No. _____

IN THE SUPREME COURT OF ILLINOIS

ABRAHAM LINCOLN REYNOLDS, III,
2006 DECLARATION OF LIVING TRUST;
ROZLYN TAYLOR, Individually and as
Trustee; and MARVIN GRAY,

(Marvin Gray)
Petitioner,

v.

GERALD S. McCARTHY,

Respondent.

On review of the opinion of the Appellate Court of Illinois
First Judicial District, No. 1-16-2478

There on appeal from the Cook County Circuit Court,
No. 14 CH 09651
The Honorable Kathleen M. Pantle, Judge Presiding

PETITION FOR LEAVE TO APPEAL

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ORAL ARGUMENT REQUESTED

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SUPREME COURT CLERK

No. _____

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PRAYER FOR LEAVE TO APPEAL

Pursuant to Illinois Supreme Court Rule 315, Petitioner, defendant and appellant below, Marvin Gray (herein, the "Petitioner") respectfully petitions this Honorable Court for leave to appeal from that decision of the Appellate Court of Illinois, First Judicial District, that reversed a portion of the judgment entered by the trial court in favor of the Petitioner in this matter as to *pro se* attorneys' fees.

JURISDICTIONAL STATEMENT

The Appellate Court issued its opinion on this matter on March 30, 2018. The Petitioner timely filed a petition for re-hearing, which was denied on May 1, 2018, as evidenced by a letter from the Clerk of the Appellate Court that is contained in the **Appendix** attached hereto. This Court has jurisdiction pursuant to Supreme Court Rule 315.

POINTS RELIED UPON SEEKING REVIEW BY THIS COURT

The issue and fact situation apparently amount to a case of first impression and have not been presented to this Court in the past and, therefore, warrant review by this Court. This Petition was necessitated by the reversal by the Appellate Court of the trial court's award of sanctions in favor of this Petitioner, pursuant to Supreme Court rule 137, in the form of an award of attorney's fees against the Respondent, plaintiff and appellee below, Gerald McCarthy (herein, the "Respondent") who, as the Appellate Court clearly found, filed frivolous pleadings before the trial court below. The Appellate Court refused to afford the protections of Rule 137 to *pro se* litigants who defend against frivolous pleadings and declared, at paragraph 29, *inter alia*:

> "¶29 The parties have not cited, and our research has not uncovered, any case law applying the *Hamer* rule to a Rule 137 motion. We acknowledge the purpose of Rule 137 is, in relevant part, to curb the filing of frivolous pleadings. (Citation omitted). We further acknowledge that plaintiff's tortious interference claim was undoubtedly a frivolous cause of action. Rule 137, however, is silent on the recovery of attorney fees for all *pro se* litigants, whether an attorney or not. Without any support establishing that attorney fees are appropriate under the circumstances before us, we choose to follow the demonstrated law providing that *pro se* attorneys are not entitled to attorney fees, especially because Rule 137 is penal in nature and must be strictly construed. (Citation omitted) We find the **policy reasons** provided in prior case law to be convincing; thus, we will not extend Rule 137 to provide attorney fees to *pro se* attorneys."
> (Emphasis added.)

The problem with the Appellate Court decision, and the underlying "policy reasons" and the case authority upon which it relied, is that it none of the same addresses the facts of the case before both it and the case that was presented before the trial court. In consequence, the Appellate Court decision left a substantial vacuum of judicial relief in the circumstances which constitutes an unmistakable anomaly encompassing the purpose, intent and construction of Rule 137 in the context of frivolous pleadings. As stated in the Petitioner's Petition For Re-Hearing:

> "The effect of the instant decision is that any litigant can file frivolous pleadings that blatantly violate Rule 137 with total impunity as to the penal award of attorneys' fees so long as the defense to the frivolous pleadings is interposed by a *pro se* attorney. This is error."

It is asserted and should be noted that the importance of the correction of this judicial relief vacuum and anomaly far exceed the relatively minor amount of attorneys' fees at issue in this cause. Although this Petitioner does not disclaim interest in the denied fee award, this Petition is brought as a result of the overarching dilemma that the "*Hamer* rule" imposes on any *pro se* litigant defending against frivolous allegations posited by a prosecuting litigant (who, incidentally, as in the instant case, may also proceed *pro se*). Among other standards, the oft-noted review standard of "a just result and a uniform body of precedent", admittedly invoked in circumstances of *waiver*, call for this Supreme Court to address that dilemma with respect to facts that are converse to *Hamer*.

Finally, the clear implication of the Appellate Court decision is that its decision, largely derived from that prior *Hamer* ruling from this Supreme Court on the basis of opposite facts and the resultant judicial vacuum and anomaly, can only be addressed and corrected by this Supreme Court. Indeed, the unspoken holding of the Appellate Court

seems undeniably to be: ***In light of the Supreme Court's prior ruling in Hamer, if the protections of Rule 137 are to be extended, the Supreme Court will have to provide such extensions, itself.***

STATEMENT OF FACTS

The section entitled "Facts" in the Appellate Court decision contains an accurate description of the events of the instant cause. That decision is fully set forth in the **APPENDIX** section of this Petition and need not be repeated here except for following declarations presented for the purpose of both inclusion and emphasis:

1. The complaint that was filed by the Respondent in 2013 against the Trustee of the Trust in which the Petitioner, among others, testified, the trial court ruled against him and the Appellate Court affirmed (*McCarthy v. Taylor*, 2014 IL App (1st) 132239), was filed by the Respondent's counsel of record at that time. (Leave to appeal to this court was denied in that case.)

2. Thereafter, the five-count complaint filed by the Respondent on June 9, 2014 against the Trustee and this Petitioner (two counts of which were addressed to this Petitioner) and that is the subject of the instant action was filed *pro se*. The subsequent filings, by the Respondent, of his amended complaint of March 27, 2015 and his motion to reconsider of March 30, 2016 were also all filed *pro se* by the Respondent.

3. All of the responsive pleadings filed by Petitioner, i.e., motion to dismiss the original complaint, motion to dismiss the amended complaint, motion seeking Rule 137 sanctions and supplemental petition for sanctions were also filed *pro se*.

4. The instant appeal was initially initiated and filed by the Respondent, *pro se* although in the course of the appeal, he subsequently, apparently, retained Attorney Tonya Woods to complete the appellate process that he had started.

5. Both the Petitioner and the Respondent are licensed lawyers in the State of Illinois and have been in civil private practice for a substantial period of time.

6. The overall positions of the Respondent were that the Petitioner, the lawyer for the Trust and the Trustee, a) presented false statements in a previous forum and b) owed a fiduciary duty to the Respondent, because of the latter's status as a beneficiary of the Trust.

7. The overall positions of the Petitioner were that a) the false-statement allegation was violative of the principle of *res judicata*, b) a trust lawyer's duty is directed only to the trust and trustee absent certain special facts that the Respondent never pleaded and c) the Respondent necessarily caused the Petitioner to incur expenses and expend time from his practice of law to defend against the Respondent's frivolous pleadings.

The trial court ultimately granted the Petitioner's motions to dismiss as to both of the Respondent's counts and granted the Petitioner's petitions for sanctions in the form of costs and attorneys' fees and stated that: "*The amount of time Gray spent was appropriate and reasonable, and the requested amounts are reasonable and customary*."

This appeal followed. Therein, the Appellate Court made various findings, including the following:

1. That the Respondent's tortious interference claim was not well-grounded in law because it was barred by *res judicata*. As a result, it was not unreasonable for the circuit court to find the tortious interference claim was filed for an improper purpose under

Rule 137. Moreover, the Petitioner's motion requesting Rule 137 sanctions alleged he was entitled to such sanctions "[d]ue to the plaintiffs unfounded, fallacious and specious allegations and pleadings" were warranted.

2. That the circuit court's decision was informed, based on valid reasoning, and followed logically from the facts.

3. That in *Hamer v. Lentz*, 132 Ill. 2d 49 (1989) the supreme court held that an attorney appearing *pro se* in an action brought pursuant to the Freedom of Information Act (FOIA) (Ill. Rev. Stat. 1987, ch. 116, ¶201 et seq.) was not entitled to attorney fees.

