IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

LINDA CASTRATARO :

Plaintiff, 86 :

-vs- 188-199 : Case No. 02CV-A-11-677

KENNETH URBAN :

Defendant :

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
03 MAY -9 AM 11:17
JAN ANTONOPLOS
CLERK

JUDGMENT ENTRY

This case is presently pending before this Court on the Motion Of Defendant Dr. Kenneth Urban For Summary Judgment, Defendant Dr. Kenneth Urban having filed said Motion on January 27, 2003; Plaintiff's Memorandum Contra Motion For Summary Judgment; Oral Hearing Requested; Motion Contra Counterclaim Of Vexatious Litigator/Motion For Oral Hearing On Civil Rule 60 Motion, Plaintiff having filed said Motions and Memorandum Contra on February 21, 2003; the Reply of Defendant Dr. Kenneth Urban To Plaintiff Linda Castrataro's Memorandum Contra To Motion Filed On January 27, 2003, Defendant having filed said Reply on February 27, 2003; and the Memorandum Contra Of Defendant Dr. Kenneth Urban To Plaintiff Linda Castrataro's Rule 60(B) Motion Filed On February 21, 2003, Defendant having filed said Memorandum Contra on March 6, 2003.

This Court must make disposition of the instant Motion for Summary Judgment within the confines of Rule 56(C) of the Ohio Rules of Civil Procedure, as well as the interpretation of that rule by the Supreme Court of Ohio. Civ.R. 56; See State ex rel. Zimmerman v. Tompkins (1996), 75 Ohio St.3d 447, 663 N.E.2d 639; Dresher v. Burt

Common Pleas Court
Delaware Co., Ohio
I hereby certify the within be a true copy of the original on file in this office.
Jan Antonoplos, Clerk of Courts
By Sue Likens **Deputy**

(1996), 75 Ohio St.3d 280, 662 N.E.2d 264. Pursuant to Civil Rule 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of dispute as to a material fact. Dresher, at 293. However, the moving party cannot discharge its burden with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must be able to point to evidence of a type listed in Civil Rule 56(C), affirmatively demonstrating that the nonmoving party has no evidence to support the claims. Id.; Vahila v. Hall (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164. Moreover, Summary Judgment is appropriate if the nonmoving party does not respond with, or fails to set forth, by affidavit or as otherwise provided in Civil Rule 56, specific facts showing that there is a genuine issue for trial. Dresher, at 293; Civ.R. 56(E).

Inevitably, a Motion for Summary Judgment may not be granted unless the court determines that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the Motion for Summary Judgment is made. Tompkins, at 448.

The instant case arose as result of a Complaint Plaintiff filed on November 18, 2002. Plaintiff's Complaint alleges a single cause of action, nominally for breach of contract, against Defendant Dr. Kenneth Urban. Plaintiff alleges that she "was a patient of Doctor Urban in Franklin County about May thru [sic] September, 1995." Plaintiff also alleges "Defendant orally agreed with Plaintiff to treat Plaintiff for medical problems in which he was qualified to prescribe medication and treatment. Defendant was given reimbursement for his services and subsequently failed to fulfill his legal obligations as to

disclosing medical information, misleading his patient, and giving his patient false information." Plaintiff further alleges that Defendant "did not in good faith fulfill his obligations to Plaintiff as a patient or client." Plaintiff seeks damages as compensation for Defendant's alleged wrongful conduct.

In response to Plaintiff's Complaint, Defendant filed an Answer in which he denied the material allegations contained in Plaintiff's Complaint and raised various defenses to Plaintiff's cause of action. Additionally, Defendant brought a counterclaim seeking a declaration from this Court stating that Plaintiff qualifies as a vexatious litigator under the provisions of Section 2323.52 of the Revised Code. Defendant now seeks summary judgment against the Plaintiff not only on the claim raised in her Complaint but on his counterclaim as well.

