorney Klie, with copies of deeds and surveys, in correspondence to her dated December 5, 2006, and January 12, 2007. Still, she continued to pursue this claim.

IV. ARGUMENT

There are stark differences between the Warners' version of the legal representation provided to them by Attorney Erika H. Klie, and her version of that representation. The Warners told the circuit court at the April 17, 2007, hearing, that "they never even met Ms. Klie before she filed the complaint, but only met with a member of her staff and did not meet with Ms. Klie personally until [a month after she filed the Complaint]." (Circuit Court Order, 12/21/07, p.3) Whether or not Ms. Klie actually met with the Warners prior to the filing of the complaint on their behalf, she nevertheless utterly failed to perform the most basic investigation into the matters which were alleged.

Assuming for a moment that she actually met with the Warners, then she must have failed to ask them any questions regarding the first four counts of the complaint, and she must have failed to review any deeds or surveys with respect to the allegations set forth in the fifth count of the complaint. A simple inquiry of her clients would have revealed that each and every one of the claims set forth in the complaint that she drafted were false.

The inclusion of Count 4 in the complaint is particularly revealing of Ms. Klie's recklessness in the drafting and filing of the complaint. It is inconceivable that the Warners would have known of the existence of a "tort of outrage," or requested that the same be included in the complaint absent the recommendation of their attorney. In Count 4, Ms. Klie claimed that the Wingfields committed each of the acts alleged in the first three counts in an outrageous manner which was "so extreme as to be intolerable in a civilized society." It is obvious that by asserting a "tort of outrage," Ms. Klie was oppressively attempting to harass the Wingfields and to scare them into either taking down the fence, painting it, or offering a monetary settlement. She later claimed to the circuit court that "all we wanted was for the [Wingfields] to purchase a couple of gallons of paint and paint the fence." (Circuit Court Order, 12/21/07, p. 4) In an attempt to obtain that relief, Attorney Klie grossly overcharged the claims against the Wingfields. To have done so, reveals that she was being deliberately vexatious, wanton and oppressive by filing a baseless complaint with the intent to bully the Wingfields into submitting to the Warners' demands.

In her January 18, 2007, response to the Wingfields' counsel's January 12 letter, again advising Ms. Klie that the complaint was baseless, she essentially admitted that she did not care whether or not her pleading was accurate, stating, "I think you and I both know most complaints are boiler plate language and plaintiff does not need to prove each and every allegation within a count to maintain that specific cause of action." She asked that defendants' counsel "reevaluate [his] positions [that the allegations set forth in the complaint are baseless] after the depositions of [her] client." Said letter was written one day before the taking of the depositions. As previously discussed, it was during said depositions that Ms. Klie's clients repudiated each and every allegation which she had asserted. Not surprisingly, it was after Mrs. Warner had testified that Ms. Klie made her first settlement proposal.

Even in the face of her clients' repudiation of the allegations in the complaint, Ms. Klie refused to back away from any of the allegations other than the assault charge. Yet, because her clients had stated that the alleged acts never occurred, Ms. Klie was unable to file a response to the Wingfields' Motion for Summary Judgment. Nevertheless, at the hearing before the circuit court on April 17, 2007, Ms. Klie stated that she still believed her clients had a case based upon the complaint that she filed. Her statement that "all we wanted was for the [Wingfields] to purchase a couple gallons of paint and paint the fence," was disingenuous, at best. If that were the goal, why would Ms. Klie have taken the case on a contingent fee basis and then supposedly spend 153 hours of her time to get a fence painted?

The West Virginia Supreme Court, in *Daily Gazette Co. v. Canady*, 175 W.Va. 249, 252, 332 S.E.2d 262, 265 (1985), "identified the devastating effect that baseless lawsuits wreak on our judicial system:

"Although there is an undeniable interest in the maintenance of unrestricted access to the judicial system, unfounded claims or defenses asserted for vexatious, wanton, or oppressive purposes place an unconscionable burden upon precious judicial resources already stretched to their limits in an increasingly litigious society. In reality, to the extent that these claims or defenses increase delay or divert attention from valid claims or defenses asserted in good faith, they serve to deny the very access to the judicial system they would claim as justifications for their immunity from sanction."

Pritt v. Suzuki Motor Co., Ltd., 204 W.Va. 388, 394, 513 S.E.2d 161 (1998).

This Court in *Pritt* continued at 394, "[B]ased on the recognized need to impose sanctions for frivolous suits and abuses of the judicial system . . .

"[A] court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive asserting of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law."

"Syllabus, [Canady] 175 W.Va. at 250, 332, S.E.2d at 263; *see also Syl. Pt. 4*, in part, *State ex rel. Roy Allen S. v. Stone*, 196 W.Va. 624, 626, 474 S.E.2d 554, 556 (1996) (holding that 'circuit court has discretion [under Rule 11 of the West Virginia Rules of Civil Procedure] to impose attorney's fees on litigants who bring vexatious and groundless lawsuits')."

