2016 IL App (2d) 150169-U
No. 2-15-0169
Order filed August 1, 2016

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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<tr><td>SANDY BURGER, ADAM CAREY,
TREVOR CAREY and SANDY BURGER
as next of friend of STEVE BOTTINO,

Plaintiffs-Appellants,

v.

JEFFREY NYE, STOCK BUILDING
SUPPLY MIDWEST, LLC, MICHAEL
NICHOLAS CARPENTRY, LLC, and
WOLSELEY INVESTMENTS, INC.,

Defendants-Appellees.</td><td>)
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)</td><td>Appeal from the Circuit Court
of DeKalb County.

No. 09-L-100

Honorable
William P. Brady,
Judge, Presiding.</td></tr>
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JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in denying plaintiffs' motion for sanctions and it did not err in granting defendants' motion for a setoff against the jury's award. We affirm.

¶ 2 Plaintiffs brought a personal injury action against defendants to recover for injuries sustained in a motor vehicle accident. The jury returned a verdict in favor of plaintiffs and awarded them more than one million dollars collectively. Plaintiffs brought a motion for

sanctions, alleging that defendants had wrongfully denied being negligent throughout the course of the underlying litigation. Defendants brought a motion for a setoff against the jury's award relating to payments already made to plaintiffs by defendants' insurance carrier. The trial court denied plaintiffs' motion for sanctions and granted defendants' motion for a setoff. These two post-trial rulings are at issue in this appeal.

¶ 3 I. BACKGROUND

¶ 4 The record reflects the following undisputed facts. On June 6, 2008, the parties were involved in a two-car collision at an intersection near Genoa. Plaintiffs, Sandy Burger, Adam Carey, Trevor Carey, and Steve Bottino, were traveling southbound on State Route 23. Defendant Jeffrey Nye was traveling westbound on Melms Road. At the time, Nye was an employee of defendants, Stock Building Supply Midwest, LLC, and Michael Nicholas Carpentry, LLC. Defendant Wolsely Investments, Inc. provided liability insurance for Nye's employers through Liberty Mutual Insurance Company (Liberty Mutual). DeKalb County Sheriff's Deputy Douglas Cook stated in his accident report that Nye's vehicle struck plaintiffs' vehicle after Nye failed to yield at the intersection. Cook's report mentioned nothing of possible brake failure.

¶ 5 Nye completed an accident report for his employers the next day, stating therein that his vehicle "was not stopping as brakes were applied." Nye later testified during a deposition that he had attempted to apply the brakes about 500 feet before he reached the intersection. Nye claimed that, after he realized the brakes were not working, he noticed only one other car was approaching the intersection. Nye then accelerated through the intersection and struck plaintiffs' vehicle. Nye testified that he had relayed these events to Deputy Cook after the accident.

¶ 6 Daniel Fittanto, a traffic accident reconstruction engineer, was retained by defendants to inspect Nye's vehicle. Fittanto's inspection took place on July 7, 2008, approximately one month after the accident. Fittanto opined during a deposition that the brakes were operating normally at the time of the accident. Fittanto found no evidence of brake failure in Nye's vehicle and he had no reason to suspect brake malfunction. However, Fittanto would not definitively rule out the possibility of brake failure, as he explained it was possible that something beyond the scope of his investigation could have caused the brakes to fail. Fittanto also testified that the electronic data from the vehicle's crash data retrieval system was consistent with Nye's description of his actions immediately prior to the accident. Specifically, the electronic data confirmed Nye's deposition testimony that his foot was on the brake pedal moments before his vehicle reached the intersection. The electronic data also confirmed that Nye removed his foot from the brake pedal and placed it on the accelerator pedal just before impact. Fittanto testified that he discussed the results of his inspection with defense counsel on at least seven occasions, as early as July 8, 2008.

¶ 7 Plaintiffs filed their complaint on October 22, 2009. Plaintiffs alleged that Nye was negligent in several respects, including the failure to stop or yield at the intersection, the failure to maintain brakes adequate to control his vehicle's movement, the failure to decrease his speed as he approached the intersection, and the failure to avoid the collision despite having ample time to view plaintiffs' vehicle. These allegations were restated in each of plaintiffs' amended complaints, including the fourth and final amended complaint, which was filed on November 16, 2011. Defendants consistently denied the allegations of negligence in their respective answers.

¶ 8 On May 19, 2010, plaintiffs' counsel wrote a letter to defense counsel suggesting that the attorney signatures on defendants' answers were in violation of Illinois Supreme Court Rule 137

(eff. Feb. 1, 1994) (providing that an attorney's signature on a pleading certifies that, to the best of the attorney's knowledge, the pleading is "well grounded in fact," and it is not "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"). Plaintiffs' counsel noted that defendants had denied plaintiffs' allegations of negligence despite defense counsel's knowledge of the results from Fittanto's investigation. On May 24, 2010, defense counsel responded with a letter directing plaintiffs' counsel to Nye's statement in his employers' accident report, wherein Nye claimed that his vehicle "was not stopping as brakes were applied."