The instant case is not the first case Plaintiff has filed against Defendant in this Court. See Castrataro v. Urban, Case No. 01CV-A-05-243. Plaintiff's complaint in Case No. 01CV-A-05-243 contained allegations materially identical and, indeed, verbatim to those contained in the instant Complaint. Defendant eventually filed a motion for summary judgment in that case. Plaintiff failed to respond to the motion and, in fact, upon filing her complaint made no further appearance whatsoever. This Court sustained Defendant's motion and dismissed the case. This Court subsequently found that Plaintiff's failure to pursue her case against Dr. Urban constituted "frivolous conduct" and, as a consequence, pursuant to the provisions of Section 2323.51 of the Revised Code, charged Defendant's attorneys' fees against her. On appeal, the Fifth District Court of Appeals affirmed this Court's disposition of Case No. 01CV-A-05-243. See Castrataro v. Urban (Ohio App. 5th Dist. June 27, 2002), Case No. 01CAE12064, 2002 – Ohio – 3472.

In addition to the cases Plaintiff filed against Defendant in this Court, Plaintiff

previously filed similar cases against Defendant in the Franklin County Court of Common Pleas. In April, 1997, Plaintiff filed the first of her cases against Defendant. See Castrataro v. Urban (Franklin Cty. C.C.P.), Case No. 97CVA04-4393. Plaintiff alleged in her complaint in Case No. 97CVA04-4393 that she sought medical care from Defendant on May 12, 1995. Plaintiff alleged that, although Dr. Urban conducted a battery of tests and examinations, he "failed to properly diagnose and treat Plaintiff for Epstein-Barr virus on or about June 9th, 1995." Defendant moved for summary judgment on the basis that Plaintiff could produce no evidence creating a genuine issue of material fact on the issue of whether or not Defendant deviated from the applicable standard of care governing his treatment of the Plaintiff. The trial court sustained Defendant's motion. On appeal, the Tenth District Court of Appeals reversed on the grounds that Defendant failed to attach an affidavit demonstrating that he treated Plaintiff within the applicable standard of care and that Plaintiff could produce no evidence to rebut the same. Castrataro v. Urban (Ohio App. 10th Dist. 2000), 2000 WL 254315 *1. In reversing, however, the Court noted the trial court's observation that Plaintiff's failure to disclose an expert witness who might testify on her behalf rendered her malpractice claim against Dr. Urban essentially unsupported. Id. Following remand, Plaintiff voluntarily dismissed Case No. 97CVA04-4393.

On March 13, 2001, Plaintiff re-filed her case against Defendant in Franklin County. See Castrataro v. Urban (Franklin Cty. C.C.P.), Case No. 01CVA03-2391. Again Defendant moved for summary judgment. In support, Defendant relied upon affidavit and deposition testimony establishing that he examined and treated Plaintiff within the accepted standard of care. In reviewing Defendant's motion, the trial court found the testimony of the expert Plaintiff presented in opposition to the motion provided little, if

any, support for her case and generally supported Defendant's position. The trial court ultimately sustained Defendant's motion for summary judgment and dismissed the action. There is no evidence in the instant record indicating whether or not Plaintiff has taken an appeal from that decision.

Now, in support of the present Motion for Summary Judgment, Defendant contends Plaintiff split a malpractice action into claims for negligence and breach of contract. Defendant also draws attention to the fact that Plaintiff filed separate actions on these respective claims in courts sharing concurrent jurisdiction. Accordingly, Defendant contends that this Court lacks jurisdiction to proceed further given the fact the Franklin County Court of Common Pleas obtained jurisdiction prior to this Court obtaining such jurisdiction. On that basis, Defendant seeks summary judgment on Plaintiff's Complaint.