4. That subsequent appellate decisions have expanded the rule to other contexts (naming *Hamer's* "progeny").

5. That it was acknowledged that (1) the purpose of Rule 137 is, in relevant part, to curb the filing of frivolous pleadings and that (2) the Respondent's tortious interference claim was undoubtedly a frivolous cause of action.

6. That although in *Department of Conservation v. Lawless*, 100 Ill. App. 3d 74 (1981), the Third District awarded attorney fees to a *pro se* attorney under the Eminent Domain Act, this Appellate Court did not find that *Lawless* persuasive enough to depart from *Hamer* and its progeny because, as it stated, the *Lawless* court provided little, or no, analysis and no support for its reasoning.

In consequence, on March 30, 2018, the Appellate Court's decision affirmed the judgment of the circuit court dismissing Respondent's tortious interference claim based on *res judicata* and affirmed the finding that Respondent violated Rule 137 by virtue of filing of that frivolous claim. But the court reversed the circuit court's finding that the Petitioner,

appearing *pro se* in the proceedings, was entitled to attorney fees and vacated that award. Ruling: "*Affirmed in part; reversed in part; attorney fees vacated*."

Petitioner filed his Petition for Re-Hearing before the Appellate Court on April 13, 2018 and the same was denied on May 1, 2018.

ARGUMENT

With respect to the *pro se* attorneys' fee issue, the Appellate Court relied upon and/or referenced in support the following authority (comprising 10 cases):

- *Hamer v. Lentz*, 132 Ill. 2d 49 (1989);
- *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 2017 IL App (1st) 152668, ¶101.;
- *Kehoe v. Saltarelli*, 337 Ill. App. 3d 669, 678 (2003);
- *In re Marriage of Pitulla*, 202 Ill. App. 3d 103, 117-18 (1990);
- *Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161, 25;
- *In re Marriage of Adler*, 271 Ill. App. 3d 469, 476 (1995);
- *Kay v. Ehrler*, 499 U.S. 432, 436-37 (1991);
- *Brazas v. Ramsey*, 291 Ill. App. 3d 104, 110 (1997);
- *Aronson v. United States Department of Housing & Urban Development*, 866 F.2d 1, 5 (1st Cir. 1989); and
- *Department of Conservation v. Lawless*, 100 Ill. App. 3d 74 (1981).

1. In *Hamer v. Lentz*, the plaintiff-attorney brought suit for the release of information under the FOIA and was awarded attorneys' fees. This Supreme Court reversed and held that *pro se* attorneys' fees are not compensable because: (1) The purpose

of the FOIA is to seek enforcement and this is accomplished by removing the burden of attorneys (that are not reimbursed) which, otherwise may deter a litigant from seeking relief; (2) Citizens are encouraged to seek legal advice before filing suit; and (3) Abusive fee generation is to be avoided and the best way to accomplish this is to deny fees to lawyers representing themselves. The case also reiterated the oft-quoted policy statement that a *pro se* lawyer does not incur legal fees.

2. In *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc*., the plaintiff, a law firm, brought suit against the defendant for its failure to collect and remit use taxes on products sold in Illinois or to Illinois customers under the Retailer's Occupation Tax Act (ROTA). The trial court awarded statutory treble damages and attorneys' fees. The appellate court held that the fee-shifting provision in the Act does not permit the award of attorney fees to the plaintiff, who served as its own attorney and cited the three prongs of *Hamer* as precedent, and, further, found that:

A. Such false claims cases represent the whole of the work performed by the plaintiff-attorney firm. No time was taken away from other clients or cases as such false claims were all the work that the plaintiff-attorney did. The barrier to seeking relief would not be served by awarding fees to the plaintiff who is both attorney and client.

B. The need to seek legal advice before filing suit was only marginally illustrative as to the plaintiff-attorney as he was both the lead counsel and decision maker of the antecedent corporate client, thereby suggesting the allowance of such fees in the organizational exception mentioned in *Kay v. Ehrler* (cited above and addressed below).

C. The abusive fee-generating efforts of the plaintiff-attorney was clearly evident in that the court found that the plaintiff had filed 157 of such suits and did not subsequently deny the allegation that it had actually filed 600 of such suits.

3. In *Kehoe v. Saltarelli*, the plaintiff filed suit, *pro se*, against the defendants for legal malpractice and attorneys' fees. Trial court dismissed the complaint and the plaintiff appealed. The Appellate court affirmed the dismissal and held that a *pro se* attorney cannot be awarded attorneys' fees, citing *Hamer* and *Kay v. Ehrler* (cited above and addressed below).

4. *In re Marriage of Pitulla,* a domestic relations matter containing a myriad of issues in a combined appeal, involved an attorney who filed a petition for sanctions against his former client for filing a frivolous pleading and the trial court granted the petition and awarded the attorney a sanction in the amount of $100.00. The appellate court, after determining that the award was improper and mentioned and acknowledged, in passing, the *Hamer* holding re *pro se* attorneys but also mentioned and acknowledged, in passing, *Lawless* (cited above and addressed below) which contrarily holds that a *pro se* lawyer is entitled to fees under the Eminent Domain Act. But, the appellate court determined that the award was improper because the trial court made no specific findings as to the merits of the attorney's fee petition and, therefore, did not apply either case to the issue before it because, as it stated, "Since we have determined that Rinella was not entitled to the $100.00 sanction, we need not give this issue further consideration."

5. In *Uptown People's Law Center v. Department of Corrections*, the plaintiff, a prisoner's rights organization through two of its in-house counsel, filed suit against the Illinois Department of Corrections seeking information pursuant to the Freedom of

Information Act and requested statutory attorneys' fees. The IDOC complied and the trial court dismissed the case, as a result; the plaintiffs appealed regarding the attorneys' fees not awarded. The appellate court acknowledged the cases that prohibit attorneys' fees when the plaintiff proceeds *pro se* but particularly held that the attorney-plaintiffs were not so entitled because (1) the attorneys were salaried employees of the organization and no expenses were incurred by the representation, (2) such fees, rather than compensating the organization, would actually amount to a reward to it and, as such, (3) an award would encourage salaried employees working for a not-for-profit organization to engage in such fee generation activity on the organization's behalf.

6. *In re Marriage of Adler*, a domestic relations matter, does not reference the *pro se* attorneys' fee issue specifically but reinforces the principles that Rule 137 is penal in nature and must be strictly construed and that sanction awards pursuant to Rule 137 must be accompanied by specific findings such as to propriety, basis, reasons and manner of computation.

7. In *Kay v. Ehrler*, a United States Supreme Court case, the plaintiff-attorney successfully filed two suits against the State of Kentucky and in the second cause, requested attorneys' fees pursuant to a federal statute that allows for the payment of attorneys' fees in certain civil rights actions where the attorney prevails. The Supreme Court held that the statute did not authorize award of attorneys' fee to attorney representing himself in successful civil rights action and that further, "furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." The Court, in a footnote, seemed to identify the existence of an attorney-client relationship as critical in establishing an objective assessment of a meritorious claim

(discussing the difference between individual attorneys engaged in self-representation and organizational plaintiffs being represented by an employee of the organization). The Court further provided, (1) that the statute's overriding concern is that victims of civil rights violations obtain independent counsel in order to ensure the effective prosecution of meritorious claims; (2) that a plaintiff-attorney may be subject to emotion rather than reason in re unforeseen developments in the courtroom; and (3) that a contrary ruling would diminish the incentive to retain counsel in every such case.

8. In *Brazas v. Ramsey*, plaintiff individual non-lawyer sought review of the order of the Circuit Court of Kane County (Illinois), which denied his motion for attorney fees pursuant to the Illinois Freedom of Information Act. In reliance upon *Hamer*, the reviewing court held that non-lawyer *pro se* litigants are also barred from collecting attorney fees under section 11(i) of the Act and that there is no appreciable difference between a lawyer and a nonlawyer representing himself in a *pro se* complaint under the Act. The court further stated that neither litigant (lawyer or non-lawyer) incurs any legal fees in the prosecution of his action and that such a rule (disfavoring such an award) will further the Act's goal of avoiding unnecessary litigation by encouraging citizens to seek legal advice prior to filing suit (citing *Hamer*).

