NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1461

MATTHEW C. NODIER

VERSUS

UNGARINO & ECKERT, L.L.C.

Judgment Rendered: May 4, 2007

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 526,841 Division "E" "Section 23"

Honorable William A. Morvant, Judge Presiding

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Matthew W. Bailey Matthew C. Nodier Baton Rouge, LA	Counsel for Plaintiff/Appellee Matthew C. Nodier
Matthew J. Ungarino David I. Bordelon Metairie, LA	Counsel for Defendant/Appellant Ungarino & Eckert, L.L.C.

* * * * * * * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing, J. concurs.

HUGHES, J.

This is an appeal from a trial court judgment awarding sanctions under LSA-C.C.P. art. 863. For the reasons that follow, we deny appellant's motion to supplement the record, amend the lower court judgment, and affirm as amended.

FACTS AND PROCEDURAL HISTORY

From January of 2001 through March of 2003, plaintiff Matthew C. Nodier worked as an attorney for the defendant law firm, Ungarino & Eckert, L.L.C. (U&E), in its Baton Rouge office. After beginning employment with U&E, Mr. Nodier was asked to sign a contract entitled "Legal Agreement," which stated, essentially, that Mr. Nodier would not represent any clients of U&E for a period of two years after termination of employment with the firm, under penalty of having to pay the firm "$3 million at today's present value." The agreement was made reciprocal against U&E as to any clients Mr. Nodier "has brought or will bring into the law firm," and it further stated that U&E was "not attempting to formulate a non-compete clause but instead [was] interested in being compensated for the time and effort that [had been] taken to obtain the firm's clients." The agreement also stated that any dispute arising regarding the document would be subject to binding arbitration at the Metairie office of Mediation Arbitration Professional Systems, Inc. (MAPS). Both the signature of Mr. Nodier and that of Matthew J. Ungarino, on behalf of U&E, appeared on the agreement, which was dated March 30, 2001.

After leaving the employ of U&E and beginning work for another law firm in Baton Rouge, Mr. Nodier received a letter from U&E, dated November 23, 2004, stating:

> The legal agreement[] signed by you on ... March 30, 2001 [was] violated by you representing our clients during the first two years of your departure. As per the contract, the mandatory arbitration clause now goes into effect with MAPS/Metairie office. Roger Larue with MAPS is awaiting your e-mail or phone call regarding the dates that you are available in the next 20 days. Your failure to contact MAPS regarding this mandatory arbitration clause during that period of time will force our law firm to file a declaratory judgment action against you for enforcement of the mandatory arbitration clause. That will cost you more in attorneys fees and court costs.
>
> Please forward a check in the amount of $2,500.00 to MAPS to cover your half of the arbitration expense.

Mr. Nodier responded to this letter, via e-mail, stating that the agreement was an unenforceable non-competition contract and that any attempt to enforce such an agreement was prohibited by Louisiana Rules of Professional Conduct, Rules 5.6 and 8.3. Mr. Nodier further requested that he be provided with a copy of the referenced agreement and a specification of which clients were at issue; he received a copy of the agreement but his request regarding identification of the clients went unanswered. Mr. Nodier further requested that the matter be dropped by U&E before any formal legal proceedings became necessary.

On November 29, 2004, Mr. Nodier filed a petition in the trial court against U&E, seeking injunctive and declaratory relief against the enforcement of the agreement, alleged to be an illegal non-competition agreement. On December 21, 2004, U&E filed a "Notice of Removal," which stated that the matter had been removed to the United States District Court for the Middle District of Louisiana, signed on behalf of U&E by Matthew J. Ungarino.

Thereafter, no further action was taken in the lower court until March 16, 2006, when Mr. Nodier filed a motion for sanctions, contending that the notice of removal filed by U&E was "frivolous and baseless." A

memorandum was also filed in support of the motion for sanctions, attaching pleadings filed in and rulings of the federal district court to which the matter had been removed. The appended magistrate judge's report of November 1, 2005, stated: "There is no diversity of citizenship in this case, nor is there federal question subject matter jurisdiction. Finally, the cases cited by the defendant, besides being non-binding on this court, are so completely inapposite that they do not bear analysis." The federal magistrate judge concluded that removal was legally improper and because "a brief analysis of applicable law would have revealed that there was no federal subject matter jurisdiction in this case," recommended the imposition of attorney's fees, costs, and expenses, against U&E, though not sanctions. On December 8, 2005, United States District Court Judge James J. Brady signed a ruling and order accepting the magistrate judge's recommendations, granting the motion to remand, and awarding costs/attorney's fees associated with the removal in the amount of $5,101.25 ("reflecting 29.15 hours at $175 per hour") and expenses in the amount of $199.00.

