No. 123622

IN THE
SUPREME COURT OF ILLINOIS

ABRAHAM LINCOLN REYNOLDS, III, 2006 DECLARATION OF LIVING, TRUST, ROZLYN TAYLOR, Individually and as Trustee, and MARVIN GRAY, Petitioner-Appellants,	)	On Petition for Leave to Appeal from the Illinois Appellate Court, First Judicial District, No. 1-16-2478
v.	)	There on Appeal from the Circuit Court of Cook County, Illinois Chancery Division No. 14 CH 9651
GERALD S. McCARTHY, Respondent-Appellee.	)	Hon. Kathleen M. Pantle (ret.)

BRIEF OF RESPONDENT-APPELLEE, GERALD S. McCARTHY

TO PETITION

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TABLE OF CONTENTS

POINTS AND AUTHORITIES

STATEMENT OF FACTS

In 2006, Abraham Lincoln Reynolds, III executed a Declaration of Living Trust (2006 Trust). The 2006 Trust named Gerald Scott McCarthy (Mr. McCarthy) as Successor Trustee and Beneficiary under the Trust. Abraham Lincoln Reynolds, III (Reynolds) committed suicide in December 2012. The day after Reynolds' death, Marvin Gray (Mr. Gray) contacted Mr. McCarthy and stated that on the day he died, Reynolds had amended the Trust.

In January 2013, in his capacity as Successor Trustee, and believing that the amended trust was invalid, Mr. McCarthy filed a Verified Complaint in the Circuit Court of Cook County. Mr. Gray was not a named party in the Complaint, but was a witness for the Defendant. The Hon. Rodolfo Garcia presided over the proceedings. The trial court determined that the amendment was indeed valid; that Rozyln Taylor (Ms. Taylor) was the new Successor Trustee; and Mr. McCarthy remained Beneficiary to the Trust. Subsequently, Mr. Gray became the Trust Attorney. The Garcia ruling was upheld on appeal.

Mr. McCarthy's repeated outreach to the Trust Attorney, regarding his interest in the Trust, remained unanswered. On June 9, 2014, after over one year with no communication from the representatives of the Trust, and with the only piece of real property in the Trust in foreclosure, Mr. McCarthy, filed a new action; a five-count Verified Complaint in Circuit Court of Cook County. Two of the counts in the Complaint, breach of fiduciary duty and tortious interference, were directed at Mr. Gray. The Complaint alleged, among other things, that Mr. Gray had intentionally breached his

fiduciary duty to Mr. McCarthy as a Beneficiary and that he had tortiously interfered with his share of the Trust. (R. at Vol. I C005.)

On November 3, 2014, Mr. Gary filed a Motion to Dismiss the tortious interference count, pursuant to Section 2-619, under the doctrine of *res judicata* and the breach of fiduciary duty count pursuant to Section 2-615. (R. at Vol. I C120.) On February 27, 2015, the trial court dismissed the tortious interference count with prejudice and granted Mr. McCarthy leave to amend the breach of fiduciary duty count.

On March 27, 2015 Mr. McCarthy filed an Amended Complaint including the remaining count which pertained to Mr. Gray, again, alleging that he had intentionally breached his fiduciary duty. (R. at Vol. I C222.) On April 16, 2015 Mr. Gray filed a Motion to Dismiss (R. at Vol. I C245.) and on August 25, 2015 the trial court dismissed the breach of fiduciary duty count, pursuant to Section 2-619 with prejudice. (R. at Vol. I C330.)

On September 16, 2015 Mr. Gray filed a Motion for Sanctions which was amended on October 15, 2015. (R. at Vol. II C421.) In Paragraph 8 of his Amended Motion for Sanctions, Mr. Gray alleged, as his reasons for sanctions, that (1) Mr. McCarthy made false statements and (2) that no attorney-client relationship existed between them, thus there was no duty (R. at Vol. II C427.) On March 20, 2016, the trial court found Mr. McCarthy credible and also found that Mr. Gray failed to prove Mr. McCarthy made false statements. Mr. Gray's Motion does not mention *res judicata* or make any reference to the tortious interference count. The trial court granted Mr. Gray's Motion for Sanctions and subsequently Mr. Gray was awarded attorneys fee for representing himself. (R. at Vol. III C511-C516.)

The next month, on April 29, 2016, Mr. McCarthy timely filed a Motion for Reconsideration of Mr. Gray's First Amended Motion for Sanctions Against Plaintiff's Attorney. (R. at Supp. II). In that Motion, Mr. McCarthy argued that the trial court should not have sanctioned him for the breach of fiduciary duty count because the trial court relied upon case law that referenced a negligent breach of duty and Mr. McCarthy instead was arguing Mr. Gray intentionally breached his duty.

