

[Cite as *Mitchell v. Mid-Ohio Emergency Servs., L.L.C.*, 2010-Ohio-6350.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Geoffrey C. Mitchell, M.D., :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 10AP-374
 : (C.P.C. No. 00CVF03-2427)
 Mid-Ohio Emergency Services, L.L.C. et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on December 23, 2010

Wiles, Boyle, Burkholder & Bringardner Co., LPA, Michael L. Close, and Dale D. Cook, for appellant.

Wickens, Herzer, Panza, Cook & Batista Co., Matthew W. Nakon, and Rachelle Kuznicki Zidar, for appellees Mid-Ohio Emergency Services, L.L.C., John Drstvensek, M.D., InPhyNet Hospital Services, Inc., and Acute Care Specialists, Inc.

Roetzel & Andress, LPA, Stephen D. Jones, and Jeremy S. Young, for appellees Grant-Riverside Methodist Hospital and Suzanne DeWoody.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Geoffrey C. Mitchell, M.D. ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas finding that appellant violated Civ.R. 11 and engaged in frivolous conduct, pursuant to R.C. 2323.51, and awarding sanctions in favor of appellees, Mid-Ohio Emergency Services, LLC, John Drstvensek, M.D., InPhyNet Hospital Services, Inc., and Acute Care Specialists, Inc. (collectively "MOES"); and appellees, Grant-Riverside Hospitals and Suzanne DeWoody (collectively "Grant-Riverside").

{¶2} Appellant filed this action against appellees, claiming that he had been improperly terminated from his position as an attending physician due to his criticism of an arrangement under which MOES undertook management of the emergency practice groups at Grant-Riverside.¹ Appellant argued that his termination violated Ohio public policy.

{¶3} The trial court ultimately granted summary judgment against appellant on his claims, finding that appellant's termination by MOES was not based on his criticisms, and that Grant-Riverside was entitled to judgment because it was not appellant's employer, and had not taken any adverse action against him. We affirmed. *Mitchell v. Mid-Ohio Emergency Servs.*, 10th Dist. No. 03AP-981, 2004-Ohio-5264.

{¶4} On April 29, 2005, appellant filed a pro se motion seeking relief from the trial court's judgment pursuant to Civ.R. 60(B). Appellant primarily argued that relief was appropriate under Civ.R. 60(B)(3), which allows for relief from a judgment that was

¹ For a full explanation of the facts and circumstances underlying appellant's claims, see *Mitchell v. Mid-Ohio Emergency Servs.*, 10th Dist. No. 03AP-981, 2004-Ohio-5264.

obtained by fraud. Specifically, appellant argued that the circumstances surrounding the termination of his employment were part of a course of fraudulent activity engaged in by Richard Scrushy ("Scrushy") through his involvement with MedPartners, a company appellant claimed was secretly associated with MOES. In his motion, appellant also alleged that appellees' counsel were engaged in the concealment of the relationship between MOES and MedPartners. In support of his motion, appellant filed an appendix containing a number of documents purporting to support his claim of fraud.

{¶5} MOES filed a combined motion seeking to strike a number of the documents included in the appendix filed by appellant with his motion and for a finding that MOES was entitled to an award of sanctions pursuant to Civ.R. 11 and R.C. 2323.51. Subsequently, MOES and Grant-Riverside each filed memoranda in opposition to appellant's Civ.R. 60(B) motion.

{¶6} The trial court rendered a decision denying appellant's motion to vacate, finding that appellant had neither presented a meritorious defense nor shown the existence of any of the grounds set forth in Civ.R. 60(B)(5). The court also concluded that many of the documents provided by appellant were inadmissible, and concluded that it was "highly irresponsible of [appellant] to saddle the Court and opposing counsel with voluminous material that was obviously inadmissible, and place the burden on the Court to sift through it to perhaps find the parts that would be admissible." (R. 344, p. 4.) The court specifically stated that it was retaining jurisdiction for the purpose of considering MOES' motion for sanctions. Subsequently, Grant-Riverside filed its own motions seeking an award of sanctions pursuant to R.C. 2323.51.