In response to Mr. Nodier's motion for sanctions in the lower court, U&E filed both a "Memorandum in Opposition to Motion for Sanctions" and a separate pleading entitled "Exception and Incorporated Memorandum in Opposition to Motion for Injunction, Declaratory Judgment and Attorney's Fees."

A hearing on the matters before the lower court was held on March 29, 2006, during which both parties stipulated that the legal agreement at issue was in fact an unenforceable non-competition agreement; the hearing proceeded on the issue of whether damages and/or sanctions were awardable against U&E. Following the hearing, the lower court declared the non-competition agreement null and void *ab initio* and permanently enjoined its

enforcement, ordered U&E to pay Mr. Nodier damages in the amount of $3,486.00 (together with judicial interest and all court costs), denied U&E's exceptions and motions, and granted Article 863 sanctions in the amount of $12,725.06 in favor of Mr. Nodier. A judgment so holding was signed by the trial court on April 10, 2006.

U&E now appeals this judgment, making the following assignments of error:

> 1. The trial court below erred in imposing sanctions where no timely service of the motion was made.
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> 2. The trial court below erred in re-litigating motions and awarding attorneys fees and costs, where the federal court has exclusive jurisdiction under 28 U.S.C. 1447, and plaintiff filed the motion for fees and costs and sanctions with the federal court, and these motions were actually adjudicated by Judge Brady in the U.S. District Court for the Middle District of Louisiana.
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> 3. The trial court erred in sanctioning defendant, in order to award plaintiff attorneys fees, when plaintiff has solely pursued this matter:
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> (a) despite a settlement agreement;
> (b) despite an agreement by defendant not to pursue this matter;
> (c) where plaintiff has filed repeated motions, even in the face of repeated denials, and;
> (d) where plaintiff has pursued this action even after judgment precluding enforcement of the agreement; and
> (e) where plaintiff has filed frivolous motions to dismiss appeals solely to harass defendant.

LAW AND ANALYSIS

Failure to Serve Motion for Sanctions

Relative to U&E's first assignment of error, it states in brief to this court that it was served with the motion for sanctions on the day of the hearing, March 29, 2006, and noted that "[f]or some reason, none of the service returns appear in the record." U&E further argues that service of the motion on the date of the hearing "is patently unfair and this court should

reverse the judgment below, and order the clerk to produce all service returns in connection with this matter."[1] U&E subsequently filed with this court a "Motion and Order for Leave of Court to File Exhibits Not in the Record," seeking to have a post-trial memorandum and the service return at issue filed in the record. We hereby deny the motion to supplement, as unnecessary in light of our ruling on this issue, which follows.

On the issue of service, the following statement was made by counsel for U&E at the March 29, 2006 hearing:

> I'm here to argue a motion that was filed, a motion for sanctions. And as far as my understanding – and I don't think that the Metairie office, the home office, has been served ... with the preliminary injunction, or have they; do you know?

No objection was made by counsel for U&E regarding service of the motion for sanctions. U&E's counsel merely questioned whether there had been service of the original petition for injunctive relief. Further, we find no indication in the record presented on appeal that the issue of improper service of the motion for sanctions was ever raised before the lower court.

Appellate courts generally find it inappropriate to consider an issue raised for the first time on appeal that was not pled, urged, or addressed in the court below. **Johnson v. State**, 2002-2382, p. 4 (La. 5/20/03), 851 So.2d 918, 921; **Geiger v. State ex rel. Department of Health and Hospital**, 2001-2206, p. 11 (La. 4/12/02), 815 So.2d 80, 86; **Jackson v. Home Depot, Inc.**, 2004-1653, pp. 6-7 (La. App. 1 Cir. 6/10/05), 906 So.2d 721, 725; **Hudson v. East Baton Rouge Parish School Board**, 2002-0987, p. 3 (La. App. 1 Cir. 3/28/03), 844 So.2d 282, 285; **Mobil Exploration &**

[1] We note that Uniform Rules - Courts of Appeal, Rule 2-1.11 provides: "Subpoenas, notices, and returns may be omitted from the record, unless they are at issue. Such items may be supplied upon timely application to this court by any party, upon showing their materiality." Uniform Rules - Courts of Appeal, Rule 2-1.17 further provides: "Notwithstanding the foregoing requirements, the parties may designate, in writing, portions of the record to constitute the record in a Court of Appeal."