A claim arising out of alleged misconduct of a medical professional constitutes a cause of action for malpractice regardless of whether the claim is brought as either a tort or a contract action. Prysock v. Ohio State University Medical Center (Ohio App. 10th Dist. 2002), 2002 WL 1164098, 2002-Ohio-2811, ¶10. Moreover, under the "jurisdictional priority rule," among courts sharing concurrent jurisdiction, the court whose power is first invoked acquires exclusive jurisdiction to adjudicate the claims and issues existing between the parties. State ex rel. Dannaher v. Crawford (1997), 78 Ohio St.3d 391, 393, 678 N.E.2d 549. An examination of the pleadings both here and in Franklin County quite clearly reveals that Plaintiff has pursued and is presently pursuing a malpractice action against Dr. Urban arising out of the same operative and material facts, though her Franklin County actions sound in tort while the actions before this Court sound in contract. It is equally clear the Franklin County Court of Common Pleas obtained jurisdiction to adjudicate Plaintiff's malpractice claim prior in time to this Court

obtaining jurisdiction. Therefore, this Court is, once again, without jurisdiction to consider Plaintiff's claim, leaving it with no choice but to sustain Defendant's Motion for Summary Judgment.

Nevertheless, in opposition to Defendant's Motion, Plaintiff argues the procedural issues Defendant raises "[are] not correct and [are] not directly relevant at this time to this lawsuit." Interestingly, Plaintiff attempts in her Memorandum Contra to frame her cause of action as one of fraud. Granted, a party may pursue a cause of action for fraud independent of an action based on alleged malpractice. See e.g. Gaines v. PreTerm – Cleveland Inc. (1987), 33 Ohio St.3d 54, 514 N.E.2d 709. However, a party must plead an action for fraud with particularity. Civ.R. 9(B). A party seeking to establish fraud must demonstrate a representation or, where there is a duty to disclose, concealment of a fact; which is material to the transaction at hand; made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; with the intent of misleading another into relying upon it; justifiable reliance upon the representation or concealment; and a resulting injury proximately caused by the reliance. Burr v. Stark County Board of Commissioners (1986), 23 Ohio St.3d 69, 73, 491 N.E.2d 1101. Here, Plaintiff failed to plead the elements of fraud, let alone plead those elements with any semblance of particularity. Thus, Plaintiff cannot seriously expect this Court to entertain the notion that her claim against Defendant constitutes a cause of action for fraud.

Additionally, Plaintiff claims that summary judgment is not appropriate at this time in light of the fact that discovery remains ongoing. Whether Plaintiff realizes it or not, Civil Rule 56(B) provides that a "party against whom a claim is asserted *** may at any time, move with or without supporting affidavits for summary judgment in his favor

as to all or any part thereof." Civ.R. 56(B) (emphasis added). Consequently, contrary to Plaintiff's belief, the instant case is eminently ripe for a motion for summary judgment.

Lastly, Plaintiff insists on this Court scheduling an oral hearing on Defendant's Motion. A court is not required to hold an oral hearing on a motion for summary judgment, Huntington National Bank v. Ross (10th Dist. 1998), 130 Ohio App.3d 687, 697, 720 N.E.2d 1000, and the decision to do so lies in the discretion of the trial court. Doe v. Beach House Development Co. (8th Dist. 2000), 136 Ohio App.3d 573, 583, 737 N.E.2d 141. It is not entirely clear why Plaintiff believes an oral hearing on Defendant's Motion is necessary. Plaintiff's overall argument in opposition to Defendant's Motion suggests that she wishes to present, at the oral hearing, evidence to support her allegations against the Defendant. A court, however, in deciding a motion for summary judgment, may not consider evidence adduced at oral hearings. See Carrabine Construction Co. v. Chrysler Realty Corp. (1986), 25 Ohio St.3d 222, 495 N.E.2d 952. Furthermore, it has been this Court's experience that parties tend to set forth their arguments, either in opposition to or in support of such motions, clearly and more concisely in textual form, rather than by oration. As a result, this Court believes that oral hearings on motions for summary judgment are largely useless exercises. Therefore, this Court finds an oral hearing on Defendant's Motion unnecessary.

On the basis of the foregoing, this Court sees no reason to not now proceed with summary judgment and, indeed, enter summary judgment in Defendant's favor.

Defendant also seeks summary judgment on the issue of whether or not Plaintiff qualifies as a "vexatious litigator" pursuant to the provisions of Section 2323.52 of Revised Code. Section 2323.52 provides, in relevant part:

"[a] person *** who has defended against habitual and persistent vexatious

> conduct in the court of claims or in a court of common pleas, municipal court, or county court, may commence a civil action in a court of common pleas with jurisdiction over the person who allegedly engaged in the habitual and persistent vexatious conduct to have that person declared a vexatious litigator."