9. In *Aronson v. United States Department of Housing & Urban Development*, the Appellee attorney filed an action under the Freedom of Information Act in order to compel appellant Department of Housing and Urban Development to allow him access to certain records concerning individual mortgagors who were entitled to receive reimbursements from appellant. Appellee prevailed, and the lower court awarded him attorney fees pursuant to 5 U.S.C.S. § 552(a)(4)(E) for his own work and for the work of

his lawyers on the case. On appeal, the court affirmed the award of attorney fees to appellee for the services of his lawyers because appellee was a prevailing party, in that his action conferred a significant benefit on the public and the government's withholding of the records did not have a reasonable basis in law. The court reversed the award of attorney fees for appellee's own work in prosecuting the case and remanded the case for a re-computation of the attorney fee award for the work of his lawyers. The court held that a *pro se* litigant who was an attorney could not recover attorneys' fees for his own work in an action under the Freedom of Information Act.

10. In *Department of Conservation v. Lawless*, the plaintiff landowner sought a writ of mandamus ordering defendant department of conservation director to purchase the landowner's land by condemnation. He was awarded a default judgment but the trial court denied his claim for attorneys' fees and other costs, as enumerated in section 9.8 of the Eminent Domain Act; the department appealed from the judgment. In pertinent part, the appellate court held that the denial of attorneys' fees was error and remanded the matter back to the trial court for a determination as to the reasonable fees and costs incurred at trial and upon appeal and, once determined, to award those amounts. However, the instant Appellate Court stated that, "*We…do not find Lawless persuasive enough to depart from the cases discussed above where the Lawless court provided little, or no, analysis and no support for its reasoning*."

But, Lawless provided that the appropriate considerations are as follows:

- The trial judge shall determine the composition of those enumerated litigation expenses and allow or refuse such expenses in the exercise of its sound discretion.

- This means reasonable expenses should be allowed, whereas unreasonable ones should not.
- In determining whether a *pro se* award is reasonable, the fact an attorney appears *in propria persona*, in addition to hiring outside counsel, is not the sole determinant in justifying an award of attorneys' fees.
- Various factors such as the time and labor required, the customary fee for such legal work, the amounts of such awards in similar cases, the novelty of the question presented, the actual necessity of hiring additional counsel, and the attorney's reputation and experience, form that matrix of factors which comprise the reasonableness of an attorney's fee.

12. Otherwise, while the cases cited above have some commonalities, they substantially vary as to allegations, forums, jurisdictions, pleadings, causes of action and other circumstances. But, they all bear a common leitmotiv of singularity that is composed of two overriding and unmistakable elements: Each, at one point or another, asserts a claim for *pro se* attorneys' fees and each postured the claimant as a plaintiff that filed or initiated the respective causes of action.

13. The cited cases do not apply to the facts of the cause before the trial court, the Appellate Court or this court. In that respect, none of the cases constitute precedence, insight or instruction as to special and different facts of the instant cause reviewed by this court. The gravamen of the instant cause of action involves a claim for attorneys' fees that resulted from the claimant's defense against allegations that this reviewing court found that unmistakably frivolous and, therefore, violative of Rule 137.

14. The trial court below clearly was also cognizant of the *Hamer* case but, apparently sensing the inapplicability of the case, didn't find that the case represented a deterrence to the award of attorneys'; that court set forth that, as is set forth in the decision, that:

> *"There is no case law to suggest that the Supreme Court intended for a party to pay no sanction for filing a frivolous claim just because the other party(,) who is a lawyer(,) proceeded pro se."* (top of SUP1 C 7)

15. The operative language in the trial court's selection involves "a party…filing a frivolous claim" and "the other party, who is a lawyer, proceeded *pro se*." The "other party" is obviously the party responding to and defending against the frivolous claim. The trial court apparently felt, notwithstanding its consideration of *Hamer*, that a party responding to a frivolous claim should not be precluded an award of attorneys' fees and costs. It is submitted, again, that the trial court was correct.

16. In the course of the discussion in *Aronson v. United States Department of Housing & Urban Development*, which held, as set forth above, that that a *pro se* litigant who was an attorney could not recover attorneys' fees for his own work in an action under the Freedom of Information Act, that court annotated and cited *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980). That case, decided well prior to *Hamer*, provides guidance into the relatively uncharted waters of the instant fact situation, where the *pro se* attorneys' fee claim pertains to a defensive posture against frivolous pleadings.

17. Indeed, where the *Aronson* court referenced *Ellis*, it stated that in that latter case, the *pro se* lawyers were defendants and not plaintiffs and that such fact weighed heavily in the court's decision awarding fees, that the lawyers had to take time from their practices to prepare and defend the suit against them and that fees had been granted to both

attorneys and laypersons in FOIA case. Therefore, the case seems to indicate that while the law may be shifting regarding *pro se* attorney's fee claims in connection with the prosecution of FOIA matters, the legal ground has been solid where the *pro se* lawyer incurs fees defending against frivolous allegations filed by an opponent.

18. The Appellate Court, at paragraph 22 of the decision, states that, "*We find the circuit court did not abuse its discretion in imposing Rule 137 sanctions against plaintiff for violating the Rule*." but also states at paragraph 29 of the decision, that, *"…because Rule 137 is penal in nature and must be strictly construed. (Citation omitted.) We find the policy reasons provided in prior case law to be convincing; thus, we will not extend Rule 137 to provide attorney fees to pro se attorneys."* But, prior case law does not pertain to, affect or control the facts herein under consideration and is understandably sparse. Certainly, no case law has been tendered (or likely, can be found) where *pro se* attorneys' fees have been denied in reference to the defense against frivolous pleadings.

19. Further, it has been acknowledged by the cited authority, the instant trial and reviewing courts and the parties that there is no plethora of Illinois cases regarding *pro se* attorneys' fees claims generally and research shows that those few cases that are found pertain to attorneys' fee claimants who have instigated the litigation.

20. In *Ellis*, the plaintiff brought an action against all parties related to the foreclosure of his land by his mortgagees and the trial court dismissed the action on the basis that he failed to properly state a claim and concluded that the plaintiff-appellant brought suit "in bad faith and vexatiously" and awarded attorneys' fees to the defensive *pro se* appellees who were attorneys that represented themselves. The reviewing court pointed out that it is unquestioned that a federal court may award counsel fees to a

successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons and cited *Hall v. Cole*, 412 U.S. 1, 5, 93 S. Ct. 1943, 1946, 36 L. Ed. 2d 702 (1972). The court, further, asserted that "the Supreme Court has recently concluded that attorneys' fees may be awarded to a prevailing defendant in an action brought under the Civil Rights Act of 1964 even without a showing of actual bad faith where the action is "unfounded," "meritless," "unreasonable," "frivolous," or "vexatiously brought." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978)."

Addressing the issue of attorneys who defensively represent themselves, the *Ellis* court additionally provided that:

> "The law in this area is far from clear. Here, we conclude that the award was proper. **The award of attorneys' fees in this case furthers the underlying policy of discouraging frivolous or harassing litigation**. See *Christiansburg Garment Co. v. EEOC*, [**9] supra, 434 U.S. at 420, 98 S. Ct. at 699. **The appellees have actually suffered pecuniary loss, since they have been required to take time away from their practices to prepare and defend the suit.** See *Winer v. Jonal Corp.*, 169 Mont. 247, 545 P.2d 1094 (1976). **Legal services have actually been performed.** See *Wells v. Whinery*, 34 Mich. App. 626, 192 N.W.2d 81 (Mich.1971). The difficulty of placing a dollar value on the legal services performed, present in the situation where a lay defendant represents himself, is largely absent in the case of an attorney who has established fees and billing practices. **Further, these appellees did not seek out a chance for pro se litigation to compensate for an inactive practice; they were forced to defend against frivolous claims made by a plaintiff who is apparently bent on endless litigation. We conclude that attorneys' fees were properly awarded."**
> (Emphasis added.)

The cause was remanded for the trial court to determine the appropriate fee amount.

21. But, this is not all. Aside from the cases referenced and relied upon by the Appellate Court (and annotations therein), some of other jurisdictions have also weighed in:

A. In *Keaty v. Raspanti*, 2003-1080 (La. App. 4 Cir 02/04/04), 866 So. 2d 1045, 1051-52, the appellate court held that La. C.C.P. art. 863 is a special statute that, like Rule 137 in Illinois, allows a person to recover a reasonable attorney's fee from the person who files frivolous pleadings and that the purpose of the article is to deter frivolous litigation. Further, acknowledging prior case law that prohibited attorneys' fees being awarded to a pro se lawyer, it found that such authority was confined to the pro se lawyer who brings suit in his own name and not, as was before the court, a pro se litigant who "*was the defendant and was forced to expend his time defending a frivolous lawsuit"* and concluded, "*To hold that an attorney who must defend himself or herself cannot recover reasonable attorney's fees, including his or her own lost time and expenses in defending himself or herself, would frustrate the purpose of the statute and possibly reward those who persist in maintaining litigation such as that found in this case*." (Emphasis repeated.)