Producing U.S. Inc. v. Certain Underwriters Subscribing to Cover Note 95-3317(A), 2001-2219, p. 36 (La. App. 1 Cir. 11/20/02), 837 So.2d 11, 41, writ denied, 2003-0418 (La. 4/21/03), 841 So.2d 805, writs denied, 2003-0417, 2003-0427, 2003-0438 (La. 5/16/03), 843 So.2d 1129, 1130. See also Uniform Rules - Courts of Appeal, Rule 1-3. Since the lower court was given no opportunity to rule on this alleged service deficiency, and therefore had no opportunity to remedy any insufficiency, we decline to address this issue, which is presented for the first time on appeal.[2]

Propriety of Article 863 Sanctions Imposed

Louisiana Code of Civil Procedure Article 863 provides:

> A. Every pleading 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. A party who is not represented by an attorney shall sign his pleading and state his address.
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> B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but ***the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it 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***.
>
> C. If a pleading is not signed, it shall be stricken unless promptly signed after the omission is called to the attention of the pleader.
>
> D. ***If, upon motion of any party or upon its own motion, the court determines that a certification has been made in***

[2] Counsel for U&E did appear at the hearing and indicated, through statements to the court, that he was aware of the nature of the proceedings, and counsel for U&E did in fact present an able defense on the issue of sanctions. How counsel for U&E came to be in court for the hearing and to what extent he had advance notice of the matters scheduled for hearing are not apparent from the record. Thus even if the matter were properly preserved for review, the paucity of evidence in the record on the issue would present a hinderance to such a review. We further note that under Article 863, no sanctions can be imposed unless there is a hearing first; however, the article does not provide a requirement for notice of such a hearing to be given. Obviously, due process requires that reasonable notice be given, but this court has held that such notice would not have to be in writing, and actual notice would be sufficient. **Lee v. Woodley**, 615 So.2d 349, 352 (La. App. 1 Cir.), writ denied, 618 So.2d 411 (La. 1993).

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 or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

E. A sanction authorized in Paragraph D shall be imposed only after a hearing at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction.

F. A sanction authorized in Paragraph D shall not be imposed with respect to an original petition which is filed within sixty days of an applicable prescriptive date and then voluntarily dismissed within ninety days after its filing or on the date of a hearing on the pleading, whichever is earlier.
[Emphasis added.]

The prerequisites for imposition of Article 863 sanctions were set forth by this court in **Sanchez v. Liberty Lloyds**, 95-0956, pp. 5-7 (La. App. 1 Cir. 4/4/96), 672 So.2d 268, 271-72, writ denied, 96-1123 (La. 6/7/96), 674 So.2d 972, as follows:

> Article 863 is derived from Rule 11 of the Federal Rules. Because there is limited jurisprudence interpreting and applying Article 863, the Federal decisions applying Rule 11 provide guidance to this court. Both Rule 11 and Article 863 apply to the signing of pleadings, motions and other papers, imposing upon attorneys and litigants affirmative duties as of the date a document is signed. The district court must determine if the individual, who has certified the document purported to be violative, has complied with those affirmative duties. The standard of review by the appellate court has been referred to as the "abuse of discretion" standard. We conclude that this standard is nothing more or less than the "manifestly erroneous" or "clearly wrong" criteria used by the appellate courts in reviewing a trial court's factual findings. Once the trial court finds a violation of Article 863 and imposes sanctions, the determination of the type and/or the amount of the sanction is reviewed on appeal utilizing the "abuse of discretion" standard.
>
> Thus, the obligation imposed upon litigants and their counsel who sign a pleading is to make an objectively reasonable inquiry into the facts and the law. Subjective good faith will not satisfy the duty of reasonable inquiry.
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> Among the factors to be considered in determining whether reasonable factual inquiry has been made are:
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> 1) The time available to the signer for investigation;

2) The extent of the attorney's reliance on his client for the factual support for the document;

3) The feasibility of a prefiling investigation;

4) Whether the signing attorney accepted the case from another member of the bar or forwarding attorney;

5) The complexity of the factual and legal issues; and

6) The extent to which development of the factual circumstances underlying the claim requires discovery.