On August 4, 2016, denying Mr. McCarthy's motion, the trial court upheld its sanctions against Mr. McCarthy and awarded fees to the *pro se* movant, Mr. Gray.

The trial court held that sanctions did not pertain to the breach of fiduciary duty but instead related back to the tortious interference count, which it deemed frivolous based on the doctrine of *res judicata*. (R. at Vol. III. C551 and Supp. R. at Vol. I C004.)

On September 2, 2016, Mr. McCarthy filed his Notice of Appeal. (R. at Vol. III C558.) In his appeal, Mr. McCarthy presented several issues before the Appellate Court.

First, that the trial court erred when it sanctioned him based on the *res judicata* doctrine. Mr. McCarthy argued the doctrine did not apply in the instant case. He emphasized that the parties and the subject matters were not the same. In the prior action, Mr. Gray was not a party and the issue before the Court was Trust construction. (R. at Vol. I C163-C187.) In the present case, Mr. Gray *was* a named party and Mr. McCarthy attempted to address Mr. Gray's behavior *after* the Garcia ruling. The Appellate Court upheld the sanction against Mr. McCarthy, reasoning *res judicata* did apply. The trial court held that although Gray was not a named party in the previous action, as the doctrine requires, as the Trust Attorney, he possessed identical interests as the Successor Trustee and thus was in privity with the Trustee. This interpretation of privity was

enough to satisfy one the essential elements of *res judicata*. The Appellate Court also did not find Mr. McCarthy's position that the subject matter was different persuasive. (See *McCarthy v. Abraham Lincoln Reynolds, III 2006 Declaration of Living Trust, et al,* 2018 (1st) 162478 ¶16)

Secondly, since he was sanctioned for the tortious interference count *after* he filed his Motion for Reconsideration, Mr. McCarthy argued that an Order demanding sanctions, under these circumstances, was procedurally flawed. In his Motion for Sanctions, Mr. Gray never mentioned *res judicata* and therefore, it was improper to sanction a litigant who was never afforded a forum to address the reason for his behavior which warranted sanctions or explain his intent and motivation. Responding to the issue of the lack of a proper hearing, the trial court reasoned that Mr. Gray was not required to raise the issue of *res judicata* in his pleading for sanction. But rather the trial court could raise its own reason for the imposition of a sanction and an evidentiary hearing was not required.

The Appellate Court deduced that since Mr. McCarthy was aware of Mr. Gray's February 27, 2015 Motion to Dismiss, and since the Motion for Sanctions included the following language, "[d]ue to the plaintiff's unfounded, fallacious, and specious allegation and pleading", the Motion for Sanctions did not have to specifically mention *res judicata* as the reason for the sanction and was therefore proper. See *Id* at ¶23.

Third, Mr. McCarthy asserted that it was equally improper to sanction a litigant for a claim that he was never permitted the opportunity to amend. The Appellate Court ruled that Mr. McCarthy forfeited his right to address the issue that he was sanctioned for

a count that he was not allowed to amend. See *Id* at ¶ 25. That point notwithstanding, procedurally, Mr. McCarthy was never granted an opportunity to amend the offensive claim or explain to the trial court his intent behind the claim.

Finally, Mr. McCarthy argued that the trial court abused its discretion when it awarded fees to *pro se* attorney defendant and furthermore, that the amount of the award, over $9,000.00 for a single count, was excessive. The Appellate Court agreed and reversed the decision of the trial court and denied an award of attorney fees to Mr. Gray. See *Id* at ¶ 32.

Mr. Gray filed a Petition for Reconsideration which the Appellate Court denied on May 1, 2018. On May 25, 2018, he subsequently filed a Petition for Leave to Appeal to this Court, which the Court granted.

On October 5, 2018 Mr. Gray filed his Notice of Election pursuant to Supreme Court Rule 315(h). On November 9, 2018 Mr. McCarthy filed his Answer of Respondent-Appellee, Gerald S. McCarthy to Petition.

ARGUMENT

I. The Appellate Court Correctly Reversed the Trial Court's Decision to Award Fees to a *Pro Se* Attorney Defendant.

A. Illinois Courts Address Public Policy Concerns By Justly Refusing to Award Attorney Fees to Pro Se Attorney Litigants

The Court in *Hamer*, and its progeny held that attorneys who proceed *pro se* in cases are not entitled to an award of attorney fees. (*Hamer v. Lentz*, 132v Ill.2d. 49 (1989). Although *Hamer* deals with an award of attorney fees under the Freedom of Information Act (FOIA), the principles in *Hamer* have been appropriately, fairly, and thoughtfully applied in the Appellate Court in contexts other than FOIA and not in a "automatic and