¶ 9 On April 2, 2014, approximately two and a half months before the originally scheduled trial date, defendants filed a motion to admit negligence and to have the jury instructed accordingly. See Illinois Pattern Jury Instructions, Civil, No. 103A (2014). The trial court granted the motion, but the trial was rescheduled due to the unavailability of one of plaintiffs' expert witnesses. On September 24, 2014, approximately two weeks before the new trial date, defendants filed a motion requesting that payments already made to plaintiffs by Liberty Mutual be setoff against any judgment rendered against defendants. Plaintiffs opposed the motion, arguing in part that defendants waived their ability to claim a setoff by not raising the issue in the pleadings. The trial court delayed ruling on the motion until after the trial.

¶ 10 The trial concluded on October 10, 2014, with the jury returning verdicts in favor of each plaintiff. Sandy Burger was awarded $907,000.00; Adam Carey was awarded $59,000.00; Trevor Carey was awarded $24,000.00; and Steve Bottino was awarded $40,500.00. None of the parties filed a motion for a new trial. However, plaintiffs filed a post-trial motion for attorney fees and costs pursuant to Rule 137. Plaintiffs argued that there were no just reasons for defendants to deny negligence throughout the course of the underlying litigation, and asserted

that defendants took such actions for the improper purposes of causing delay and increasing the costs of the litigation. Plaintiffs further asserted that, as a result, they incurred thousands of dollars in costs and counsel performed hundreds of hours of attorney work unnecessarily arguing about the issues of liability and brake failure. Defendants responded by arguing that they were justified in denying negligence based on Nye's claims that he attempted braking before the accident.

¶ 11 On January 20, 2015, the trial court heard arguments on plaintiffs' Rule 137 motion and defendants' motion for a setoff. In denying plaintiffs' Rule 137 motion, the trial court noted that there was "some evidence" to support Nye's claim of brake failure. The trial court further commented that it was unwilling to presume that defendants' ulterior motive in denying negligence was to increase the costs of litigation. Regarding defendants' motion for a setoff, the trial court noted that it saw no reason why Liberty Mutual's payments toward plaintiffs' medical bills should not be set off against the judgment. Accordingly, the trial court entered an order that same day denying plaintiffs' Rule 137 motion and granting defendants' motion for setoff. Pursuant to the order, Sandy Burger's award was set off by $19,142.23; Adam Carey's award was set off by $9,844.00; Trevor Carey's award was set off by $19,273.00; and Steve Bottino's award was set off by $12,343.00. Plaintiffs filed a timely notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 Plaintiffs' first contention on appeal is that the trial court abused its discretion in denying their motion for Rule 137 sanctions. As noted above, Rule 137 provides the following signature requirement for attorneys:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; 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 for the extension, modification, or reversal of existing law, and that it is not 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 (eff. Feb. 1, 1994).

Rule 137 is designed to discourage frivolous filings; it is not designed to punish parties for making losing arguments. *Rubin & Norris, LLC v. Panzarella*, 2016 IL App (1st) 141315, ¶ 49. Courts should not impose sanctions solely because the facts ultimately determined in a particular case are adverse to the facts set forth originally in the pleadings. *Commonwealth Edison Co. v. Munizzo,* 2013 IL App (3d) 120153, ¶ 35. We review a trial court's denial of Rule 137 sanctions for an abuse of discretion. *Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 64. An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *Morgan Place of Chicago v. City of Chicago*, 2012 IL App (1st) 091240, ¶ 60.

¶ 14 Plaintiffs stress that defense counsel knew the results of Fittanto's inspection at the outset of the litigation. Given Fittanto's opinion that the brakes in Nye's vehicle were not faulty, and the absence of any reference to brake failure in Deputy Cook's report, plaintiffs argue that defendants knew Nye was negligent. Thus, plaintiffs assert, each of the pleadings wherein defendants denied Nye's negligence lacked a legal or factual foundation. In support, plaintiffs rely on *Hernandez v. Williams*, 258 Ill. App. 3d 318 (1994), and *Koch v. Carmona*, 268 Ill. App. 3d 48 (1994), both of which involved allegations of negligence arising out of a car accident. We find these cases distinguishable.