The factors for determining whether reasonable legal inquiry was made include:

1) The time available to the attorney to prepare the document;

2) The plausibility of the legal view contained in the document;

3) The pro se status of the litigant; and

4) The complexity of the legal and factual issues raised.

In order to impose sanctions, a trial court must first find that one of the affirmative duties imposed by article 863(B) has been violated. LSA-C.C.P. art. 863(D). The certification required by paragraph B of the article is, from a grammatical reading of the paragraph, a four-part certification, the violation of any part of which would fatally infect the entire certification. The first part of the certification is that an attorney has read the pleading. The second part is that to the best of the attorney's knowledge, information, and belief formed after reasonable inquiry, the pleading is well grounded in fact. Thirdly, the attorney must certify that the pleading is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Fourth, and lastly, the attorney certifies that the pleading is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Article 863, similar to Rule 11, is not to be used simply because parties disagree as to the correct resolution of a matter in litigation. Rule 11's use is intended only for exceptional circumstances. In determining a violation of Article 863, the trial court should avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted. [Citations omitted.]

See also **Brown v. Sanders**, 2006-1171 (La. App. 1 Cir. 3/23/07), ___ So.2d ___.

The instant lawsuit was filed on November 29, 2004 by Mr. Nodier as a preventative measure to ward off U&E's threat in its November 23, 2004 letter to enforce the non-compete agreement between the parties. Mr. Nodier testified at the hearing of this matter that he sent an e-mail response

to U&E's demand, informing them of the illegality of the agreement and requesting that the matter be dropped so that further litigation would be averted. Mr. Nodier further indicated that he received no response to his request, and therefore found it necessary to file suit for declaratory and injunctive relief. Yet, the copy of the e-mail referenced, which was filed into evidence as Plaintiff's Exhibit 3, indicates on its face that it was sent to Matthew J. Ungarino on November 30, 2004 at 3:10 p.m., one day *after* the instant suit had been filed.

The first pleading filed in this suit by U&E was its notice of removal, filed December 21, 2004. Following remand of the matter from federal court back to the state court below, the record presented on appeal reflects that U&E filed only two additional items prior to judgment in the matter: a "Memorandum in Opposition to Motion for Sanctions" and a separate pleading entitled "Exception and Incorporated Memorandum in Opposition to Motion for Injunction, Declaratory Judgment and Attorney's Fees," both of which were fax-filed on March 24, 2006. Both the memorandum and the pleading of exceptions were filed in response to and in defense of the motion for sanctions, and in each, U&E asserted that it had conveyed to plaintiff its intention to drop its claim under the "legal agreement" and would not attempt to enforce the agreement in the future. Therefore, the only pleading that could serve as the basis for Article 863 sanctions was the notice of removal.

As to this pleading, we find no merit in U&E's assertion that the propriety of the pleading fell exclusively within the jurisdiction of the federal court. Because U&E filed separate pleadings in both the state district court and the federal district court, it is answerable for those pleadings in each respective court, according to the law applicable in each. It is

undeniable that the notice of removal filed by U&E in the state district court caused delay in that proceeding; following the December 21, 2004 notice of removal, the state court proceeding was suspended until after the December 8, 2005 judgment of remand by the federal district court became final. The question before the lower court was whether this pleading was filed in the state district court after reasonable inquiry that it was well grounded in fact, that it was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it was not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. See LSA-C.C.P. art. 863(B).

After receiving the evidence presented at the hearing of the matter, the lower court judge gave the following oral reasons for sanctioning U&E:

> My cursory review of that removal leads me to believe it was removed to federal court when the defendant knew or should have known that the agreement sought to be enforced in this matter was void and unenforceable and that defendant had no basis in law or in fact to remove the matter to federal court. Be that as it may, under the law, once the removal notice is filed, just like an appeal, this Court is divested of any further jurisdictional ability to rule on this case. I looked at the documents attached to the motion for sanctions ... in this case, upon removal of the matter to the Middle District, Magistrate Dalby, in recommending a remand back to this court - - and I'm not going to cite the entire rationale, but I do note and I'll quote - - a brief analysis of applicable law would reveal no federal subject matter jurisdiction in this case, which seemed to imply that not even a cursory examination of the law was made prior to filing in this court the notice of removal. I also note that Judge Brady, in adopting the recommendation of the magistrate, indicated that this is the second time defendant removed a case of this type without any legal basis whatsoever to do so, and while he declined to impose Rule 11 sanctions, the next time such action was taken will trigger imposition of Rule 11 sanctions, not just sanctions under 28 1447(c). And I do note that both Judge Brady and Judge Tyson, in declining to impose Rule 11 sanctions, both awarded attorney's fees under 28 U.S.C. 1477(c). ... However, ... the Court is of the opinion that the fact that those judges in the cases that stood before them chose not to award sanctions is clearly not binding on this

