DEADRE THIEL AND GERMAINE DYER	NO. 14-CA-879
VERSUS	FIFTH CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DAVID PODEWELL AND BANU GIBSON	COURT OF APPEAL STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 714-081, DIVISION "P"
HONORABLE LEE V. FAULKNER, JR., JUDGE PRESIDING

May 28, 2015

STEPHEN J. WINDHORST
JUDGE

Panel composed of Judges Jude G. Gravois, Marc E. Johnson
Robert M. Murphy, Stephen J. Windhorst and Hans J. Liljeberg

JOHNSON, J., DISSENTS WITH REASONS

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JUDGMENT VACATED; EXCEPTION OF NO RIGHT OF ACTION GRANTED

Appellants/defendants, Banu Gibson, David Podewell, and State Farm Mutual Automobile Insurance Company, appeal the trial court's judgment awarding sanctions, attorney's fees, and costs to appellee/non-party, Orthopedic Care Center of Louisiana ("OCCL"), and against appellants. For the reasons that follow, the trial court's judgment is vacated and we grant appellants' exception of no right of action dismissing appellee's motion for sanctions.

Facts and Procedural History

On June 27, 2011, plaintiffs, Deadre Thiel and Germaine Dyer, were involved in a motor vehicle accident. Plaintiffs filed a petition for damages seeking monetary damages for personal injuries suffered. Following the accident, plaintiffs sought treatment with Dr. David Wyatt. Dr. Wyatt's practice is conducted through the medical entity, OCCL. This appeal involves a discovery dispute between appellants and OCCL.

After initially conducting discovery, appellants contend they became aware of evidence that suggested Dr. Wyatt may be influenced by bias and financial

motive in his treatment of personal injury plaintiffs. As a result, appellants deposed Dr. Wyatt to determine the nature of his "discounting" and whether he maintains contingent financial relationships with law firms, including plaintiffs' counsel, the Womac Law Firm. Based on the testimony of Dr. Wyatt in his deposition, appellants determined that OCCL, a non-party, was the only source to obtain discovery from concerning OCCL's billing process or protocols and any contingency fee relationship with plaintiff's counsel. Appellants then noticed the taking of a La. C.C.P. art. 1442 deposition of OCCL, and issued a subpoena *duces tecum*. In response, OCCL filed a motion to quash subpoena *duces tecum*, for issuance of a protective order, and for sanctions.

On November 20, 2013, the trial court granted OCCL's motion to quash and awarded sanctions in favor of OCCL and against appellants. The trial court issued written reasons on December 17, 2013. Appellants filed an application for a supervisory writ to this Court. On February 11, 2014, this Court reversed the trial court's award of La. C.C.P. art. 1420 sanctions.[1]

After this Court's reversal of sanctions, OCCL filed a motion to re-set its motion for sanctions to "comply" with this Court's prior writ disposition.[2] The trial court re-set the motion for sanctions after the date for the trial on the merits. The parties subsequently settled the case. On August 5, 2014, the trial court held a hearing on OCCL's motion to re-set motion for sanctions and appellants' motion to compel attorney testimony during motion for sanctions. On

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[1] This Court granted appellants' writ in part finding:

> Upon review of the application, we find that the trial court was clearly wrong in granting sanctions under La. C.C.P. art. 1420(D) where no evidence was admitted at the hearing. See Beard v. Beard, 01-1381 (La. App. 5 Cir. 5/15/02), 821 So.2d 45, 51. Therefore, the trial court's judgment imposing sanctions under La. C.C.P. art. 1420(D) is hereby reversed.

[2] OCCL's motion to re-set only states that it is re-setting the motion for sanctions for an evidentiary hearing. However, in opposition to appellants' motion to compel attorney testimony during the motion to re-set motion for sanctions, OCCL argued that it re-set the motion for sanctions "for an [*sic*] contradictory, evidentiary hearing so as to comply with the Firth Circuit's Judgment." This Court's reversal of the award of sanctions to OCCL did not remand the case for further proceedings, nor was OCCL ordered to re-set its motion for sanctions for an evidentiary hearing.

August 6, 2014, the trial court rendered judgment in favor of OCCL and against appellants awarding OCCL sanctions, attorney's fees, and costs.[3] Appellants filed this timely appeal.