{¶7} During this time, appellant served discovery requests on MOES. MOES responded by filing a motion seeking a protective order that would bar appellant from filing any additional discovery requests without leave of court, as well as sanctions in connection with responding to appellant's discovery request. Appellees also sought to conduct a deposition of appellant for the purpose of questioning him about the claims he had made in support of his Civ.R. 60(B) motion to support their claims seeking sanctions. Appellant filed a motion seeking a protective order regarding this deposition, and appellees filed a motion to compel to require appellant to appear for the deposition.

{¶8} Also during this time, appellant filed a number of pleadings purporting to set forth supplemental authority in support of his memorandum contra the motions for sanctions. These supplemental pleadings included, among other things, information regarding the Securities and Exchange Commission's civil action against Richard Scrushy and information about the conviction and subsequent resignation from the practice of law of MOES' corporate counsel as a result of theft from a client. Each of these pleadings resulted in the filing of a motion to strike.

{¶9} On June 11, 2007, appellant filed a motion seeking leave to file a second Civ.R. 60(B) motion. As the basis for relief, appellant pointed to the action against Scrushy and the conviction of MOES' former corporate counsel, arguing that these indicated an ongoing fraud.

{¶10} Throughout this period, voluminous pleadings were filed with the court involving appellant's claims regarding the purported fraud. These pleadings included additional discovery requests, motions seeking protective orders from the court, as well as continued arguments that appellant should be sanctioned for his conduct. On

June 26, 2008, the trial court issued a decision regarding a number of outstanding motions, which included a denial of appellant's motion for leave to file a second Civ.R. 60(B) motion.

{¶11} During the years this litigation was pending, appellant had attended law school. During the process of seeking admission to the bar, a hearing was held before the Board of Commissioners on Character and Fitness ("Board") to consider whether appellant's conduct in this case should result in appellant not being allowed to sit for the bar exam. Citing appellant's repeated accusations about alleged unethical conduct of appellees' counsel in this case, the Board found that there was no basis for appellant's allegations. Based on this conclusion, the Board recommended that appellant not be allowed to sit for the July 2008 bar examination, but that he be allowed to reapply for the February 2009 examination. The Supreme Court of Ohio adopted the Board's findings of fact, as well as its recommendation regarding appellant's application to take the bar examination. *In re Application of Mitchell*, 119 Ohio St.3d 38, 2008-Ohio-3236.

{¶12} On March 19, 2009, a hearing on the pending motions for sanctions was held in front of a magistrate. At the beginning of the hearing, the parties' counsel entered a stipulation regarding the evidence that had been presented at the hearing before the Board. Under the stipulation, the parties agreed that the testimony and exhibits from the hearing would be entered into the record for this case, and also stipulated to the Board's findings of fact.

{¶13} The magistrate heard testimony from Matthew Nakon, counsel for MOES, and Stephen Jones, counsel for Grant-Riverside. Each testified regarding appellant's ongoing efforts to obtain relief from the trial court's summary judgment, including the

multiple allegations of fraud made by appellant. Each witness also testified regarding the attorney fees that had been incurred in defending against appellant's claims, with each testifying that the bills submitted reflected only those costs incurred in connection with appellant's Civ.R. 60(B) motion and his motion for leave to file a second such motion.

{¶14} The magistrate issued a decision concluding that appellant's conduct had violated both Civ.R. 11 and R.C. 2323.51. In his decision, the magistrate cited the Supreme Court's decision regarding appellant's application to sit for the bar examination, concluding that appellant's conduct in this case constituted the entire basis for the decision to delay appellant taking the bar examination. The magistrate pointed out that the Supreme Court did not make any explicit finding that appellant's conduct in this litigation constituted frivolous conduct in violation of R.C. 2323.51. The magistrate concluded that appellant's conduct constituted frivolous conduct, and also concluded that appellant willfully violated Civ.R. 11. The magistrate recommended an award of \$81,297.04 in favor of Grant-Riverside, and an award of \$233,429.45 in favor of MOES.