R.C. § 2323.52(B). Section 2323.52 defines "vexatious conduct" as any of the following:

> "(a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action.
> "(b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.
> "(c) The conduct is imposed solely for delay."

R.C. § 2323.52(A)(2). Furthermore, Section 2323.52 defines a "vexatious litigator" as:

> "any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claim or in a court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions."

R.C. § 2323.52(A)(3).

In support of the instant Motion as it relates to his counterclaim, Defendant directs attention to the actions against which he has had to defend not only in this Court and in Franklin County, but in federal court as well. Defendant submits the pertinent pleadings from those cases as well as certified copies of judicial decisions from the issuing courts evidencing disposition of the substantive merits therein and the cases in general. Plaintiff offers no evidence calling into question these pleadings and decisions.

In opposition, Plaintiff claims the provisions of Section 2323.52 do not permit Defendant to bring a vexatious litigator action as a counterclaim. Plaintiff believes the provisions of Section 2323.52 require the Defendant to file a civil action separate and apart from any litigation existing between the alleged vexatious litigator and the person subjected to the alleged vexatious conduct. Plaintiff, however, is mistaken in her reading

of Section 2323.52. To reiterate, Section 2323.52 permits a person to "commence a civil action in a court of common pleas ***." R.C. § 2323.52(B). A counterclaim that seeks affirmative relief, such as the counterclaim Defendant pursues herein, essentially constitutes a separate civil action within the main civil action wherein it is brought. Thus, a party may pursue an action seeking to declare a person a vexatious litigator as a counterclaim brought in the course of an existing civil action. See e.g. Borger v. McErlane (Ohio App. 1st Dist. 2001), 2001 WL 1591338, 2001 – Ohio – 4030. Therefore, this Court finds that, for purposes of Section 2323.52 of the Revised Code, Defendant commenced a civil action in a court of common pleas.

Turning to the merits of Defendant's counterclaim, this Court at the outset questions whether or not it may consider evidence of litigation Plaintiff pursued in federal court. There is authority holding such evidence relevant in establishing vexatious conduct. See Borger, *supra*. However, this Court believes the express language of Section 2323.52 limits the determination strictly to conduct occurring in state court. As the language of Section 2323.52 provides, in order to declare a person a "vexatious litigator," a court must find that a person "engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of common pleas, municipal court, or county court ***." R.C. § 2323.52(A)(3)(emphasis added). Similarly, in order to bring a vexatious litigator action, a person had to have "defended against habitual and persistent vexatious conduct in the court of claims or in a court of common pleas, municipal court, or county court ***." R.C. § 2323.52(B)(emphasis added). Obviously, no allowance appears for conduct occurring in the federal court system. Therefore, this Court declines to consider any conduct on the part of the Plaintiff occurring in the federal courts.

Inevitably, Defendant's counterclaim turns on whether or not Plaintiff's conduct

both here and in Franklin County qualifies her as a vexatious litigator. Plaintiff, of course, initiated her state court actions against Defendant in Franklin County with Case No. 97CVA04-4393. Ultimately, Plaintiff voluntarily dismissed that case, but not until after both the trial and appellate courts recognized that Plaintiff identified no witness, other than herself, who could testify on her behalf. Nonetheless, given her voluntarily dismissal, she was well within her rights to re-file an action against Defendant. After learning the lesson taught from her first action, Plaintiff produced a witness to testify on her behalf in her second action against Defendant in Franklin County. Unfortunately for the Plaintiff, the testimony of her witness actually bolstered Defendant's defense more than it established her case. Not surprisingly, Plaintiff's action ended with the trial court entering summary judgment in Defendant's favor. In other words, Plaintiff's claim ended in much the same manner as do hundreds, if not thousands, of cases every year: termination by summary judgment.