Court's determination as to whether or not sanctions are or are not appropriate. And I do note that in this case, and I'm going to cite the date, I think it was the 24th of March, I received the opposition to the motion for sanctions, and despite the stipulation that was entered into today, I received another memoranda raising a no cause, no right of action and motion for summary judgment. And I note that all of these, the motion for summary judgment and the peremptory exceptions of no cause and no right of action, were done by memo with no formal motion or no formal exception filed, which in my opinion is a violation of Code of Civil Procedure articles 924, 927, 961 and 966, not to mention Uniform Rules of District Court Rules 9.8, 9.6, and 9.10. Aside from the numerous procedural deficiencies, the exceptions raised by defendant and the motion for summary judgment were totally without merit. And I do note with interest that in the memorandum in opposition to the motion for sanctions, in the second paragraph, defendant claims, and I'm going to quote, defendant sent one letter which precipitated this flood of suits and motions. And it just strikes me as peculiar that defendant would make that claim in brief when, of all of the parties to this litigation, it was defendant who had it clearly within their power to prevent all of this litigation simply by taking a position contrary to the November 23, 2004, correspondence or simply responding to Mr. Nodier's correspondence of November 30, 2004, indicating that we are in agreement, we're not going to go forward with this arbitration and, you're right, this does violate 5.6. They indicate in brief that they have and have always withdrawn the demand for arbitration, but they could have answered this suit if their position was truly that they had withdrawn the demand for arbitration or had no intent to enforce the non-compete agreement. But that's not what they did. Rather, they chose a course of conduct that, in my opinion, was designed to delay, harass plaintiff, and which undoubtedly and needlessly increased the cost of this litigation. I think, clearly, that the removal from this court to federal court was filed for those reasons which constitute an improper purpose and is actually tantamount, in my opinion, to an abuse of process. Looking at the position taken by defendant in this case, both prior to and subsequent to the removal, the Court is of the opinion that sanctions under article 863 are appropriate. The request in this case is made for sanctions constituting the legal fees incurred in defending this case or in prosecuting this case, as well as the additional costs involved in having to defend what I think was a meritless removal to federal court. Under plaintiff's Exhibit 4, that total is $17,725.06. However, I do note that Judge Brady made an award of attorney's fees in the amount of $5,000 in connection with the dismissal and remand of the federal action back to the 19th JDC. So I will deduct that amount, and I will award sanctions in the amount of $12,725.06. ...I am going to say for the record that, based on my review of this entire matter, it should have, first of all, never got to the filing of this petition for injunction and declaratory judgment. Beyond that, it should

have never survived past December 23 of 2004, when this matter was set for a hearing. That should have been the resolution.

After a thorough review of the record on appeal, we cannot say the lower court was manifestly erroneous or abused its discretion in finding and imposing an Article 863 sanction as to U&E's notice of removal of the action to federal court. There was a reasonable basis in the record for the lower court's finding that the filing of the notice of removal was not filed after a reasonable inquiry and that it was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, in violation of Article 863.[3]

We do, however, conclude that to the extent the lower court's sanction award encompassed matters other than U&E's filing of the notice of removal, it was improper. Since the memorandum and exceptions filed by U&E, after remand from the federal district court, were in defense of the plaintiff's motion for sanctions, these pleadings could not be said to be in violation of Article 863. The goal to be served by imposing sanctions is not wholesale fee shifting, but correction of litigation abuse. **Keaty v. Raspanti**, 2003-1080, p. 5 (La. App. 4 Cir. 2/4/04), 866 So.2d 1045, 1050, writs denied, 2004-0941, 2004-0947 (La. 6/18/04), 876 So.2d 806, 807; **Alombro v. Alfortish**, 2002-1081, p. 10 (La. App. 5 Cir. 4/29/03), 845 So.2d 1162, 1170, writ denied, 2003-1947 (La. 10/31/03), 857 So.2d 486; **Lafourche Parish Council v. Breaux**, 2002-1565, p. 5 (La. App. 1 Cir.