mechanical policy application" as Mr. Gray suggests in his Petition for Leave to Appeal (Petition for Leave to Appeal, p.20) (See *Uptown People's Law Ctr. v. Dept. of Corrections*, 2014 IL App (1st) 130161, ¶ 23, ¶ 24). Furthermore, in considering whether to award attorney fees, neither the court in *Hamer*, nor any court since, has found a reason to award fees based on whether an attorney litigant instigated the litigation or defended themselves in an action. Mr. Gray suggests this is a critical determining factor; resting the crux of his argument on an almost 40-year old case, he discovered in a footnote. *Ellis v. Cassidy*, 625 F.2nd 227 (9th Cir. 1980). Equally, Gray's position that a person defending themselves in an action is entitled to an award for attorney fees is not supported by Illinois case law. See *Kehoe v. Saltarelli*, 337 Ill. App. 3d 669, 678, 786 N.E.2d 605 (1st Dist. 2003) (Attorney defending himself in a Motion to Dismiss) and *In re Marriage of Pitulla*, 202 Ill. App. 3d 103, 117, 559 N.E.2d 819 (1st Dist. 1990) (Attorney defending himself against a Rule to Show Cause).

When considering whether to award attorney fees for sanctions, the Court relies upon Illinois Supreme Court Rule 137, which states in relevant parts:

> **(a) Signature requirement/certification.**
> Every pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated…The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument…If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other document, including a reasonable attorney fee. Il. S. Ct. R. 137(a).

In this instance, the trial court, without reservation, acknowledged in the Corrected Order entered on August 4, 2016, its awareness of the *Hamer* holding and subsequent application of law. The trial court further declared that it could find no case law interpreting this issue of awarding fees to attorneys who proceed *pro se* in an Illinois Supreme Court Rule 137 context. (R. at Vol. III C551.)

Yet, in the absence of case law to support its final decision, the trial court awarded Mr. Gray, fees and costs of over $9,000.00 to cover the purported fees and costs to defend himself against a single count in a five-count complaint. The trial court boldly eschewed previous Illinois court holdings by awarding fees and costs, even when the case law clearly demonstrates Appellate Courts have applied the public policies announced in *Hamer* to a variety of cases that go beyond a statutory context, including marriage and malpractice actions for example. (See *Uptown's People Law Ctr. v. Dept. of Corrections*, 2014 IL App. (1st) 130161, ¶ 24)

With only one case to support the award of attorney fees, the Appellate Court reasoned that the holding in that singular case was not persuasive, and justly found that the trial court erred when it awarded attorney fees to an attorney representing himself (*Department of Conservation v. Lawless*, 100 Ill. App. 3d 74 (1981). In the instant case, the Appellate Court, conscientiously following the rule *Hamer*, the long line of Illinois cases that followed, and the holding in the U.S. Supreme Court case *Kay v. Ehler*, 499 U.S. 432, 436-37 (1991) held that *pro se* attorney litigants are not entitled to attorney fee awards due to a myriad of reasons not merely an "automatic and mechanical public policy application". (Petitioner's Petition for Leave to Appeal, p.20)

A few of those public policy reasons the Illinois courts have cited as adequate justification to deny attorney fees to *pro se* attorney litigants include:

1) When an attorney proceeds *pro se*, the lawyer is deprived of independent judgment
2) Legal fees do not prevent the attorney *pro se* litigant from obtaining counsel
3) Non-attorney *pro se* litigants are not entitled to attorney fees for their time spent defending themselves, so why should attorneys be treated differently?
4) Without proper policing and a system of checks and balances, some attorneys representing themselves in a dispute may be tempted to prolong litigation in order profit professionally.
5) Awarding fees would open a flood gate of pro se attorneys filing Rule 137 motions.

Furthermore, the Appellate Court held, Rule 137 when strictly construed as intended is silent on the matter of awarding attorney fees to *pro se* attorney litigant, thus there is no bright-line rule. However, even in the absence of a "plethora of Illinois cases regarding *pro se* attorney fees generally", the Appellate Court has not created " a vacuum of judicial relief", as Mr. Gray would suggest. The alleged vacuum, if it existed, would be filled with volumes of Illinois case law and rulings in the majority of jurisdictions across the country which continue to uphold a pervasive and fundamental belief and tenet that attorney litigants proceeding *pro se*, are not entitled to attorney fees.

B. In the Absence of a Bright-line Rule, Instances Where Awarding Attorney Fees Will Invite Potential Abuse and Misappropriation of Resources

Despite a general prohibition of awarding fees to *pro se* attorney litigants, there are specific instances where attorneys have attempted to win awards for attorney fees and

the courts have denied such relief. Law firm litigants are often tempted to utilize their own partners and associates when representing the firm's interests in a litigation.