But the story is hardly at an end. For whatever reason, Plaintiff felt the need to bring an action, Case No. 01CV-A-05-243, against Defendant in this County, while she had an action pending against Defendant in Franklin County. In Case No. 01CV-A-05-243, Plaintiff offered no legitimate reason to this Court explaining why she brought a breach of contract action against Defendant here in Delaware County while simultaneously pursuing a negligence action against Defendant in Franklin County. Simply stated, Plaintiff offered no legal justification for such a tactic, despite the wealth of judicial precedent instructing her to the contrary. Instead, upon filing her complaint, Plaintiff "altogether disappeared" from Case No. 01CV-A-05-243 and her case suffered dismissal by means of Defendant's unopposed motion for summary judgment.

Undeterred by the disposition of Case No. 01CV-A-05-243, Plaintiff proceeded to

bring the instant action against Defendant. As he did in the prior case brought before this Court, Defendant raised the "split-claims" and "jurisdictional priority" issues. And, once again, Plaintiff failed to present this Court with a justification for her pursuit of the same cause of action in two different courts.

In the end, Plaintiff offered no credible argument and cited no case law suggesting she may split her present or previous malpractice claim into separate actions and pursue those separate actions in courts sharing concurrent jurisdiction. Plaintiff's conduct in pursuing her claims before this Court was not warranted under existing law and certainly not supported by a good faith argument for either a modification or a reversal of existing law. Moreover, Plaintiff's pursuit of her claim before this Court while simultaneously pursuing the same claim before the court that first acquired jurisdiction to consider the claim served to harass the Defendant and cause him considerable expense. Thus, Plaintiff has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in civil actions before this Court against the Defendant. Therefore, based on the foregoing, this Court hereby declares Plaintiff Linda Castrataro a vexatious litigator.

As a final matter, Plaintiff submitted a Motion For Oral Hearing On Civil Rule 60 Motion. After a review of the docket and the record in the instant case, this Court is unable to find any Motion filed pursuant to Civil Rule 60. However, in her Sixth Defense to Defendant's counterclaim, Plaintiff states that "she would like this court to reconsider its decision to award attorney's fees under ORC Section 2323.51, frivolous conduct under Ohio Civil Rule 60, Relief from Judgment or Order." Assuming that defense and Plaintiff's instant Motion somehow constitutes a Civil Rule 60(B) motion, such a motion is procedurally improper. A party seeking relief under the provisions of Civil Rule 60(B) should file a motion in the case within which the final judgment was entered. A party

may not file a Civil Rule 60(B) motion in a subsequent case, even if that subsequent case is a re-filing of an earlier case. This Court entered final judgment in Case No. 01CV-A-05-243. That is the case number under which Plaintiff must attempt to seek relief from the final judgment entered therein. Consequently, this Court declines to schedule a hearing on a procedurally improper motion.

In conclusion, this Court finds no genuine issue exists as to the material facts. This Court further finds that Defendant has established that he is entitled summary judgment as a matter of law on not only the claim stated in Plaintiff's Complaint but on his counterclaim as well. Accordingly, the Motion Of Defendant Dr. Kenneth Urban For Summary Judgment is hereby SUSTAINED. In light of this Court declaring Plaintiff Linda Castrataro a vexatious litigator, Plaintiff is hereby prohibited from instituting, continuing, or making an application in any legal proceeding in this Court without first obtaining leave of this Court pursuant to the provisions of Section 2323.52(F) of the Revised Code. Furthermore, Plaintiff's Motion For Oral Hearing On Civil Rule 60 Motion is hereby OVERRULED. The instant Judgment Entry terminates the instant case. Therefore, this Court finds no just reason for delay and the instant Judgment Entry is hereby made a final appealable order. Costs taxed to Plaintiff.

TERMINATION CODE

W. DUNCAN WHITNEY, JUDGE

cc: Linda Castrataro, Plaintiff, P.O. Box 24104, Mayfield Heights, Ohio 44124
Craig R. Carlson, Monique Lampke, and Ryan P. Sherman, Attorneys for Defendant, 41 South High Street, 29th Floor, Columbus, Ohio 43215
Jan Antonoplos, Clerk of the Delaware County Court of Common Pleas, 91 North Sandusky Street, Delaware, OH 43015