B. In *Ibarra v. Mount*, NO. 37383-8-I, 1998 Wash. App. LEXIS 1154, at 24 (Ct. App. Aug. 3, 1998), pro se claimant requested attorney fees and argued that he should be compensated for his own time in defending against a frivolous pleading. The court reiterated that lawyers who incur fees representing themselves should be awarded attorney fees where fees are otherwise justified because they must take time from their practices to prepare and appear as any other lawyer would. The court went further, stating that, *"…overall costs may be saved because lawyers who represent themselves are more likely to be familiar with the facts of their cases*." That latter statement is particularly germane to the facts of the instant cause under review.

22. And, the paucity of Illinois authority pertaining to the attorneys' fee to be awarded to defensive pro se attorneys in the context of Rule 137, should not deter this court

from the logically judicial application of the rationale that Hamer, "and its progeny", assert. The three-pronged Hamer rationale exists (1) to remove a deterrence to seeking relief that unreimbursed attorneys' fees may impose, (2) to encourage citizens to seek counsel when the pursuit of such relief is contemplated and (3) to discourage fee-generating activity by pro se attorneys who may specialize in such litigation. None of those factors are brought to bear when a litigant is not initiating litigation but is constrained to defend himself against frivolous pleadings and allegations with respect to Rule 137.

23. In fact, the imposition of Rule 137 sanctions goes far to discourage such frivolous actions, especially where the responding litigator is himself an attorney. Moreover, and more importantly, it is submitted that the denial of such sanctions, under such circumstances, actually, has the opposite effect of defeating the purpose and reason for the Rule against frivolous pleadings.

24. Further, as in the instant cause, the mandate that the Petitioner herein must have sought outside counsel in a cause of action with which he was intimately familiar before the fees that he might so incur can be reimbursed represents, it is submitted, an unnecessary specious imposition especially where the matter is summarily resolved after motions to dismiss (in spite of his opponent's continuous and repeated allegations of the same frivolous positions). (See the *Lawless* reference at paragraph 11 above as *to the actual necessity of hiring additional counsel* and the quotation from *Ibarra* at paragraph 21 B, above, as to the cost-saving by the *pro se* lawyer defending upon his familiarity with the matter.) Also, such a defending attorney does not respond in such manner unless the irresponsible pleader has initiated the frivolous litigation and, therefore, there can be no question of fee-generating activity. Finally, the bare and facile statement that a *pro se*

attorney does not incur fees amounts, it is respectfully submitted, to a fiction that bears no actual validity to the actual business of a practicing attorney who is forced to take time from that practice to defend against and address allegations that are "unfounded," "meritless," "unreasonable," and/or "frivolous", as has been annotated. Again, these "policy reasons", as termed by this court, have no actual bearing to the facts of this matter.

25. In conclusion, the trial court was also imminently correct when it stated that, "*McCarthy is not entitled to a windfall in the form of being excused from paying Rule 137 sanctions merely because Gray chose to represent himself…*"

26. Additionally, the Petitioner also petitioned, in his Petition for Re-Hearing, that he also be awarded appellate attorney's fees and repeats that petition here. The request was mooted in the Appellate Court's denial in the mechanical adherence to the *Hamer* "policy" reasons that occasioned that court to reverse the trial court's fee award.

27. However, the frivolousness of the instant Respondent's specious postures before the trial court has been thoroughly documented by this Appellate Court in its opinion and need not be repeated or reiterated here; the strictures of Rule 137 need not also be replicated. However, it is submitted, that, in point of fact, the instant appeal is only minutely less frivolous, especially regarding the legal validity of the Respondent's allegations as to the "issues" of "res judicata", "privity", "tortious interference", "fiduciary duty", etc. However, frivolous arguments before a trial court are no less frivolous before an appellate court as filed and instigated by the Respondent, *pro se*.

28. Therefore, without setting forth the contents of Supreme Court Rule 375, the Petitioner, in consequence, respectfully moves that an award for appellate attorneys'

fees be entered herein against the Respondent or that, in the alternative, this court enter such an order imposing such a sanction, *sua sponte*.

CONCLUSION

WHEREFORE, the Petitioner, MARVIN GRAY, prays that this Supreme Court repair this modest but tellingly complete tear in the fabric of the jurisprudence of the State of Illinois that is created by the automatic and mechanical "policy" application of the *Hamer* "rule" to such cases that involve absolutely converse facts to those contained in that case and its "progeny" and, therefore, that:

A. This court reverse the decision of the Appellate Court, affirm the decision of the trial court enter and reinstate the sanctions initially prayed for in the amount of $12,966.25; and

B. This court impose, pursuant to Supreme Court rule 375, a further sanction, in the form of an award of damages and the reasonable costs of defending the instant frivolous appeal, including reasonable attorney's fees against the Respondent, as have been necessarily incurred by the Petitioner.

Respectfully submitted,

Marvin W. Gray

May 25, 2018
LAW OFFICE OF
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APPENDIX

The following documents are appended hereto:

1. The decision of the Illinois Appellate Court, First District, filed on March 30, 2018.

2. A Compendium of The Relevant Portions of The Instant Record on Appeal, which contains a schedule of the brief descriptions, responses, locations, synopses other information about the various pleadings and court orders filed in and entered by the trial court. This document, while not required for an appreciation of the issues before this Court, is provided in the case that reference to specific portions of the record is desired or appropriate for any reason.

3. That portion of the Appellant's PETITION FOR RE-HEARING, electronically filed on April 13, 2018, found at pages 12 and 13, paragraphs 24 through 26, and bearing the subtitle of PETITION FOR AWARD OF APPELLATE ATTORNEYS' FEES.

4. A copy of a letter dated May 1, 2018 from Thomas D. Palella, Clerk of the Appellate Court which relates, in part, that:

> "The Court today denied the petition for rehearing filed in the above entitled cause. The mandate of this Court will issue 35 days from today unless a petition for leave to appeal is filed in the Supreme Court."

Lawyer

2018 IL App (1st) 162478
No. 1-16-2478
Opinion filed March 30, 2018

Fifth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

GERALD S. McCARTHY, Plaintiff-Appellant, v. ABRAHAM LINCOLN REYNOLDS, III, 2006 DECLARATION OF LIVING TRUST; ROZLYN TAYLOR, Individually and as Trustee; and MARVIN GRAY, Defendants (Marvin Gray, Defendant-Appellee).	) Appeal from the) Circuit Court of) Cook County.)))) No. 14 CH 09651))))) Honorable) Kathleen M. Pantle,) Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Justices Hall and Rochford concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Gerald McCarthy, was the beneficiary of a living trust. After the trustee died, defendant, Marvin Gray, was appointed as the attorney of that trust. Plaintiff filed a complaint against Gray for breach of fiduciary duty and tortious interference with plaintiff's beneficiary interest. Plaintiff's complaint eventually was dismissed. Plaintiff now appeals the order of the

circuit court imposing Illinois Supreme Court Rule 137 (eff. July 1, 2013) sanctions against him and awarding attorney fees to Gray, who appeared *pro se*. Plaintiff contends the circuit court erred in dismissing his tortious interference claim based on *res judicata* and issuing Rule 137 sanctions because the claim was frivolous. Plaintiff additionally contends the circuit court erred in awarding excessive fees as a sanction against him and in favor of defendant, appearing as a *pro se* attorney. Based on the following, we affirm in part and reverse in part.

¶ 2 FACTS

¶ 3 In 2006, plaintiff was named as a beneficiary to the Abraham Lincoln Reynolds, III, Declaration of Living Trust (Trust). Plaintiff filed a complaint in 2013 alleging an amendment to the Trust naming defendant, Rozlyn Taylor, as the trustee was invalid. Gray was presented as a witness in the subsequent trial. The circuit court ultimately ruled against plaintiff, and this court affirmed. *McCarthy v. Taylor*, 2014 IL App (1st) 132239.