{¶15} Appellant filed objections to the magistrate's decision, arguing that the magistrate's decision constituted an improper adoption of the Supreme Court's decision on appellant's bar admission because the issues in the two cases were not the same. The trial court overruled appellant's objections and adopted the magistrate's decision.

{¶16} Appellant then filed this appeal, and asserts four assignments of error:

- I. The trial court erred in adopting the conclusions of law from In Re Mitchell as a primary basis for its decision on the motion for sanctions thus failing to independently weigh the evidence.

II. The trial court erred in finding that Dr. Mitchell's conduct was merely to harass or maliciously injure defendants.

III. The trial court erred in finding that Dr. Mitchell's 60(B) motion lacked evidentiary support and were [sic] not warranted under existing law.

IV. The trial court abused its discretion in finding Dr. Mitchell violated Civil Rule 11.

{¶17} In his first assignment of error, appellant argues that the magistrate and trial court improperly "adopted" the findings of the Board and the Supreme Court in *In re Mitchell*, when it found that appellant had engaged in frivolous conduct and violated Civ.R. 11. At the beginning of the hearing before the magistrate, the parties stipulated to the Board's factual findings, but appellant argues that the magistrate, and subsequently the trial court, went further than the stipulation by not only accepting the factual findings in the case, but also adopting the conclusions of law.

{¶18} We do not agree that the magistrate's decision can be properly characterized as adopting the conclusions of law from *In re Mitchell*. In his decision, the magistrate specifically recognized that the Supreme Court had not determined that appellant engaged in frivolous conduct, but had focused solely on whether appellant's conduct showed the requisite character to be allowed to sit for the bar examination. The magistrate then considered whether appellant's factual conduct as determined in *In re Mitchell* constituted sanctionable conduct for purposes of R.C. 2323.51 and Civ.R. 11.

{¶19} The facts found in *In re Mitchell* that were cited by the magistrate included the Board's conclusion that appellant made multiple meritless accusations that appellees' counsel intentionally withheld or concealed evidence from appellant, as well

as the conclusion that there was no evidentiary basis in the record to conclude that there was any connection between Scrushy's actions and appellant's termination from his employment by MOES. *In re Mitchell* at ¶13-15. The magistrate then applied these factual conclusions to R.C. 2323.51(A)(2)(a)(iii), which includes in the definition of frivolous conduct "allegations or other factual contentions that have no evidentiary support or * * * are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

{¶20} Thus, it is clear that the magistrate applied the facts as found in *In re Mitchell* and as stipulated to by appellant to the specific definition of frivolous conduct set forth in R.C. 2323.51(A)(2)(a)(iii), and did not simply adopt *In re Mitchell's* conclusion regarding appellant's character and fitness to be allowed to sit for the bar examination.

{¶21} Consequently, appellant's first assignment of error is overruled.

{¶22} In his second assignment of error, appellant argues that the trial court erred when it concluded that appellant's conduct in seeking to vacate the summary judgment granted against him was for the purpose of merely harassing or maliciously injuring appellees. By this assignment, appellant challenges that portion of the trial court's decision finding that he engaged in frivolous conduct as defined in R.C. 2323.51(A)(2)(a)(i), which includes conduct that "obviously serves merely to harass or maliciously injure another party to the civil action."

{¶23} Appellant first argues that his conduct was motivated by a good faith belief that evidence of fraud had been concealed in his case. Appellant also argues that as a pro se litigant, he should have been afforded some latitude in asserting his claims.

{¶24} We review a trial court's finding that a party engaged in frivolous conduct under the "harassing or maliciously injuring" definition for an abuse of discretion. *Bryan v. Bryan*, 161 Ohio App.3d 454, 2005-Ohio-2739. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶25} With regard to appellant's argument that his actions were motivated by a good faith belief that his assertions were correct, we note that "[t]he finding of frivolous conduct under R.C. 2323.51 is determined without reference to what the individual knew or believed." *Bikkani v. Lee*, 8th Dist. No. 89312, 2008-Ohio-3130, ¶22, citing *Ceol v. Zion Indus., Inc.* (1992), 81 Ohio App.3d 286.