A long line of cases, including *Witte v. Kaufman*, 141 Cal.App.4th 1201, 1211, Cal.Rptr.3d 845 (2006), hold that firm attorneys, when representing the firm in litigation, essentially representing their own interests. Courts have held the rule applies to "of counsel" and independent contractors as well. No matter what titles are used, courts examine the totality of the relationship between the attorney and the firm *Carpenter v. Cohen*, 195 Cal.App.4th 373, 124 Cal.Rptr.3d 598 (2011). Thus, the firm could not recover attorney fees. An Arizona court ruled similarly, in a case involving a law firm that asserted the attorney for the firm worked on a case in their spare time. The court opined it would not be fair to compensate the attorney representing herself when a non-attorney would not be able to recover fees.

A corporation or firm represented by in-house counsel poses the same question of whether or not the corporation should be awarded attorney fees when in-house counsel is representing the corporation in litigation. Some jurisdictions recognize the attorney-client relationship between the in-house counsel and its client, holding it to be the same as hiring outside counsel. However, jurisdictions are split on whether or not that entitles a corporation to claim attorney fees when utilizing in-house counsel.

In *PLCM Group v Drexler, 22 Cal.4th 1084 (2000)*, the California Supreme Court held that employing in-house counsel to represent the corporation in a matter was the same as hiring an outside firm, as the in-house counsel did not share the same interest as the corporation, an agency relationship existed thus entitled to attorney fees.

Juxtaposed with the holding in *Jones v. Ippolito,* 52 Conn.App. 199, 727 A.2d 713, where a law firm attempted to recover attorney fees for litigation in a case in which the firm was a party. The firm attempted to claim fees for in-house paralegal services, drafting pleadings, research etc. alleging these tasks required time during the regular business day to complete. The court in this instance, held that the attorneys never filed an appearance and thus were not entitled yet even so, if they had filed one, the appearance would have been as *pro se* attorneys and thus barred from recovering fees.

Finally, when awarding a fee to an attorney proceeding *pro se*, there is no way to police the process. When a client pays their attorney bill, there is an independent record, accounting, an invoice, or a canceled check. There is a finite amount billed for each service that can be independently verified and quantified. And if the client disagrees with any charges in the billing, there is a process they can follow in order to resolve the dispute. In an instance where an attorney litigant essentially bills himself for services, there is no check and balance to ensure counsel only bills for necessary and customary services related to the case; there is nothing to prevent an unanticipated spike in the attorney's hourly rate in the middle of litigation; and inherently the bill will also be construed in the light most favorable to the attorney who he alone is tracking his time and expenses.

II. Mr. Gray Provides Ample Examples of Abuses in Legal Billing.

When an attorney represents himself there is no method of independent review. See *Kay vs. Ehler*. The legal community is peppered with articles from Forbes to the American Bar Association, addressing the prevailing concern regarding padding invoices

with excessive billable hours, extraneous costs, and other billing exaggerations in order to increase profitability.

Mr. Gray's original and amended invoice provides this Court with illustrative examples of potential abuse. An example of padding: Mr. Gray billed for two (2) hours for reading (13) pages of documents. (R. at Vol. II C431 on October 4, 2014.) He bills for four (4) hours to conduct a "modicum of legal research" and records an additional 7.5 hours of combined researching and drafting. Mr. Gray spent 2.5 hours making copies, stapling and assembling and preparing to file in his Motion to Dismiss (also includes in the preparation of a Notice of Motion.) (R. at 431 on October 27, 2014, October 28, 2014, October 29, 2014, October 30, 2014, and October 31, 2014.)

Additionally, many of the tasks on Mr. Gray's invoice are clerical in nature: photocopying, binding documents, traveling to the courthouse to secure a hearing date, file stamping copies, and serving courtesy copies. (R. at 431 at October 31, 2014 and November 3, 2104; R. at Vol. II C431; R. at Vol. II C432 on January 12, 2015, and September 9, 2015.) Almost every line has a combined task. There is even a line item for work not actually performed but for an estimation of time. (R. at Vol. II C433)

When asked to delineate in his bill the time and expenses devoted to defending the single count of the Complaint for which Mr. Gray sought sanctions and fees, Mr. Gray stated in his Supplemental Petition for Sanctions Against the Plaintiff Attorney, filed April 2016, "Time and Expense Schedules; the defendant did not separate his activities by the counts alleged or contained in either the plaintiff's original or amended

complaint; the responsive activity was indivisible" and without explanation, proceeded to multiple his entire bill by two thirds. (R. at Vol III, C523, ¶4).