[3] We are unpersuaded by U&E's assertion that sanctions were improper as contrary to a verbal settlement agreement with counsel for plaintiff/appellee. A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. LSA-C.C. art. 3071. An oral settlement agreement in unenforceable. See **Bennett v. Great Atlantic & Pacific Tea Company**, 95-0410 (La. App. 1 Cir. 11/9/95), 665 So.2d 84, writ denied, 95-2981 (La. 2/9/96), 667 So.2d 536.

5/9/03), 845 So.2d 645, 648; **Joyner v. Wear**, 27,631, p. 14 (La. App. 2 Cir. 12/6/95), 665 So.2d 634, 642, writ denied, 96-0040, 96-0042 (La. 2/28/96), 668 So.2d 370. In the instant case, U&E could have had a reasonable and good faith belief that Article 863 sanctions were not warranted for the filing of their notice of removal, and on this basis a justifiable cause for defending the motion was presented. The failure to prevail does not automatically trigger sanctions. **Cooks v. Rodenbeck**, 97-1389, p. 8 (La. App. 3 Cir. 4/29/98), 711 So.2d 444, 449.

The amount of the sanction award was calculated by the lower court with reference to the amount of time spent by Mr. Nodier working on the case, as reflected by an itemized listing prepared by Mr. Nodier noting number of hours worked and a brief description of each line item, which was filed into the record as Plaintiff's Exhibit Number 4. In that document, Mr. Nodier listed a minimum of 99.6 hours he worked on this matter from November 23, 2004 through March 29, 2006 (for March 29, 2006 he listed an "unknown" amount of hours as the itemization was prepared prior to the hearing scheduled for that date). Applying the rate of $175.00 per hour, which Mr. Nodier's testified was his current law firm's rate for that type of case, to the 99.6 hours results in an amount of $17,430.00. Given that the lower court found that the hours presented on Plaintiff's Exhibit Number 4 totaled $17,725.06, presumably the difference of $295.06 represented the amount the lower court attributed to plaintiff's appearance at the March 29, 2006 hearing. The lower court deducted the $5,000.00 amount awarded by the federal court from the total amount of $17,725.06 and thereby derived $12,725.06 as the sanction award.

Our review of this award leads us to conclude that since the pleading violative of Article 863 was not filed until December 21, 2004, work Mr.

Nodier may have performed on the case prior to that time was not occasioned by the improper pleading and therefore should not have been considered by the lower court in arriving at a suitable sanction award. Moreover, included within Mr. Nodier's listing of time spent on this case, was time spent working on the matters presented to the federal court. In view of the fact that only the federal court could impose sanctions as to the federal pleadings, it was error for the lower court to have considered the work time by Mr. Nodier occasioned by pleadings filed in the federal district court, when determining a suitable sanction for the inappropriate pleading filed in the state district court. A close review of Plaintiff's Exhibit Number 4 reveals that only 1.9 hours were spent by Mr. Nodier in connection with the notice of removal filed in the state court; these were itemized by Mr. Nodier as follows: 12/23/04 Attend hearing/conference with court re Ungarino fax filed notice of removal, thus, court could not hear matter until federal court remanded case - 0.8 hour; 12/24/04 Receipt, review and analysis of correspondence from defendant re notice of removal - 0.1 hour; and 12/24/04 Receipt, review and analysis of notice of removal - 1.0 hour. The hours listed by Mr. Nodier as representing time spent working on the state district court case following remand from the federal court totaled 14.5 hours, when added to the pre-remand 1.9 hours produces as total of 16.4 hours, which at $175.00 per hour amount to $2,870.00, together with the amount the court attributed to the March 29, 2006 court appearance of $295.06, results in a total of $3,165.06. Consequently, we conclude that it was an abuse of the lower court's discretion to award more than this amount. Therefore, we will amend the judgment to reflect an LSA-C.C.P. art. 863

sanction award in the amount of $3,165.06. We find no error in the remainder of the lower court judgment.[4]

CONCLUSION

For the reasons assigned, the judgment of the trial court is amended as indicated herein, and affirmed as amended. The motion to supplement the record filed by Ungarino & Eckert, L.L.C. is denied. Each party is to bear its own costs of this proceeding.

MOTION TO SUPPLEMENT DENIED; JUDGMENT AMENDED; AFFIRMED AS AMENDED.

[4] U&E did not assign error to those portions of the lower court judgment declaring the non-compete agreement void and enjoining its enforcement, or to the $3,486.00 in damages awarded in conjunction therewith.