The circuit court, in its December 21, 2007 order imposing sanctions upon Ms. Klie, noted the aforementioned case law in West Virginia and found that the bad faith

conduct of Ms. Klie revealed a vexatiousness, wantonness, and oppressiveness that required the imposition of sanctions. Specifically, the court found:

a. The Warners' deposition "testimony indicated that all factual allegations contained in the Complaint were inaccurate and did not support any of the causes of action."

b. The claims were "frivolous and baseless."

c. Although she "alleg[ed], among other things, assault and the tort of outrage, . . . Ms. Klie indicated to the Court that 'all we wanted was for the [Wingfields] to purchase a couple of gallons of paint and paint the fence. The Court does not believe that the relief sought justified the serious allegations made in the complaint, which was completely unfounded."

d. Ms. Klie "utterly failed to make an 'inquiry reasonable under the circumstances' as required by Rule 11(b) of the West Virginia Rules of Civil Procedure."

e. Prior to filing the Complaint, Ms. Klie failed to do a cursory investigation of the claim contained therein.

f. "The lack of thorough preparation is especially disconcerting once the court takes into consideration Ms. Klie's claim that she spent approximately 153 hours working on the case." She produced no documentary evidence to support that claim and "nothing in the file would even remotely justify her claims of 153 hours of work."

g. "The Court, regrettably, has seriously questioned the accuracy and truthfulness of Ms. Klie's statements to the Court."

The "vexatious, wanton and oppressive" standard is not a high bar for the imposition of a Rule 11 sanction when those words are properly understood and applied. Black's Law Dictionary (4th Ed.) and the Oxford American Dictionary (1980) define those words as follows:

vexatious: without reasonable cause (Black's); annoying (Oxford)

wanton: reckless (Black's); irresponsible (Oxford)

oppressive: to treat with injustice (Oxford)

According to those definitions, the threshold determination for the circuit court was whether Ms. Klie's Rule 11 violation was annoying, reckless and unjust. Clearly, there was no reasonable cause or excuse for the mental distress and financial pain which she recklessly inflicted upon the Wingfields.

Ms. Klie's apparent purpose in asserting baseless allegations was to force her clients' will upon the Wingfields, to gain an advantage in seeking the use of the Wingfields' property. She proved to be an irresponsible attorney, willing to advocate on her clients' behalf without performing any reasonable investigation into the facts. Even after being told a number of times that her complaint was baseless, she persisted in forcing the Wingfields to continue expending large sums of money to defend themselves. Incredibly, the record of this case shows that Ms. Klie claimed to have spent 153 hours working on this case, at the time of the hearing. At that same time, Wingfields' counsel who took depositions, and prepared memoranda and Motions for Summary Judgment and Sanctions, had 54.1 hours invested in

the case. Both the number of hours and the billing rate (\$150.00/hr) of the Wingfields' counsel were reasonable.

The one question which Ms. Klie cannot answer: Why should the Wingfields, who did not do any of the things of which they were accused, have to pay to defend themselves when, if "an inquiry reasonable under the circumstances" as required by Rule 11(b), would have revealed that the allegations should never have been pursued? Ms. Klie had a duty, as a lawyer, to make that inquiry. Even now, because of her appeal of the circuit court's order, the Wingfields are having to incur additional unnecessary legal fees. The Wingfields believe that these legal fees should also be reimbursed.

The conduct of Erika H. Klie was "annoying" and "irresponsible," in filing an obviously baseless complaint designed to harass her clients' neighbors, and in continuing to pursue the litigation after being made fully aware by both her clients and by opposing counsel that there was no basis in fact for any of the stated allegations. Accordingly, The Wingfields believe that the Rule 11 sanction imposed upon her was fully justified. *Pritt v. Suzuki Motor Co., Ltd.*, 204 W.Va. 388, 393, 513 S.E.2d 161(1998) (Fn. 10: "Rule 11 provides for sanctions against both parties and their counsel for the filing of frivolous, harassing, or baseless claims.")

There is absolutely no basis for believing that the circuit court's ruling was clearly erroneous and, thus, there is no basis for overturning the sanction imposed upon Ms. Klie.

V.

PRAYER OF RELIEF

The Wingfields pray that the Court will affirm the ruling of the Circuit Court of Randolph County, and uphold the imposition of the sanction against Erika H. Klie in the full amount of their attorney fees and expenses which they have been forced to pay to defend themselves against Ms. Klie's reckless and fabricated allegations.

Respectfully submitted,

LEROY WINGFIELD, JR. and
SUSAN WINGFIELD,
Defendants.

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CERTIFICATE OF SERVICE

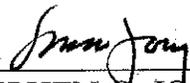
This is to certify that the undersigned has this date served a true copy of the foregoing *Appellee's Brief* upon all other parties to this action by:

_____ Hand delivering a copy hereof to the parties listed below:

or by

 X Depositing a copy hereof in the United States Mail, first class postage prepaid, properly addressed to the parties listed below.

Dated at Elkins, West Virginia, this 23rd day of December, 2008.



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