¶ 15 In *Hernandez*, defense counsel requested a jury in a small claims case. The trial court directed a verdict in favor of the plaintiff after defense counsel cross-examined the plaintiff's witnesses, but presented no evidence in defense. The plaintiff moved for Rule 137 sanctions, alleging *inter alia* that defense counsel had denied the allegations in his complaint without conducting a reasonable investigation and without a good faith basis. The trial court granted plaintiff's motion after defense counsel failed to provide any evidence that they had spoken with the defendant or conducted any investigation whatsoever prior to filing a jury demand. *Hernandez*, 258 Ill. App. 3d at 319-320. The appellate court affirmed the imposition of sanctions, agreeing with the trial court's conclusion that defense counsel "proceeded to trial on a 'misguided hope that the plaintiff simply [wouldn't] be able to prove his case' rather than on the knowledge or belief that its defense was well grounded in fact." *Id*. at 321.

¶ 16 The same defense counsel that was sanctioned in *Hernandez* came under scrutiny again in *Koch*. There, the plaintiff alleged in her complaint that she was stopped near an intersection when the defendant's car struck her car from behind. Defense counsel signed an answer admitting contact between the vehicles, but denying all allegations of negligence. At trial, the defendant's case in chief consisted of calling the plaintiff to testify as an adverse witness. After entering a directed verdict for the plaintiff, the trial court found that the answer denying negligence was in violation of Rule 137 because it was not based upon a reasonable inquiry and it was not well grounded in fact. *Koch*, 268 Ill. App. 3d at 49-50. This court affirmed the trial court's imposition of sanctions, noting the "striking resemblance" to the facts in *Hernandez*. *Id*. at 56. This court concluded in pertinent part:

> "By its actions in this case, [defense counsel] has breached its duty to the legal system by taking the time of the judge and jury away from matters truly in need of resolution. We

are forced to echo the statements made by numerous other panels of the appellate court and remind [defense counsel] that an attorney is not entitled to file a pleading denying the existence of negligence on the part of his client in the unfounded hope that some evidence supporting his denial might surface at trial." *Id.* at 57.

¶ 17 We do not believe that defense counsel's conduct in this case falls within the same category of conduct that was sanctioned in *Hernandez* and *Koch*. Unlike in *Hernandez*, there is nothing here to suggest that defense counsel failed to conduct any type of investigation. See *Hernandez*, 258 Ill. App. 3d at 320. To the contrary, defense counsel obtained the accident report that Nye completed for his employers and retained Fittanto to investigate Nye's vehicle. Just as he had indicated to his employers, Nye maintained in his deposition testimony that the vehicle's brakes failed. Although Fittanto's opinions did not support Nye's testimony in that regard, Fittanto did not conclusively rule out the possibility of brake failure. Finally, the electronic data supported Nye's claim that his foot was on the brake pedal as he approached the intersection and he switched his foot to the accelerator before impact. Defense counsel maintained during the litigation that these facts supported a viable defense which justified denying plaintiffs' allegations of Nye's negligence. We believe defense counsel formed this conclusion after performing a reasonable inquiry; that is to say, defense counsel did not deny the existence of negligence "in the unfounded hope that some evidence supporting his denial might surface at trial." *Koch*, 268 Ill. App. 3d at 57. We acknowledge that the totality of the evidence may have favored a conclusion that Nye was negligent, and that Nye's defense may not have proved successful at trial. However, we do not believe that Nye's pre-trial defense theory was so lacking in legal or factual support that defense counsel should have been precluded from asserting it in the first instance.

¶ 18 Plaintiffs additionally argue that Rule 137 sanctions are warranted because defendants' consistent denials of Nye's negligence were interposed for an improper purpose. Namely, plaintiffs assert that defense counsel sought to increase the costs of litigation and generate larger fees for defense counsel's law firm. To award sanctions for a needless increase in the cost of litigation, there must be subjective bad faith. *Cook*, 2014 IL App (1st) 123700, ¶ 63. The trial court noted the lack of evidence that defense counsel had denied Nye's negligence for improper purposes and accordingly declined to presume that defense counsel had improper ulterior motives. We find no abuse of discretion in the trial court's conclusion, and in light of our determination that defense counsel was entitled to present Nye's defense theory, we similarly decline to presume that defense counsel was acting in bad faith.

¶ 19 Plaintiff's final argument on this issue is that the trial court employed flawed reasoning in denying their Rule 137 motion for sanctions. During its oral ruling, the trial court commented that defense counsel was allowed to "wait until the last moment" to admit negligence, likening the scenario to a criminal defendant's right to deny his guilt in the face of overwhelming evidence against him. We acknowledge that this is not an accurate reflection of the law, and we remind the trial court that a defendant in a civil case does not benefit from the same constitutional protections afforded a defendant in a criminal case. Specifically, a defendant in a criminal case is entitled to proceed to trial on a misguided hope that the prosecution will be unable to prove its case. See *People v. Weinstein*, 35 Ill. 2d 467, 470 (1966) (noting that a defendant in a criminal case is presumed innocent and the burden of proof remains the responsibility of the prosecution throughout the trial). As discussed above, a defendant in a civil case is not similarly entitled. See *Hernandez*, 258 Ill. App. 3d at 321. However, the trial court's comments notwithstanding, we may affirm its ruling on any basis appearing in the record.