This assertion that the bill cannot be divided is not entirely true; it is possible to delineate the activities into three (3) parts using the dates found in the invoice itself. Part One: from October 4, 2014, the day Mr. Gray received the Complaint Summons, to February 27, 2015, the day Mr. Gray received the Order dismissing the tortious interference count with prejudice, Mr. Gray was defending both counts related to him in Mr. McCarthy's five-count Complaint. Part Two: from February 27, 2015 to September 9, 2015, Mr. Gray was defending the breach of fiduciary duty count solely. Finally, Part Three is the time after September 9, 2015 when Mr. Gray was filing and advocating for his own Motion for Sanctions. (R. at Vol. II C431 and 432.) The only time that cannot be parsed out, is the first period where Mr. Gray was addressing two counts and at this point, his purported bill totaled $7,600.30. (R. at Vol. II C432) A more logical and reasonable calculation would be to divide Part One in half in order to derive a fair amount, not to charge ⅔ of the entire bill as Mr. Gray has done.

III. Petitioner Seeks Sanctions and Attorney Fees Under Rule 375 for an Allegedly Frivolous Appeal

A. When Sanctions Are Appropriate Under Rule 375.

In his prayer for relief, Mr. Gray requests that this Court impose sanctions against Mr. McCarthy under Rule 375. Mr. Gray argues that Mr. McCarthy's appeal, of the trial court's decision to impose sanctions for the tortious interference count of his five-count Complaint, was frivolous. Under Rule 375, sanctions may be imposed if an appeal is frivolous or not taken in good faith. An appeal is considered frivolous if 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." *Gunthorp v. Golan*, 184 Ill. 2d 432, 441, 704 N.E.2d 370 (1998).

The standard is an objective one, or would a reasonably prudent attorney have brought this appeal. See *Id*. Given the long history of this case; the basis for the sanctions and the award of attorney fees to a *pro se* attorney litigant; and the remaining fact that no one has been held accountable for the mismanagement of the Estate's assets, a reasonably prudent attorney would have surely appealed the trial court's decision. Therefore, Mr. McCarthy's appeal is not frivolous under this standard.

B. It Was Not Frivolous When Mr. McCarthy Appealed the Trial Court's Decision to Impose Sanctions, Holding Mr. McCarthy Violated the Doctrine of *Res Judicata.*

The trial court granted Mr. Gray's motion for sanctions finding Mr. McCarthy's tortious interference count was barred by the doctrine of *res judicata*. Mr. McCarthy using the reasonably prudent attorney standard, filed a timely appeal arguing res judicata did not apply. For *res judicata* to bar a claim, three requirements must be satisfied: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) the parties or their privies are identical in both actions; and (3) an identity of cause of action exists. *Nelson v. Chicago Park Dist.*, 408 Ill. App. 3d 53, 60 (2011).

At the trial court and in his appeal, Mr. McCarthy argued that (2) the parties or their privies were not identical in both actions; and an identity of cause of action did not exists. While the Appellate Court concluded that Mr. Gray was not a party in the previous action, it held that Mr. Gray was in privity with the successor trustee, Rozlyn Taylor. We disagree.

Privity is said to exist between parties who adequately represent the same legal interests. *Diversified Financial Systems v. Boyd,* 286 Ill. App. 3d 911, 916, 678 N.E.2d 308 (4th Dist. 1997). To find that Mr. Gray was a party, the Appellate Court construed a new definition of privity, which did not exist prior to the appeal, declaring Mr. Gray was in privity with the Successor Trustee, arguing their interests were the same. However, the Appellate Court's reasoning is confounding because Mr. Gray did not become the Trust attorney until AFTER the Garcia ruling. Therefore, Mr. Gray could not have either been a party to or in privity with the Successor Trustee in the first case.

The Appellate Court erroneously found that *res judicata* applied because Mr. McCarthy's tortious interference count in his five-count Complaint had the same nexus cause of action as the case before the Garcia court. Mr. McCarthy's contention was that the Garcia ruling dealt with trust construction issue and the validity of the trust amendment. The trial court appeared to agree. In the ruling on Ms. Taylor's Motions To Dismiss the Count II of Verified Complaint of Mr. McCarthy, the Pantle court reasoned that Ms. Taylor was not entitled to sanctions based on the doctrine of *res judicata* because the case did not involve the "same cause" with the exception of some of the allegations [in the tortious interference count] ...in *McCarthy v. Taylor* the issues involved whether handwritten amendment to the Trust were valid...however the present case alleged wasted or mismanaged assets, real estate going into foreclosure, failure to pay claims of the trust and failure to provide an accounting and inventory" (R. at Vol. I C219.), yet the trial court did not apply the same reasoning as it related to Mr. Gray. Thus, if in the case before the Appellate Court, Mr. McCarthy argues *res judicata*, as it relates to same cause, does not apply for the same reasons the Pantle court found were

persuasive when examining the application of *res judicata* for Ms. Taylor. Given the inconsistency, a prudent person would have appealed.

