
COLORADO COURT OF APPEALS
No. 96CA1556

January 29, 1998
NOT SELECTED FOR PUBLICATION

Kenneth Smith,

Plaintiff-Appellee,

v.

Bob Larson Ministries, Inc., a Colorado corporation;
International Broadcasting Network, a Colorado corporation; and
Bobby E. Larson, both individually and as the agent for Bob
Larson Ministries,

Defendants-Appellants.

Appeal from the District Court of Jefferson County
Honorable William P. DeMoulin, Judge
No. 94CV121

Division IV
Opinion by JUDGE RULAND
Hume and Ney, JJ., concur

JUDGMENT AFFIRMED

Lawrence Katz, P.C., Lawrence Katz, Denver, Colorado, for
Plaintiff-Appellee

Miller & Welch, L.L.C., James Rolin Miller, Paul R. Wood, Denver,
Colorado, for Defendants-Appellants

Defendants, Bob Larson, Bob Larson Ministries, and International Broadcasting Company, appeal from the judgment entered dismissing their counterclaim for abuse of process against plaintiff, Kenneth Smith. Defendants also appeal from the court's order denying their request for attorney fees under §13-17-102, C.R.S. 1997. We affirm.

Plaintiff was a law student at the time the complaint was filed. Previously he had developed an interest in defendants' evangelistic organization. Over the course of several years, he secured numerous documents concerning the activities of defendants. Plaintiff also authored an unpublished book and numerous articles and pamphlets which were critical of defendants.

The acrimony culminated when, in two national radio broadcasts, defendant Bob Larson charged that plaintiff was a stalker who was disseminating false financial information about defendants and that plaintiff was part of a group that had threatened violence, property damage, and disruption of the evangelical work of defendants.

Thereafter, plaintiff filed a pro se complaint alleging defamation and various other claims. In response to a later amended complaint, defendants counterclaimed asserting an abuse of process claim and they requested an award of attorney fees and costs for what they termed a vexatious and groundless action. After nearly a year of litigation and discovery, plaintiff filed

a motion to dismiss all of his claims on the basis that he could not afford financially to pursue the litigation. The motion was granted.

Following an evidentiary hearing on defendants' abuse of process counterclaim, the court ruled in favor of plaintiff based upon its finding that defendants had failed to prove either causation or damages. Following a subsequent evidentiary hearing under §13-17-102, the court also determined that an award of fees and costs was not warranted.

I.

Defendants first contend that the trial court erred by limiting the evidence in support of their counterclaim to abuse of the discovery process only. According to defendants, the scope of the pleading included claims that plaintiff unduly expanded the litigation without justification and that plaintiff's amended complaint was without either factual or legal support. However, even if we assume that the court erred in its interpretation of the counterclaim, we find no reversible error.

As pertinent here, to establish an abuse of process claim, defendants were required to prove that plaintiff's defamation complaint was either devoid of factual support or that it had no cognizable basis in law. See Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984). Further, defendants also made this very contention in the hearing on

attorney fees, and they were permitted to present evidence in support of these contentions.

Following the hearing on fees, the court found with record support that defendants' reference to plaintiff as a "stalker" among other things was arguably defamatory under the circumstances. This finding is tantamount to a finding that plaintiff's claims were neither devoid of factual support nor without legal justification. And, this evidentiary finding is binding on this court. Lindley v. Hanson, 173 Colo. 239, 477 P.2d 453 (1970)

As a result, defendants would have been unable to establish their abuse of process claim. See Ware v. McCutchen, 784 P.2d 846 (Colo. App. 1989). Hence, the court's ruling, if error, was harmless. C.R.C.P. 61; C.A.R. 35(e); see Askew v. Gerace, 851 P.2d 199 (Colo. App. 1992) (error is harmless when there is no prejudice to a substantial right of the party).

II.

Defendants next contend that the trial court abused its discretion in denying their statutory claim for attorney fees. Defendants argue that the court's findings of fact were not supported by the record which, they assert, amply demonstrates that plaintiff's conduct was vexatious and his claims were frivolous and groundless. We are not persuaded.

Section 13-17-102, C.R.S. 1997, authorizes a trial court in its discretion to award attorney fees based upon a finding that

the action lacks substantial justification, that is, that the action was either frivolous, groundless, or vexatious. See Bilawsky v. Faseehudin, 916 P.2d 586 (Colo. App. 1995).

A claim is "frivolous" if plaintiff can present no rational argument based on the evidence or the law to support his allegations. The claim is "groundless" if the allegations in plaintiff's amended complaint, while sufficient to survive a motion to dismiss, are not supported by any credible evidence at trial. See Little v. Fellman, 837 P.2d 197 (Colo. App. 1991). Plaintiff may also be liable under the statute if the court finds that he unnecessarily expanded the proceeding, abused the discovery process, or otherwise asserted his claims for harassment only.

However, an award of fees is not mandated. Hart & Trinen v. Surplus Electronics Corp., 712 P.2d 491 (Colo. App. 1985). And, we must affirm the court's ruling on this issue unless the record confirms that the court abused its discretion. There is no abuse of discretion unless the court's decision is properly characterized as manifestly arbitrary, unreasonable, or unfair. See Hock v. New York Life Insurance Co., 876 P.2d 1242 (Colo. 1994).

In addition, to warrant an award of fees against a pro se litigant, under §13-17-102(6), C.R.S. 1997, the court must find that plaintiff clearly knew or reasonably should have known that

the suit lacked substantial justification. See Bockar v. Patterson, 899 P.2d 233 (Colo. App. 1994).

Here, as noted, the trial court found that plaintiff's claim was not without factual support or devoid of legal merit. See Maul v. Shaw, 843 P.2d 139 (Colo. App. 1992). Consistent with that finding, the court concluded that there was no showing that plaintiff knew the amended complaint lacked substantial justification.

The court also found that both parties in effect unduly expanded the proceeding by unprofessional and excessive conduct and by filing a "blizzard" of pleadings against each other. Finally, the court also found that, while there were an inordinate number of discovery disputes, the court had ruled in plaintiff's favor on more of the issues than for defendants, thus implicitly determining that any abuse of the discovery process was not necessarily attributable to plaintiff.

Under these circumstances, we find no abuse of discretion.
Judgment affirmed.

JUDGE HUME and JUDGE NEY concur.