¶ 4 On June 9, 2014, plaintiff filed a five-count complaint against defendants. In relevant part, plaintiff presented two counts against Gray (1) alleging Gray breached his fiduciary duty to plaintiff as a beneficiary of the Trust and (2) alleging Gray tortiously interfered with plaintiff's share of the Trust by making false statements and presenting misleading evidence against him in the 2013 case. In response, Gray filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). On February 27, 2015, the circuit court dismissed the tortious interference claim with prejudice pursuant to section 2-619(a)(4) of the Code (*id.* § 2-619(a)(4)) based on the doctrine of *res judicata*, where the cause of action essentially asked the circuit court to relitigate the issues determined in the 2013 case, namely, the veracity of the Trust amendment. The court also dismissed plaintiff's

breach of fiduciary duty claim, but on the basis of his failure to present a sufficient claim pursuant to section 2-615 of the Code (*id.* § 2-615). Plaintiff was granted leave to amend his complaint with regard to the breach of fiduciary duty claim.

¶ 5 On March 27, 2015, plaintiff filed an amended complaint containing one count against Gray for breach of fiduciary duty. Plaintiff alleged Gray had a duty to act with due care in providing plaintiff with services related to the Trust, such as an inventory and an accounting. On August 25, 2015, the circuit court again dismissed plaintiff's claim against Gray. In so doing, the court stated:

> "McCarthy has not alleged any facts which would establish that Gray owed him a fiduciary duty. McCarthy has cited no legal authority for the proposition that a trust attorney owes a fiduciary duty to the trust's beneficiaries as a matter of law. Since McCarthy and Gray were not otherwise in privity, McCarthy would need to allege facts which would show his eligibility for an exception to the rule. However, McCarthy has failed to allege facts to support that any contract was entered into for his benefit, or the benefit of all the beneficiaries. Since McCarthy has failed to make any more than a bare-bones assertion that a fiduciary duty exists, he has not alleged the essential elements of his cause of action.
>
> McCarthy argues that a court can impose liability upon attorneys who knowingly and substantially assist their clients in causing another party's injury. *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App.3d 15, 28 (1st Dist. 2003). Though it is true that an 'attorney can be held liable for assisting a client in a conspiracy or knowingly or substantially assisting a client commit a tort *(Id.* at 28-29),' McCarthy has not alleged any

facts in support of a claim that Gray illegally conspired with Rozlyn Taylor (the trustee) or that he knowingly or substantially assisted Taylor commit a tort. Rather, McCarthy pleads only that Gray failed to respond to McCarthy's requests for an inventory and an accounting without pleading any facts to support his claim that Gray (rather than the trustee) has a duty to provide an inventory and an accounting. McCarthy also complains that Gray failed to reimburse him for part of his expenditures *(i.e.* $2000.00) without pleading any facts that demonstrate that Gray, as the attorney for the Trust, has the responsibility to make such reimbursement. Needless to say, there are no facts which, if proved, would demonstrate that Gray and Taylor have been illegally conspiring against McCarthy or that Gray has been assisting Taylor [to] commit any torts. Additionally, Gray's legal opinion about whether McCarthy's [*sic*] is a beneficiary of the Trust is not actionable. Gray's use of the term 'ostensible beneficiary' does not make him liable to McCarthy."

¶ 6 Thereafter, Gray filed a motion seeking Rule 137 sanctions, including an award for attorney fees and an award for costs, against plaintiff. In support of his request for sanctions, Gray alleged that plaintiff made false statements in his complaint and that he and plaintiff did not have an attorney-client relationship. Gray requested sanctions in the amount of $11,232.55 as a result of having to defend against "plaintiff's unfounded, fallacious and specious allegations and pleadings."[1]

¶ 7 On March 30, 2016, the circuit court entered an order granting in part and denying in part Gray's motion for Rule 137 sanctions. The court found that, while plaintiff did not plead any

[1]Gray later amended the sanction request to $12,106.03 for the time expended defending against the case as of November 13, 2015.

false statements of fact in his complaints, his cause of action against Gray for tortious interference was frivolous and, therefore, subject to Rule 137 sanctions. The court, however, concluded that sanctions were not appropriate for the breach of fiduciary duty claim in the original complaint or the amended complaint. Moreover, the court determined that, although Gray proceeded *pro se*, "the language of Rule 137 supports the notion that sanctions are available because the supreme court made it clear that a sanction may (but does not necessarily have to) include attorney fees." Accordingly, the court found Gray would receive an award in his defense against a frivolous claim. We note that the court's March 30, 2016, order confused the numeration of the counts that were sanctionable and nonsanctionable. The court's ruling, however, is clear from the context of the order. Gray was provided 28 days to file a supplemental petition to support his requested sanctions.

¶ 8 Plaintiff then filed a motion to reconsider the March 30, 2016, order. In his motion, plaintiff argued the circuit court misapplied the law where his tortious interference claim was not barred by *res judicata* and, therefore, was not frivolous. Plaintiff additionally argued the circuit court erred in awarding sanctions based on its *res judicata* finding because Gray did not raise the issue of *res judicata* in his motion seeking sanctions. According to plaintiff, he was denied an opportunity to respond to the *res judicata* argument.

¶ 9 On April 28, 2016, Gray filed a supplemental petition reducing his sanction request to $8,745.58, which included $102.28 in costs for parking and postage fees. In the supplemental petition, Gray argued that if sanctions were appropriate for the breach of fiduciary duty count in the original complaint (as erroneously suggested in the circuit court's March 30, 2016, order) then sanctions should be available for the breach of fiduciary duty count in the amended

complaint as well because "the counts were virtually indistinguishable." Gray reasoned that he should be awarded two-thirds of his sanction request because he was successful in receiving Rule 137 violations on two of the three counts filed against him.

¶ 10 On August 4, 2016, the circuit court entered a corrected order clarifying that it had found Rule 137 sanctions were appropriate only for the tortious interference claim, not the breach of fiduciary duty claim. In addition, on the same date, the court denied plaintiff's motion to reconsider and entered a sanction award in Gray's favor in the amount of $9707.98, which included $102.28 in costs. In so finding, the circuit court reiterated that plaintiff had no legal basis for filing his tortious interference claim where the matter of the amendment of the Trust had been litigated in the 2013 case. In that case, the circuit court found Gray to be a credible witness. This court then affirmed the circuit court's findings on appeal. *McCarthy v. Taylor*, 2014 IL App (1st) 132239. In terms of the sanction award, the circuit court found Gray's request, *i.e.*, $8745.48 plus $962.50 in connection with litigating the motion to reconsider, was appropriate. Specifically, the court stated: "The amount of time Gray spent was appropriate and reasonable, and the requested amounts are reasonable and customary."

¶ 11 This appeal followed.

¶ 12 ANALYSIS

¶ 13 Plaintiff first contends the circuit court erred in dismissing his tortious interference claim on the basis of *res judicata*.

¶ 14 The doctrine of *res judicata* bars any subsequent actions between the same parties or their privies on the same cause of action where there has been a final judgment on the merits rendered by a court of competent jurisdiction. *Nelson v. Chicago Park District*, 408 Ill. App. 3d 53, 60

(2011). Critically, *res judicata* bars not only what was decided in the first action but also whatever could have been decided in that action. *Id.* In order for the doctrine of *res judicata* to apply, there must be (1) a final judgment on the merits by a court of competent jurisdiction, (2) the existence of an identity of the causes of action, and (3) the existence of the same parties or their privies. *Id.* We review the questions of law presented by plaintiff's *res judicata* challenge *de novo*. *Id.* We additionally review the dismissal of plaintiff's claim under section 2-619 of the Code *de novo*. *Id.*

¶ 15 Plaintiff does not contest the finality of the judgment at issue. Instead, plaintiff argues that *res judicata* does not apply to this case where Gray was not a named party in the 2013 case and where the causes of action differ between the 2013 case and the underlying case. We disagree.