C. Mr. Gray Did Not Meet His Burden in His Motion for Sanctions

A party seeking the imposition of Rule 137 sanctions against an opponent is the burdened party. *Century Road Builders, Inc. v. City of Palos Heights,* 283 Ill. App. 3d 527, 531 (1996). A party seeking to recover under Rule 137 has the burden of showing that his opponent violated the rule. *Miner v. Fashion Enterprises, Inc.,* 342 Ill. App. 3d 405, 668 (2003).

The trial court, in its ruling, minimized Mr. Gray's burden to specify with certainty the reason why Mr. McCarthy should be sanctioned. The burden shifted to Mr. McCarthy when it ruled that Mr. Gray did not have to specifically mention in his motion, the violation of *res judicata*. There is no disagreement that Gray's Motion for Sanction does not mention *res judicata*, yet the trial court has stated this was not necessary because this was an issue in a prior pleading.

The Appellate Court erroneously upheld this reasoning. The holding would indicate that Respondents must now interpret the language of a Motion for Sanctions beyond the ordinary meaning of the words and beyond the four corners of the pleading. The Appellate Court holding would seem to contradict the ruling in *In re Marriage of Adler*, 271 Ill. App. 3d 469, 648 N.E.2d 953 (1st Dist. 1995) *In re Marriage of Adler*, a Rule 137 petition was dismissed because it failed to specify which pleadings, motions, or other papers her request for sanctions was based upon; (2) the trial court's order of February 23, 1994, failed to specify the reasons or basis for imposing sanctions against the appellants as required by Rule 137; and (3) the transcripts of the proceedings before

the trial court when it entered its sanction order and when it denied the appellants' motion to vacate or modify that order fail to identify either the specific pleadings upon which the sanction was based or the manner in which the sanction was computed. *Id*. at 477. This contradiction is an appropriate issue for appeal.

D. The Trial Court Erred When It Immediately Dismissed with Prejudice, the Tortious Interference Count, Without Affording Mr. McCarthy an Opportunity to Amend, and Later Sanctioned Mr. McCarthy for That Count

Plaintiffs generally are granted at least one opportunity to amend their pleadings. *Sinclair v. State Bank*, 226 Ill. App. 3d 909, 910, 589 N.E.2d 862, 863 (4 Dist.), appeal denied, 145 Ill. 2d 644, 596 N.E.2d 637 (1992). This court adopted four factors to be used in determining whether the trial court's denial of a party's motion to amend constituted an abuse of discretion: (1) whether the proposed amendment will cure the defective pleading; (2) whether the proposed amendment would surprise or prejudice the opposing party; (3) whether the proposed amendment was timely filed; and (4) whether the movant had previous opportunities to amend. (Citing *Loyola Academy*, 146 Ill.2d at 274–76, 166 Ill.Dec. 882, 586 N.E.2d 1211.) The overriding concerns, however, are justness and reasonableness. See Ill.Rev.Stat.1987, ch. 110, par. 2–1005(g). *In re Estate of Hoover*, 155 Ill. 2d 402, 742 (1993).

To determine whether a cause of action has been effectively stated, the whole complaint must be taken as a whole, rather than adopting a tunnel vision approach of a single count in a five-count Complaint of a disconnected part. *People ex rel. Scott v. College Hills Corp*., 91 Ill.2d 138, 145 (1982). In the present instance, the trial court not only dismissed the tortious interference count, but it dismissed the count with prejudice; thus, denying the Mr. McCarthy an opportunity to amend it. Later, the Court agrees with

Mr. McCarthy, that while some allegations related back to the previous cause of action, this Complaint's central issue was the mismanagement of Trust assets.

When taken as whole, the basis of the Complaint addresses the Defendants' mismanagement and waste of the Trust assets. Mr. McCarthy concedes that, he alleged exactly three (3) facts in the tortious interference count which addressed Defendants' injurious conduct on specific dates that were inaccurate and occurred in the time period before Garcia's ruling in the previous case. This inaccuracy had a chilling effect on Mr. McCarthy's future pleadings in the case at bar. If given an opportunity by the trial court to amend the offending count, Mr. McCarthy could have limited his allegations to include conduct occurring *after* the Garcia ruling and still successfully stated a cause of action for tortious interference. An amendment could have cured the defective pleading, and the original complaint removed from the record, in effect having been abandon or withdrawn. *Couri v. Korn,* 202 Ill. App. 3d 848 (1990). Because of the penal nature of the sanction, Mr. McCarthy should have had an opportunity to appeal. An opportunity denied when, the trial court dismissed the count with prejudice.