Beacham v. Walker, 231 Ill. 2d 51, 61 (2008). For the reasons discussed above, we affirm the trial court's denial of plaintiff's Rule 137 motion for sanctions.

¶ 20 Plaintiffs' second contention is that the trial court erred in awarding defendants' motion for a setoff. Plaintiffs argue here, just as they did in the trial court, that defendants waived their ability to seek a setoff for the payments made by Liberty Mutual because they did not raise the issue in the form of a counterclaim. Plaintiffs' argument is based on their interpretation of our supreme court's holding in *Thornton v. Garcini*, 237 Ill. 2d 100 (2010). Defendants counter that plaintiffs' reading of *Thornton* is flawed, and that by granting their motion for setoff, the trial court properly precluded plaintiffs from obtaining double recovery for the same injuries. We agree with defendants.

¶ 21 In Illinois, a plaintiff is entitled to only one recovery for an injury, and a double recovery is against public policy. *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657, 672 (2001). "The law is well settled that, where there is a single and indivisible injury, the damages are inseparable, and any amounts received from any of the defendants must be deducted from the total damages sustained." *Young Men's Christian Association of Warren County v. Midland Architects, Inc.*, 174 Ill. App. 3d 966, 970 (1988). The determination of whether a defendant is entitled to a setoff is a question of law, and we therefore review the issue *de novo*. *Thornton*, 237 Ill. 2d at 115-16.

¶ 22 In *Thornton*, our supreme court commented that the term "setoff" is used in two distinct scenarios. First, a setoff can apply where a defendant has a distinct cause of action against the plaintiff, meaning the defendant claims that the plaintiff has done something to cause a reduction of the defendant's damages. "When a defendant pursues this type of setoff, the claim must be raised in the pleadings." *Thornton*, 237 Ill. 2d at 113. The second type of setoff applies where a defendant requests a reduction of the damage award because a third party has already

compensated the plaintiff for the same injury. This includes instances where a codefendant who would be liable for contribution reaches a settlement with the plaintiff. A request for this type of setoff constitutes an "enforcement action" which may be raised at any time. *Id.*

¶ 23 Plaintiffs argue that defendant's motion for a setoff involves the first type of scenario described in *Thornton*, and it is therefore waived for failure to raise the issue in the form of a counterclaim. In support, plaintiffs argue that Liberty Mutual is not a "third party" as was contemplated in the *Thornton* court's discussion regarding the second type of setoff. Rather, defendants and Liberty Mutual are "one in the same" because Liberty Mutual made payments to plaintiffs on behalf of defendants. Thus, plaintiffs conclude, defendants' motion for a setoff did not constitute an "enforcement action." In further support of this conclusion, plaintiffs note that the first type of setoff often results where the plaintiff has done something to cause a reduction of the defendant's damages. See *Thornton*, 237 Ill. 2d at 113. Plaintiffs suggest that the inverse should also be true: that the first type of setoff may result from a defendant's claim that another defendant has done something which results in a reduction in the plaintiff's damages. Here, it is undisputed that Liberty Mutual made payments to plaintiffs for some of their medical bills. Plaintiffs therefore conclude that, because defendants were seeking a reduction in plaintiffs' award on the basis of actions that were taken by another defendant, they were required to request the setoff in a counterclaim, and their failure to do so results in waiver.

¶ 24 The trial court rejected these same arguments, concluding that defendants' motion for a setoff involved the second type of scenario contemplated in *Thornton*. We agree with the trial court, and we similarly reject plaintiffs' reading of *Thornton*. We note that a defendant's request for a setoff to reflect amounts already paid by settling defendants seeks not to modify, but rather to satisfy the judgment entered by the trial court. *Star Charters v. Figueroa*, 192 Ill. 2d 47, 48

(2000). We have previously recognized that a setoff aimed at the satisfaction of a judgment does not require a separate claim or counterclaim. *Barkei v. Delnor Hospital*, 207 Ill. App. 3d 255, 265 (1990). "The only possible limitation on the pursuit of this type of setoff is the time constraint applicable to supplemental proceedings for the enforcement of a judgment." *Id.* For these reasons, we reject plaintiffs' argument that defendant was required to file a counterclaim for the purpose of preventing a plaintiff's double recovery for payments already made by Liberty Mutual.

¶ 25 III. CONCLUSION

¶ 26 For these reasons, we affirm the post-judgment rulings of the circuit court of DeKalb County to deny plaintiffs' motion for sanctions and to grant defendants' motion for a setoff.

¶ 27 Affirmed.