¶ 16 Although Gray was not named in the 2013 lawsuit, Taylor was named in both lawsuits. Moreover, Gray was the attorney for the Trust for which Taylor was named the successor trustee. Privity has been found to exist between parties who adequately represent the same legal interests. *Diversified Financial Systems, Inc. v. Boyd*, 286 Ill. App. 3d 911, 916 (1997). "There is no generally prevailing definition of 'privity' that the court can apply to all cases; rather, determining privity requires careful consideration of the circumstances of each case." *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 190 (2010). Under the circumstances presented here, we find Gray was in privity with Taylor for purposes of *res judicata* where plaintiff's concern in both cases was the validity of the Trust amendment and both Gray and Taylor represented the interests of the Trust.

¶ 17 We additionally find the causes of action were the same in both lawsuits for purposes of *res judicata*. Plaintiff insists the prior lawsuit involved the veracity of the Trust amendment while the underlying lawsuit involved the distribution and disbursement of the Trust assets. Plaintiff's argument is not supported by the record. Plaintiff's claim in the underlying lawsuit was labeled tortious interference; however, the complaint did not allege facts supporting a claim for tortious interference. Rather, plaintiff alleged Gray made false statements and presented misleading evidence in the 2013 case proceedings. Plaintiff's purported claim, therefore, attempted to attack Gray's credibility, which should have been raised in conjunction with the 2013 case in his efforts to invalidate the Trust amendment. See *Nelson*, 408 Ill. App. 3d at 60.

¶ 18 We, therefore, conclude plaintiff's tortious interference claim was properly dismissed based on the doctrine of *res judicata*.

¶ 19 Plaintiff next contends the circuit court abused its discretion in imposing Rule 137 sanctions and erred in issuing sanctions without providing him with a hearing.

¶ 20 Rule 137 authorizes the imposition of sanctions against a party or his attorney for filing a pleading, motion, or other paper that is not well grounded in fact and warranted by existing law or which has been interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Ill. S. Ct. R. 137(a) (eff. July 1, 2013). " 'The purpose of Rule 137 is to prevent the filing of false and frivolous lawsuits.' " *Nelson*, 408 Ill. App. 3d at 68 (quoting *Yunker v. Farmers Automobile Management Corp.*, 404 Ill. App. 3d 816, 824 (2010)). Pursuant to Rule 137, an appropriate sanction may include an order to pay the other party's reasonable expenses "incurred because of the filing of the pleading, motion or other document, including a reasonable attorney fee." Ill. S. Ct. R. 137(a) (eff. July 1,

2013). Rule 137 is penal in nature, and therefore, its provisions must be strictly construed. *In re Marriage of Adler*, 271 Ill. App. 3d 469, 476 (1995). The circuit court is required to provide an explanation when imposing sanctions. *Nelson*, 408 Ill. App. 3d at 68. On review, this court may only affirm the imposition of sanctions on the grounds specified by the circuit court. *Id.* We review a circuit court's decision to impose sanctions for an abuse of discretion. *Id.* at 67. An abuse of discretion occurs when no reasonable person could have shared the view taken by the circuit court. *Id.* at 67-68.

¶ 21 Here, in its August 4, 2016, corrected order, the circuit court held that plaintiff's tortious interference claim was filed with no basis in law because it was barred by the doctrine of *res judicata*. The circuit court noted that plaintiff filed the 2013 lawsuit and litigated it to its final conclusion. The court further reasoned that plaintiff was "acutely aware of the proceedings because he verified the complaint in that case *** and he is a lawyer himself." Plaintiff additionally appealed the circuit court's decision of the 2013 case and later listed himself as cocounsel on the petition for leave to appeal to the Illinois Supreme Court. Accordingly, plaintiff was "well-aware" of the allegations in the 2013 complaint and the proceedings that took place in relation thereto. The circuit court found there was "no basis in law" for plaintiff to file his tortious interference claim where, despite being aware of the final judgment in the 2013 case, he never set forth any good faith explanation regarding why he filed the subsequent claim that was a clear attempt to relitigate the findings of fact and credibility determinations made in the 2013 case.

¶ 22 We find the circuit court did not abuse its discretion in imposing Rule 137 sanctions against plaintiff for violating the Rule. As found by the circuit court, plaintiff, though

represented by counsel in the 2013 case, expressly was involved and had knowledge of the allegations of that complaint and the resulting proceedings that occurred. Notwithstanding, plaintiff filed the instant action to challenge Gray's credibility in the 2013 action, which is a claim that should have been raised in the 2013 case. We, therefore, conclude plaintiff's tortious interference claim was not well-grounded in law because it was barred by *res judicata.* As a result, it was not unreasonable for the circuit court to find the tortious interference claim was filed for an improper purpose under Rule 137.

¶ 23 To the extent plaintiff argues he was sanctioned without a proper hearing, we disagree. Plaintiff alleges Gray failed to raise *res judicata* as a basis for the imposition of sanctions and, therefore, the circuit court erred in awarding sanctions on that basis without providing him with a hearing. Our review of the record demonstrates that the circuit court dismissed plaintiff's tortious interference claim on February 27, 2015, based on *res judicata* and then granted Gray's request for Rule 137 sanctions on March 30, 2016, where it found the tortious interference claim was frivolous. Accordingly, at the time the circuit court considered the Rule 137 sanctions, plaintiff was fully aware that his tortious interference claim had been dismissed based on *res judicata.* Moreover, Gray's motion requesting Rule 137 sanctions alleged he was entitled to such sanctions "[d]ue to the plaintiff's unfounded, fallacious and specious allegations and pleadings." Notwithstanding, plaintiff never requested an evidentiary hearing on any basis.

¶ 24 Furthermore, the circuit court's determination that plaintiff's claim was frivolous did not require an evidentiary hearing where it was capable of being made in reliance on the pleadings and the 2013 case. *Cf. Century Road Builders, Inc. v. City of Palos Heights*, 283 Ill. App. 3d 527, 531 (1996) (finding an evidentiary hearing was necessary prior to imposing Rule 137 sanctions

where the sanctions were based on determinations that untrue statements in the pleading were without a reasonable cause and the pleadings were filed for an improper purpose). There were ample facts in the record to support the court's finding that plaintiff's tortious interference claim was barred by *res judicata*. We, therefore, find the circuit court did not err in ruling, without an evidentiary hearing, that Rule 137 sanctions were appropriate in light of plaintiff's frivolous claim barred by the doctrine of *res judicata*. Instead, the circuit court's decision was informed, based on valid reasoning, and followed logically from the facts. See *Technology Innovation Center, Inc. v. Advanced Multiuser Technologies Corp.*, 315 Ill. App. 3d 238, 244 (2000).

¶ 25 We further find plaintiff forfeited any argument related to amending his tortious interference claim where he raised the issue for the first time on appeal. See *Vandenberg v. Brunswick Corp.*, 2017 IL App (1st) 170181, ¶ 39.

¶ 26 Plaintiff finally contends the circuit court abused its discretion in awarding excessive fees against him to an attorney that proceeded *pro se*. Plaintiff cites *Hamer v. Lentz*, 132 Ill. 2d 49 (1989), and its progeny to support his argument regarding the impropriety of awarding the fees to Gray.

¶ 27 We first address our standard of review. As stated, a circuit court's decision to impose sanctions pursuant to Rule 137 is a matter of discretion and will not be overturned absent an abuse of that discretion. *Nelson*, 408 Ill. App. 3d at 67. However, whether a circuit court has the authority to grant attorney fees as an available remedy is a question of law that we review *de novo*. *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 2017 IL App (1st) 152668, ¶ 101. Because plaintiff challenges the circuit court's authority to award attorney fees under Rule 137 to Gray, who appeared *pro se*, our review is *de novo*.

¶ 28 In *Hamer*, the supreme court held that an attorney appearing *pro se* in an action brought pursuant to the Freedom of Information Act (FOIA) (Ill. Rev. Stat. 1987, ch. 116, ¶ 201 *et seq.*) was not entitled to attorney fees. *Hamer*, 132 Ill. 2d at 63. The FOIA contains a standard fee-shifting provision that is silent on the issue of a *pro se* attorney recovering fees. The supreme court reasoned that fees were not appropriate under those circumstances because the fee-shifting provision of the FOIA was designed (1) to remove the burden of legal fees as a deterrent from litigants, which was not a barrier for a *pro se* attorney because a lawyer representing himself does not incur legal fees, (2) to reduce unnecessary litigation by encouraging citizens, even lawyers, to seek objective legal advice before filing suit, and (3) to avoid abusive fee generation by unscrupulous attorneys. *Id.* at 61-62. Subsequent appellate decisions have expanded the rule to other contexts. See, *e.g.*, *Kehoe v. Saltarelli*, 337 Ill. App. 3d 669, 678 (2003) (holding an individual attorney was not entitled to recover fees for *pro se* representation in a malpractice action); *In re Marriage of Pitulla*, 202 Ill. App. 3d 103, 117-18 (1990) (finding the rule barring *pro se* attorneys from collecting attorney fees applied in the context of a divorce proceeding); *Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161, ¶ 25 (denying fees under FOIA for work performed by in-house, salaried lawyers on behalf of its employee, an organization).