In this appeal, appellants contend that: 1) the trial court was clearly wrong when it awarded discovery sanctions, attorney's fees, and costs to OCCL where appellants were attempting to conduct discovery regarding the potential bias and financial motive and the credibility of plaintiffs' health care providers, grounds for impeachment and cross-examination, and the actual amount of damages that may have been legally recoverable; 2) the trial court was clearly wrong, and abused its discretion, when it awarded discovery sanctions, attorney's fees, and costs and disregarded appellants' demonstration of good cause and a legitimate, good faith justification for the requested discovery; and 3) the trial court was clearly wrong, and abused its discretion, when it found that the sole purpose of appellants' discovery requests was to "harass" and cause "unnecessary attorney's fees and costs." Upon leave of this Court, appellants were granted permission to file, for the first time, an exception of no right of action.

Discussion

A trial court's factual determination as to whether La. C.C.P. art. 1420 was violated is reviewed on appeal pursuant to the manifest error standard. Beard v. Beard, 01-1381 (La. App. 5 Cir. 5/15/02), 821 So.2d 45, 51.

La. C.C.P. art. 1420 governs the signing of discovery requests and sanctions for certifications that are in violation thereof. Beard, 821 So.2d at 50. Article 1420 is similar to La. C.C.P. art. 863 in that it requires that every request for discovery, or response or objection thereto, made by a party represented by an

[3] The trial court granted OCCL's motion for sanctions and awarded OCCL sanctions in the amount of $3,500.00; attorney's fees in the amount of $15,510.00; and court costs in the amount of $949.00.

attorney shall be signed by at least one attorney of record in his individual name. Id.; citing La. C.C.P. art. 1420A. Additionally, like Article 863, Article 1420 provides "that the signature of an attorney or party constitutes a certification by him that to the best of his knowledge, information, and belief the request, response, or objection is consistent with all the rules of discovery and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; not interposed for any improper purpose, such as to harass or to cause unnecessary or needless increase in the cost of litigation; and not unreasonable, unduly burdensome, or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." Id., citing La. C.C.P. art. 1420B.

Article 1420, like Article 863, provides in part:

> D. If, upon motion of ***any party or upon its own motion***, the court determines that a certification has been made in violation of the provisions of this Article, the court shall impose upon the person who made the certification or the represented party, or both, an appropriate sanction which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees. (Emphasis added.)

Thus, while a trial court may impose sanctions against a party or "the person who made the certification," the request for sanctions may only be heard or determined "upon motion of ***any party***" or on the court's own motion. (Emphasis added.) See Voitier v. Guidry, 14-276 (La. App. 5 Cir. 12/16/14), 2014 La. App. LEXIS 2982.[4]

Statutes which authorize the imposition of penalties, or sanctions, are to be strictly construed. Maxie v. McCormick, 95-1105 (La. App. 1 Cir. 2/23/96), 669 So.2d 562, 565. Because La. C.C.P. art. 1420 authorizes the imposition of sanctions, it must be strictly construed. Fauria v. Dwyer, 02-2320, 02-2418 (La.

[4] While Voitier was decided based on Article 863, we find that the reasoning and logic behind this Court's decision in Voitier is applicable to Article 1420 in this case.

App. 4 Cir. 9/24/03), 857 So.2d 1138, 1146. Similar to Article 863, we interpret the clear statutory language of Article 1420 to state that only *a party or the court* may bring an action for sanctions against either another represented party or the attorney who made the certification on a discovery request. The exception of no right of action is peremptory and can be brought at any time, including on appeal. Dufrene v. Ins. Co. of the State of PA., 01-47 (La. App. 5 Cir. 5/30/01), 790 So.2d 660, 668, writ denied, 01-2261 (La. 11/16/01), 802 So.2d 611, writ denied, 01-2308 (La. 11/16/01), 802 So.2d 613, citing Lambert v. Donald G. Lambert Constr. Co., 370 So.2d 1254 (La. 1979). It is undisputed that OCCL is not a party in this proceeding. Therefore, we find that OCCL had no right of action for sanctions against appellants.

Accordingly, because we find that the trial court had no authority to award OCCL sanctions, attorney's fees, and court costs, appellants' assignments of error are rendered moot.

Decree

For the reasons stated above, the portion of the trial court's judgment granting OCCL's motion for sanctions and awarding OCCL sanctions, attorney's fees, and court costs is vacated. We further grant appellants' exception of no right of action dismissing OCCL's claims against appellants.

JUDGMENT VACATED; EXCEPTION
OF NO RIGHT OF ACTION GRANTED

DEADRE THIEL AND GERMAINE DYER

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DAVID PODEWELL AND BANU GIBSON

NO. 14-CA-879

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

JOHNSON, J., DISSENTS WITH REASONS

I respectfully disagree with sustaining State Farm's exception of no right of action. I would overrule the exception of no right of action and address the merits of the issues raised on appeal.