Mr. McCarthy appealed the award of attorney fees to a *pro se* litigant and the reasonable of that award. As stated in Section I, there is only one case that support the award of attorney fee to a *pro se* litigant. This issue alone is ripe for appeal.

Secondly, Mr. McCarthy challenged the reasonableness of the award. As stated in Section II, the bill in question could have been parsed in three (3) parts and after adjusting for the padding and performance of clerical task, Mr. Gray should have only been awarded ½ of the first part. Mr. Gray should not be entitled to any fees following

the dismissal of the offending tortious interference count. The breach of fiduciary count was not frivolous and should not have been included in his bill.

Finally, Mr. Gray received an award for time spent working on his Motion for Sanction. Neither Mr. Gray or the trial court cited any authority to support such an award. The case law cited by Mr. Gray would seem to indicate that this is not the case. See *In re Marriage of Pitulla*.

Given the fact that the trial court appeared to have circumvented existing case law to sanction Mr. McCarthy and to award of a *pro se* litigant attorney fees, Mr. Gray's request for an award of fees and costs under Rule 375 is in itself both frivolous and not grounded in good faith and thus sanctionable.

CONCLUSION

Respondent respectfully requests that this Honorable Court affirm the decision of the Appellate Court, holding that the Petitioner appearing *pro se* in this matter is not entitled to attorney fees and costs under Rule 137; deny Petitioner's request for an award of $12,966.25; and reversed the decision of the Appellate Court upholding the sanctions against Mr. McCarthy, Furthermore, Respondent requests that this Honorable Court deny Petitioner's request to impose sanctions under Rule 375 against the Respondent; deny any award of damages and costs; and award such further relief to the Respondent that the Court deems fair and just.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY THAT THIS BRIEF CONFORMS TO THE REQUIREMENTS OF RULES 341(a) and (b). THE LENGTH OF THE BRIEF, EXCLUDING pages containing the Rule 341 (d) cover, the Rule 341(h)(1) statement of points and authorities, 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 **20** pages.

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RECORD ON APPEAL INDEX

INDEX BY VOLUME		
Volume I	**Date Filed**	**Page Number**
Civil Cover Sheet	June 9, 2014	C002
Verified Complaint	June 9, 2014	C005
Summons – Taylor	June 9, 2014	C025
Summons – Gray	June 9, 2014	C026
Alias Summons – Taylor	October 1, 2014	C067
Alias Summons – Gray	October 1, 2014	C068
Motion For Special Process Server	October 1, 2014	C069
Order for Special Process Server	October 1, 2014	C071
Affidavit Special Process Server	October 7, 2014	C075
Order-Continuance	October 7, 2014	C080
Notice of Motion – Taylor	October 31, 2014	C081
Motion – Taylor	October 31, 2014	C082
Answer – Taylor	October 31, 2014	C111
Motion for Sanctions – Taylor	October 31, 2014	C114
Motion to Dismiss – Gray	November 3, 2014	C120
Order-Briefing Schedule	November 7, 2014	C190
Response to Gray's Motion to Dismiss	December 29, 2014	C191
Notice of Filing	December 29, 2014	C195
Notice of Filing	December 29, 2014	C196
Response to Taylor's Motion to Dismiss	December 29, 2014	C197
Reply from Gray	January 12, 2015	C204
Order	January 29, 2015	C209
TUA Order	January 29, 2015	C210
TUA Order	February 17, 2015	C211
Order – Ruling	February 27, 2015	C 212
Amended Verified Complaint	March 27, 2015	C222
Notice of Filing - Subpoena	March 27, 2015	C241
Notice of Filing – Amended Complaint	March 27, 2015	C243
Motion to Dismiss- Gray	April 16, 2015	C245
Volume II		
Order-Briefing Schedule	April 16, 2015	C255
Notice of Filing	April 27, 2015	C256
Answer – Taylor	April 27, 2015	C257
Notice of Filing	May 14, 2015	C263
Response to Motion- Sanctions	May 14, 2015	C265