¶ 29 The parties have not cited, and our research has not uncovered, any case law applying the *Hamer* rule to a Rule 137 motion. We acknowledge the purpose of Rule 137 is, in relevant part, to curb the filing of frivolous pleadings. See *Sanchez v. City of Chicago*, 352 Ill. App. 3d 1015, 1020 (2004). We further acknowledge that plaintiff's tortious interference claim was undoubtedly a frivolous cause of action. Rule 137, however, is silent on the recovery of attorney

fees for all *pro se* litigants, whether an attorney or not. Without any support establishing that attorney fees are appropriate under the circumstances before us, we choose to follow the demonstrated law providing that *pro se* attorneys are not entitled to attorney fees, especially because Rule 137 is penal in nature and must be strictly construed. See *Adler*, 271 Ill. App. 3d at 476. We find the policy reasons provided in prior case law to be convincing; thus, we will not extend Rule 137 to provide attorney fees to *pro se* attorneys.

¶ 30 Our review of the case law demonstrates a significant purpose of awarding attorney fees is to enable potential plaintiffs to obtain the assistance of competent, independent counsel. *Kay v. Ehrler*, 499 U.S. 432, 436-37 (1991) (holding, two years after the *Hamer* decision, that a *pro se* attorney was not entitled to recover attorney fees under 42 U.S.C. § 1988 (1988)). When an attorney proceeds *pro se*, that lawyer is deprived of independent judgment. *Id.* at 437. The United States Supreme Court advised, instead, that "furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." *Id.* at 438. We find it notable that the Supreme Court, in a footnote, seemed to identify the existence of an attorney-client relationship as critical in establishing an objective assessment of a meritorious claim. *Id.* at 436 n.7 (discussing the difference between individual attorneys engaged in self-representation and organizational plaintiffs being represented by an employee of the organization). Moreover, as in *Hamer*, courts consistently have considered the fact that *pro se* attorneys are not burdened by legal fees, such that the fees create a barrier to seeking representation. See *Uptown*, 2014 IL App (1st) 130161, ¶ 25. Further, courts have highlighted that nonattorney *pro se* litigants are not entitled to fees for the time they spend litigating their own cases; therefore, *pro se* attorneys should not be treated differently. See

Brazas v. Ramsey, 291 Ill. App. 3d 104, 110 (1997) (reasoning that *pro se* attorneys were barred from collecting attorney fees under FOIA because there was "no appreciable difference between a lawyer and a nonlawyer representing himself in a *pro se* complaint" as, "in either case, neither litigant incurs any legal fees in the prosecution of his action"); *Aronson v. United States Department of Housing & Urban Development*, 866 F.2d 1, 5 (1st Cir. 1989) ("Lawyers are not the only persons whose stock in the trade is time and advice").

¶ 31 The only case we have uncovered that awarded attorney fees to a *pro se* attorney was *Department of Conservation v. Lawless*, 100 Ill. App. 3d 74 (1981). In *Lawless*, the Third District awarded attorney fees to a *pro se* attorney under the Eminent Domain Act (Ill. Rev. Stat. 1979, ch. 47, ¶ 1 *et seq.*). *Id.* at 82. We, however, do not find *Lawless* persuasive enough to depart from the cases discussed above where the *Lawless* court provided little, or no, analysis and no support for its reasoning.

¶ 32 In sum, we conclude Gray was not entitled to collect attorney fees in this case under Rule 137 where he did not incur such fees while appearing *pro se* throughout the proceedings.

¶ 33 CONCLUSION

¶ 34 We affirm the judgment of the circuit court dismissing plaintiff's tortious interference claim based on *res judicata* and affirm the finding that plaintiff violated Rule 137 in conjunction with the filing of that frivolous claim. We, however, reverse the circuit court's finding that Gray, appearing *pro se* in the proceedings, was entitled to attorney fees and vacate that award.

¶ 35 Affirmed in part; reversed in part; attorney fees vacated.

COMPENDIUM OF THE RELEVANT PORTIONS OF THE INSTANT RECORD ON APPEAL

Item #	Pleading	Rejoinder	Loca-tion	Design-ation	Allegation/Argument
1	**McCARTHY'S** Verified Complaint For Inventory And Accounting, Removal Of Rozlyn Taylor, As Trustee, Claim On Trust Assets (,) Breach Of Fiduciary Duty, And Tortious Interference With Expentency (Sic)		C 5 to C 24	a) Count IV b) Count V	a) GRAY had a fiduciary duty to the beneficiary which was breached. b) Gray made false statements at the previous hearing and presented misleading evidence in the previous hearing.
2		**GRAY'S** Motion To Strike And Dismiss And/Or For Summary Judgment Regarding Counts Iv And V Of The Plaintiff's Verified Complaint…	C 120 to C 131	a) Count IV b) Count V	a) GRAY was retained to represent the trust only and McCARTHY had filed an action against that trust. b) McCARTHY'S contentions violate *Res judicata* and the decision of the previous hearing.
3		**McCARTHY'S** Response to Defendant Gray's Motion To Strike and Dismiss…	C 191 to C 194	a) Count IV b) Count V	a) GRAY'S assertion that he, as attorney for the trust, does not owe a duty to the trust's beneficiary is contrary to *Neal*. b) An attorney can have a duty to a beneficiary and all elements of *res judicata* are not present
4		**GRAY'S** Reply to McCarthy's Response…	C 2014 to C 208	a) Count IV b) Count V	a) *Neal* holds that where trust attorney defends against a beneficiary, the attorney owes no duty to that beneficiary. b) The requirements for res judicata are present and separate claims are considered the same cause of action when they arise from a single group of operative facts.
5		**ORDER OF COURT**	C 212 to C 221	a) Count IV b) Count V	a) Count IV stricken with leave to re-plead, at C 216. b) Count V dismissed with prejudice at C217.
6	**McCARTHY'S** Amended Verified		C 222 to	Count V	GRAY intentionally breached his fiduciary duty

	Complaint For Inventory And Accounting, Removal Of Rozlyn Taylor, As Trustee, Claim On Trust Assets, And Breach Of Fiduciary Duty		C 240		to act with due care, at C 230.
7		**GRAY'S** Motion To Dismiss Amended Verified Complaint…	C 245 to C 249 and C 252 to C 254	Count V	McCARTHY does not plead the existence of a fiduciary duty, a breach thereof, resultant damages nor special facts that come within the general exception.
8		**McCARTHY'S** Response to Motion To Dismiss Amended Verified Complaint…	SUP2 C 5 to SUP2 C 9	Count V	GRAY intentionally breached his fiduciary duty and deprived McCARTHY of trust assets, inventory, accounting, funds for a social affair and his rightful share of the trust.
9		**GRAY'S** …Reply To Plaintiff's Response To Motion To Dismiss Verified Complaint…	C 270 to C 279	Count V	McCARTHY mis-posits the law; "When an adversarial situation arises, the attorney for the executor owes allegiance only to the estate" and again fails to plead special facts to invoke the exception.
10		**ORDER OF COURT**	C 330 to C 335	Count V	Count V dismissed with prejudice: "…McCARTHY once again pleaded the alleged existence of GRAY'S fiduciary duty without any supporting facts."
11	**GRAY'S** Motion For Sanctions Against The Plaintiff Attorney with a Time & Expense Accounting and Recapitulation		C 359 to C 370		See item 13
12	**GRAY'S** Motion For Leave to File A First Amended Motion For Sanctions…, on the basis of typographical errors		C 405 to C 407		See item 13
13	**GRAY'S** First Amended Motion For Sanctions		C 421 to C 433		McCARTHY'S pleadings were filed in contravention of SC Rule 137 and 735