An exception of no right of action tests whether the party seeking relief has a real and actual interest in the action. *Hood v. Cotter*, 08-215 (La. 12/2/08); 5 So.3d 819, 829. The function of the exception of no right of action is to determine whether the party belongs to the class of persons to whom the law grants the cause of action asserted. *Id.* An exception of no right of action assumes there is a valid cause of action for some person and questions whether the party asserting the cause of action is a member of the class that has a legal interest in the litigation. *Id.*

Under La. C.C.P. art. 1420, sanctions may be imposed when an attorney or party has signed a request for discovery in violation of the certifications listed in Subsection B.[1] In other words, sanctions may be awarded if the court determines that "the discovery is interposed for an improper purpose, such as harassment, or is 'unduly burdensome.'" *Fauria*

[1] Subsection B provides that the signature of an attorney or party on a discovery matter certifies that the discovery request or response is:
(1) Consistent with all the rules of discovery and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
(2) Not interposed for any improper purpose, such as to harass or to cause unnecessary or needless increase in the cost of litigation; and
(3) Not unreasonable, unduly burdensome, or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issue at stake in the litigation.

v. Dwyer, 02-2320 (La. App. 4 Cir. 9/24/03); 857 So.2d 1138, 1144. Subsection D provides that "upon motion of any party or upon its own motion" the court shall impose sanctions upon the person who made the certification in violation of Subsection B. Subsection D further provides that appropriate sanctions for a violation may include "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the request, response, or objection, including a reasonable attorney's fee."

The majority interprets "party" under Subsection D to mean that only a named party to the litigation can bring a motion for sanctions under La. C.C.P. art. 1420. As such, the majority concludes that OCCL, which is not a named litigant, has no right to bring a motion for sanctions for State Farm's violation of Article 1420. I disagree. Considering the legislative intent of Article 1420, I believe the term "party" includes any party to the proceeding, including an aggrieved party who has been subpoenaed to provide information in the discovery phase of a lawsuit, even if that party is not a named party to the litigation.

"Legislation is the solemn expression of legislative will, and therefore, the interpretation of a law involves primarily the search for the legislature's intent." *La. Municipal Association v. State*, 04-227 (La. 1/19/05); 893 So.2d 809, 836, citing La. C.C. art. 2. A statute must be applied and interpreted in a manner that is logical and consistent with the presumed fair purpose and intention the legislature had in enacting it. *Id.* at 837.

The paramount consideration for statutory interpretation is ascertainment of the legislative intent and the reason which prompted the legislature to enact the law. *Touchard v. Williams*, 617 So.2d 885, 888 (La.

1993). The starting point in ascertaining the legislative intent of a law is the language of the statute itself. *City of New Orleans v. La. Assessors' Ret. & Relief Fund*, 05-2548 (La. 10/1/07); 986 So.2d 1, 17. "When a law is unambiguous and its application does not lead to absurd consequences, the law shall be applied as written, and no further interpretation may be made in search of the intent of the legislature." La. C.C. art. 9. However, where a statute is ambiguous or susceptible of two reasonable interpretations, statutory interpretation is necessary. *Touchard*, 617 So.2d at 887. Under La. C.C. art. 10, "[w]hen the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law."

Assuming La. C.C.P. art. 1420(D) is susceptible of two reasonable interpretations (one that limits the term "party" to be a named litigant, as espoused by the majority, and one that interprets the term "party" to include any aggrieved party to the proceeding, or an unwilling participant in the litigation through the propounding of discovery by a named party), it must be interpreted as having the meaning that best conforms to the purpose of the law.

The purpose of sanctions is to deter and correct litigation abuse. *Alombro v. Alfortish*, 02-1081 (La. App. 5 Cir. 4/29/03); 845 So.2d 1162, 1170.[2] To hold, as the majority, that a party to whom discovery was propounded and who must incur their own legal expenses to quash allegedly improper discovery cannot seek sanctions against the party propounding the discovery thwarts the purpose of the article, i.e., the offending party can continue to propound improper discovery on a non-named litigant without

[2] This case discusses sanctions under La. C.C.P. art. 863, which applies to a violation of the certifications of pleadings by an attorney or party. Because a discovery document is not a pleading, sanctions for a violation of the certifications are authorized under La. C.C.P. art. 1420 and not La. C.C.P. art. 863. *See Red Stick Studio Dev., L.L.C. v. State ex rel. Dep't. Econ. Dev.*, 09-1349 (La. App. 1 Cir. 4/8/10); 37 So.3d 1029, 1035-36. The language in La. C.C.P. arts. 863 and 1420 is virtually identical.

fear of reprisal from the aggrieved party. Such an interpretation further ignores the remaining language of the Article. Article 1420(D) provides that sanctions may include "an order to pay **to the other party or parties** the amount of the reasonable expenses incurred because of the filing of the request, response, or objection, including a reasonable attorney's fee." [Emphasis added.] The reference to "party or parties" here necessarily contemplates that the sanctions owed are payable to the aggrieved "party" incurring expenses as a result of the improper discovery, irrespective of whether that party is a named litigant.