Notice of Filing	May 14, 2015	C268
Notice of Filing	May 14, 2015	C269
Reply - Gray	May 28, 2015	C270
TUA Order	June 29, 2015	C280
Hearing Date Order	June 29, 2015	C281
Inventory	July 16, 2015	C282
Notice of Motion	July 21, 2015	C288
Motion for Summary Judgment	July 21, 2015	C291
Order	July 22, 2015	C327
Order Briefing Schedule	July 30, 2015	C328
TUA Order	July 30, 2015	C329
Order – Ruling	August 25, 2015	C330
Order - Ruling	August 25, 2015	C336
Notice of Filing	August 27, 2015	C342
Response - Taylor	August 27, 2015	C343
Reply - McCarthy	September 10, 2015	C350
Notice of Filing	September 10, 2015	C355
Notice of Motion	September 10, 2015	C358
Motion – Sanctions	September 16, 2015	C359
Written Request to Produce	September 17, 2015	C371
Notice of Motion	September 17, 2015	C378
Objection to Inventory	September 17, 2015	C380
Notice of Filing	September 17, 2015	C397
Order Briefing Schedule	September 24, 2015	C398
Order Briefing Schedule	September 24, 2015	C399
Order	September 24, 2015	C400
Order Briefing Schedule	September 29, 2015	C401
Notice of Motion	September 30, 2015	C404
Motion to Amend	September 30, 2015	C405
First Amended Motion for Sanctions	September 30, 2015	C408
First Amended Motion for Sanctions	October 15, 2015	C421
Order	October 15, 2015	C434
Memorandum	October 22, 2015	C435
Notice of Filing	October 22, 2015	C441
Response to Gray's Motion	November 3, 2015	C442
Notice of Filing	November 3, 2015	C444
Reply – Gray	November 13, 2015	C445
TUA Order	November 24, 2015	C457
Notice of filing	December 4, 2015	C458
Objections to Request	December 4, 2105	C459

Volume III	**Date Filed**	**Page Number**
Order for Briefing Schedule –	December 17, 2016	C509

14 CH 9651		
Order – 14 CH 9651	February 11, 2016	C510
Order-Motion for Sanctions 14 CH 9651	March 30, 2016	C511
Order – 14 CH 9651	March 31, 2016	C517
Volume III continued	**Date Filed**	**Page Number**
Supplemental Petition for Sanctions Against Plaintiff Attorney	April 28, 2016	C518
Order for Briefing Schedule- 14 CH 9651	May 19, 2016	C529
Response of Defendant Marvin Gray to Plaintiff's Motion for Reconsideration	June 15, 2016	C530
Plaintiff's Response to Supplemental Petition for Sanctions Against the Plaintiff Attorney	June 16, 2016	C536
Exhibit A – Separator Page		C539
Order –Motion for Sanctions 14 CH 9651	March 30, 2016	C540
Notice of Filing – Plaintiff's Response to Supplemental Petition for Sanctions Against the Plaintiff Attorney	July 16, 2016	C546
Notice of Filing – Plaintiff's Reply to Response of Defendant Marvin Gray to Plaintiff's Motion for Reconsideration	June 30, 2016 (misstamped 2017)	C547
Plaintiff's Reply to Response of Defendant Marvin Gray to Plaintiff's Motion for Reconsideration	June 30, 2016	C548
TUA Order – 14 CH 9651	July 7, 2016	C550
Corrected Order-Motion for Sanctions 14 CH 9651	August 4, 2016	C551
Notice of Filing – Response to Independent Administration Chauncey Jones' Affirmative Defenses and Motion to Strike and Dismiss	August 25, 2016	C557
Notice of Appeal to the Appellate Court of Illinois from the Circuit Court of Cook County	September 2, 2016	C558
Appellate Court Certification Page	October, 2016	C560
Supplemental Record Volume I		

Order Granting Leave	December 15, 2016	C002
Motion for Leave	December 6, 2016	C003
Order – Sanctions Ruling	August 4, 2016	C004
Supplemental Record Volume II		
Motion To Reconsider	April 29, 2016	

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I, Tanya D. Woods, an attorney, first being duly sworn, state that on November 9 and again on November 13, 2018, I caused one copy of the attached Brief of the Mr. McCarthy, Respondent-Appellee, to be served by e-filing via Odyssey File and Serve, on the following:

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ARDC # 6314300

No. 123622
IN THE SUPREME COURT OF ILLINOIS

ABRAHAM LINCOLN REYNOLDS, III, 2006 DECLARATION OF LIVING, TRUST, ROZLYN TAYLOR, Individually and as Trustee, and MARVIN GRAY, Petitioner-Appellant,	) On Petition for Leave to Appeal) from the Illinois Appellate Court,) First Judicial District,) No. 1-16-2478)
v.	) There on Appeal from the Circuit) Court of Cook County, Illinois) Chancery Division) No. 14 CH 9651
GERALD S. McCARTHY, Respondent-Appellee.	) Hon. Kathleen M. Pantle (ret.)

NOTICE OF FILING –
BRIEF OF RESPONDENT-APPELLEE, GERALD S. McCARTHY
TO PETITION

Please take notice that on November 9 and again on November 13, 2018 the Notice and the attached Brief of Respondent-Appellee, Gerald S. McCarthy was electronically filed with the Clerk of Supreme Court of the State of Illinois.

PROOF OF SERVICE

I, Tanya D. Woods, an attorney, first being duly sworn, state that on November 9 and again on November 13, 2018, I caused a copy of the attached to be served by email to:

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