	Against The Plaintiff Attorney				ILCS 5/1-109 and praying for damages in the amount of $11,232.55.
14		**McCARTHY'S** Response To First Amended Motion To (sic) Sanctions	C 442 to C 443		No false statements were identified and that a pro se attorney is not entitled to attorney's fees
15		**GRAY'S** Reply To Response To First Amended Motion…	C 445 to C 456		Invoking the language of the prior court order and praying for an increase in costs and fees to the amount of $12,106.03
16		**ORDER OF COURT**	C 511 to C 516		1. No basis in law for McCARTHY to file Count IV; 2. Sanctions are available to GRAY for Count V; 3. No law found prohibiting attorney's fees to a pro se lawyer; and 4. GRAY to file a supplemental pleading
17	**GRAY'S** Supplemental Petition For Sanctions Against The Plaintiff Attorney		C 518 to C 528		If sanctions are appropriate for Count IV of the original complaint, they should be appropriate for Count V of the amended complaint because the counts are virtually indistinguishable, reducing his claim for costs and fees to $8,745.58.
18		**McCARTHYS'** Plaintiff's Response To Supplemental Petition For Sanctions… with exhibit—the court order of March 30, 2016	C 536 to C 545		GRAY ignores the court order and presents no new material.
	GRAY DID NOT REPLY				
19	**McCARTHY'S** …Motion For Reconsideration		SUP2 C 10 to SUP2 C 21		Court mis-applied existing case law, based its decision on allegations not argued in GRAY'S motion for sanctions, failed to appreciate the timeliness of the plaintiff's complaint and praying that the order of March 30, 2016 be set aside.
20		**GRAY'S** Response of Defendant…To	C 530 to		McCARTHY'S motion seems to be directed to the

		Plaintiff's Motion For Reconsideration,	C 535		court's order of August 25, 2015 when the counts of his original complaints were addressed
21		**McCARTHY'S** … Reply To Response of Defendant Marvin Gray To Plaintiff's Motion For Reconsideration	C 548 to C 549		McCARTHY seeks to remove the sanctions.
22		**ORDER OF COURT**	SUP1 C 4 to C 9		See 7 findings and award to GRAY of $9,707.98
23		**CORRECTED ORDER OF COURT**	C 551 to C 556		Corrected error contained in the order that she entered on March 30, 2016: "The Court is willing to award GRAY a sanction for having to defend himself against the frivolous Count V of the original complaint".

23. In conclusion, the trial court was also imminently correct when it stated that, "*McCarthy is not entitled to a windfall in the form of being excused from paying Rule 137 sanctions merely because Gray chose to represent himself...*"

PETITION FOR AWARD OF APPELLATE ATTORNEYS' FEES

24. The frivolousness of the instant plaintiff-appellant's frivolous posture before the trial court has been thoroughly documented by this appellate court in its opinion and need not be repeated or reiterated here; the strictures of Rule 137 need not also be replicated. However, it is submitted, that, in point of fact, the instant appeal is only minutely less frivolous, especially regarding the legal validity of the plaintiff's allegations as to the "issues" of "res judicata", "privity", "tortious interference", "fiduciary duty", etc. (Exception may be made for the issue of attorneys' fees, which, all acknowledge and has been shown, bears sparse authority.) However, frivolous arguments before a trial court are no less frivolous before an appellate court.

25. Supreme Court Rule 375 provides, in pertinent part, as follows:

> **"(b)** ***Appeal or Other Action Not Taken in Good Faith; Frivolous Appeals or Other Actions.*** *If, after consideration of an appeal or other action pursued in a reviewing court, it is determined that the appeal or other action itself is frivolous, or that an appeal or other action was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, or the manner of prosecuting or defending the appeal or other action is for such purpose, an appropriate sanction may be imposed upon any party or the attorney or attorneys of the party or parties. An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. An appeal or other action will be deemed to have been taken or prosecuted for an improper purpose where the primary purpose of the appeal or other action is to delay, harass, or cause needless expense.*

Appropriate sanction for violation of this section may include an order to pay to the other party or parties damages, the reasonable costs of the appeal or other action, and any other expenses necessarily incurred by the filing of the appeal or other action, including reasonable attorney fees.

A reviewing court may impose a sanction upon a party or an attorney for a party upon the motion of another party or parties, or on the reviewing court's own initiative where the court deems it appropriate. If the reviewing court initiates the sanction, it shall require the party or attorney, or both, to show cause why such a sanction should not be imposed before imposing the sanction. Where a sanction is imposed, the reviewing court will set forth the reasons and basis for the sanction in its opinion or in a separate written order."

26. The defendant-appellee, in consequence, respectfully moves that an award for appellate attorneys' fees be entered herein against the plaintiff-appellant or that, in the alternative, this court enter such an order imposing such a sanction, *sua sponte*. An appeal is considered frivolous if it would not have been brought in good faith by a reasonable, prudent attorney. *Gilkey v. Scholl*, 229 Ill. App. 3d 989, 172 Ill. Dec. 120, 595 N.E.2d 183 (2 Dist. 1992).[1]

Conclusion

WHEREFORE, the Defendant/Appellee, MARVIN GRAY, prays:

A. That this court, having rejected the plaintiff's declarations and arguments, having found that the plaintiff filed frivolous pleadings and allegations in his appellant brief, having denied the plaintiff's appeal and having affirmed the decision of the trial court, except for the issue of *pro se* attorneys' fees, grant the instant Petition for Re-Hearing on that latter issue;

[1] The plaintiff's Argument in his brief contained four general broad paragraphs, only one of which was devoted to Hamer and "its successive line of cases"; that section is confined to 1 ½ pages, beginning on page 17 and incorrectly marked as paragraph "1)". The whole of the remainder of the Argument is devoted to all other contentions that this reviewing court has found to be without merit and frivolous.

CLERK'S OFFICE
APPELLATE COURT FIRST DISTRICT
STATE OF ILLINOIS
160 NORTH LASALLE STREET, RM S1400
CHICAGO, ILLINOIS 60601

May 1, 2018

RE: McCarthy, Gerald v. Gray, Marvin
General No.: 1-16-2478
County: Cook County
Trial Court No: 14CH9651

The Court today denied the petition for rehearing filed in the above entitled cause. The mandate of this Court will issue 35 days from today unless a petition for leave to appeal is filed in the Illinois Supreme Court.

If the decision is an opinion, it is hereby released today for publication.

Thomas D. Palella
Clerk of the Appellate Court

c:

No. _____

IN THE SUPREME COURT OF ILLINOIS

ABRAHAM LINCOLN REYNOLDS, III,
2006 DECLARATION OF LIVING TRUST;
ROZLYN TAYLOR, Individually and as
Trustee; and MARVIN GRAY,

(Marvin Gray)
Petitioner,

v.

GERALD S. McCARTHY,

Respondent.

On review of the opinion of the Appellate Court of Illinois
First Judicial District, No. 1-16-2478

There on appeal from the Cook County Circuit Court,
No. 14 CH 09651
The Honorable Kathleen M. Pantle, Judge Presiding

NOTICE OF FILING AND CERTIFICATES OF COMPLIANCE AND SERVICE

TO: Tanya D. Woods, Esq.
Attorney for Respondent
9811 S. Vanderpoel Ave.
Chicago, IL 60643

PLEASE TAKE NOTICE that I caused to be electronically filed with the Clerk of the Supreme Court of the State of Illinois, on this 25th day of May, 2018, the attached Petition For Leave To Appeal and that a copy thereof was served upon the attorney named above by emailing the same to that attorney at her email address of tanya@harrisonlaw.group, as is indicated in the Service Contacts in the Notification of Service.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this Petition For Leave To Appeal, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,773 words).

CERTIFICATE OF SERVICE

I certify that on May 25, 2018, I served this Petition For Leave To Appeal, prepared by the Petitioner, by emailing a copy thereof to Tanya D. Woods, Counsel for the Respondent of 9841 South Vanderpoel Avenue, Chicago, IL 60643 to her email address of tanya@harrisonlaw.group, as is indicated in the Service Contacts in the Notification of Service.

MARVIN W. GRAY, Petitioner, Pro Se

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

MARVIN W. GRAY, Attorney, Petitioner, Pro Se, Defendant and Affiant

May 25, 2018
LAW OFFICE OF
MARVIN W. GRAY
PETITIONER/DEFENDANT
/APPELLANT, PRO SE
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