In my opinion, once State Farm issued discovery to OCCL, OCCL became an unwilling participant in the litigation and a party to the proceedings. Although not a named litigant, OCCL could not ignore the discovery requests propounded by State Farm without potential legal consequences, i.e., OCCL could have been brought into court for a motion to compel related to the discovery requests and could even have been held in contempt of court for its failure to comply. These proceedings would have been conducted in the current litigation, even though OCCL was not a named party. Although not a named party, OCCL is undoubtedly the aggrieved party to which the allegedly harassing and unduly burdensome discovery was propounded. Therefore, I believe OCCL has a right of action to bring a motion for sanctions under La. C.C.P. art. 1420. I do not believe the legislature intended to protect State Farm, the propounding party, from a motion for sanction simply because the party to whom it propounded the allegedly improper discovery was not a named party. Accordingly, I do not believe the term "party" in La. C.C.P. art. 1420(D) is limited to a named litigant.

Further, I believe the majority's reliance on *Voitier v. Guidry*, 14-276 (La. App. 5 Cir. 12/16/14); 2014 La. App. LEXIS 2982, is misplaced. The facts in *Voitier* are clearly distinguishable from the present case. In *Voitier*, the appellant was an attorney who represented the wife in a domestic matter. During her representation of the wife, the appellant filed a motion for sanctions under La. C.C.P. art. 863, seeking sanctions on her own behalf and on behalf of her client. Before a hearing on the motion for sanctions, appellant withdrew as counsel for the wife. Thereafter, new counsel enrolled for the wife and withdrew the motion for sanctions previously filed on the wife's behalf by the appellant. A hearing was subsequently held on the appellant's motion for sanctions on her own behalf. At the time of the hearing, the appellant was no longer involved in the case in any capacity. This Court found that the appellant did not have an individual right of action for sanctions, noting that she was not a "party" to the matter as required by La. C.C.P. art. 863.

Article 863 is derived from Rule 11 of the Federal Rules. *Sanchez v. Liberty Lloyds*, 95-956 (La. App. 1 Cir. 4/4/96); 672 So.2d 268, 271, *writ denied*, 96-1123 (La. 6/7/96); 674 So.2d 972. Because there is limited jurisprudence interpreting and applying Article 863, the federal jurisprudence applying Rule 11 offer guidance. *Id.* The federal jurisprudence makes it clear that an attorney for a party in a case cannot bring a motion for Rule 11 sanctions on his or her own behalf, as opposed to on behalf of his or her client-party. *Westlake North Property Owners Assoc. v. City of Thousand Oaks*, 915 F.2d 1301, 1307 (9th Cir. 1990). However, the federal jurisprudence also makes it clear that parties to an action and "certain other participants" have the right to move for sanctions under Rule 11. *Sean Michael Edwards Design, Inc. v. Pyramid Designs*, *2-3, 1999

U.S. Dist. LEXIS 17442 (S.D. N.Y. 1999); *Westmoreland v. CBS*, 770 F.2d 1168 (D.C. Cir. 1985) (Court allowed a non-party deponent to bring a Rule11 motion against an attorney who improperly attempted to have the court find the deponent in contempt). Considering the federal jurisprudence, our ruling in *Voitier* properly determined that the appellant, who was neither a named party to nor participant in the litigation, had no right of action for Article 863 sanctions.

Contrary to *Voitier*, the party seeking sanctions in this case is clearly a participant in the litigation despite not being a named party to the litigation. Additionally, this Court has previously upheld the imposition of sanctions based on the motion of a party-participant who is not a named litigant. *See Sternberg v. Sternberg*, 97-101 (La. App. 5 Cir. 5/28/97); 695 So.2d 1068, *writ denied*, 97-1737 (La. 10/13/97); 703 So.2d 618.

For these reasons, I believe OCCL has a right to bring a motion for sanctions under La. C.C.P. art. 1420. Accordingly, I would overrule State Farm's exception of no right of action and address the merits of the issues raised on appeal.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **MAY 28, 2015** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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14-CA-879

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