{¶26} Furthermore, we cannot say the trial court abused its discretion in concluding that appellant's conduct served to merely harass or maliciously injure appellees. The sheer volume of filings appellant made in support of his contentions, as well as the inflammatory nature of the assertions made against appellees' counsel, are sufficient to support the trial court's conclusion that appellant's conduct was for the purpose of merely harassing or injuring appellees. This is particularly the case with respect to appellant's attempts to obtain relief from the judgment in favor of Grant-Riverside, which was based on the determination that Grant-Riverside was not appellant's employer, and had not taken any adverse action against him.

{¶27} As for appellant's contention that he should have been afforded some latitude in his conduct of the case based on his status as a pro se litigant, the mere fact that a party is acting pro se does not shield that party from a finding of frivolous conduct.

Bikkani at ¶29, citing *Burrell v. Kassicieh* (1998), 128 Ohio App.3d 226. Moreover, even were we to accept appellant's assertion that he should have been afforded some latitude based on his status as a pro se litigant, we cannot say the trial court abused its discretion in concluding that any latitude to which appellant was entitled had been exceeded.

{¶28} Consequently, appellant's second assignment of error is overruled.

{¶29} In his third assignment of error, appellant argues that the trial court erred in concluding that his claims lacked evidentiary support and were not warranted under existing law. Our disposition of appellant's second assignment of error arguably renders this assignment of error moot, since only one basis for a finding of frivolous conduct is necessary to support the trial court's decision. Nevertheless, in the interests of justice, we will address the assignment.

{¶30} The parties disagree regarding the standard of review to be applied to a trial court's finding of frivolous conduct as defined in R.C. 2323.51(A)(2)(a)(iii), which includes in the definition conduct that "consists of allegations or other factual contentions that have no evidentiary support or * * * are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." This form of frivolous conduct was established with the enactment of S.B. 80 in the 125th General Assembly. Prior to that time, there were two forms of frivolous conduct: the "harassing or maliciously injuring" form and a second "not warranted under existing law" form. Ohio courts had applied a de novo review to the "not warranted under existing law" form of frivolous conduct. See *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308.

{¶31} Regardless of the standard of review to be applied when considering the "no evidentiary support" form of frivolous conduct, the trial court did not err in finding that appellant did not have any evidentiary support for the claims asserted in seeking to vacate the summary judgment against him. Appellant offered voluminous evidentiary materials having to do with the criminal and civil actions against Scrushy and the disbarment of MOES' corporate counsel to support his claims of fraud. However, as pointed out by the trial court in denying appellant's Civ.R. 60(B) motion, appellant failed to establish the admissibility of those evidentiary materials and, more importantly, failed to show that there was any connection between Scrushy's activities or the disbarment of MOES' corporate counsel and the termination of appellant's employment. Again, this is particularly the case with respect to appellant's claims against Grant-Riverside, given that summary judgment was granted on those claims because Grant-Riverside was not appellant's employer, and had not taken any adverse action against him.

{¶32} Consequently, appellant's third assignment of error is overruled.

{¶33} In his fourth assignment of error, appellant argues that the trial court erred when it found that he violated Civ.R. 11 in the various pleadings he filed seeking to have the summary judgment against him vacated. Under Civ.R. 11, sanctions can be imposed when an attorney or pro se litigant acts willfully and in bad faith by filing a pleading that he or she believes lacks good grounds or is filed merely for the purpose of delay. *State ex rel Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, Slip Opinion No. 2010-Ohio-5073. Sanctions imposed, pursuant to Civ.R. 11, are reviewed for an abuse of discretion. *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789.

{¶34} In his decision after the hearing, the magistrate concluded that appellant violated Civ.R. 11 in two respects: first, by bringing claims for which there were no grounds, and second, by bringing claims for the sole purpose of delaying the finality of the judgment against him. We cannot say that the trial court abused its discretion in reaching this conclusion. Appellant had no grounds to believe the fraud committed by Scrushy was connected in any way to the summary judgment that was granted against him on his claims against MOES and Grant-Riverside, and continued to try to litigate those claims long after it should have been apparent that he would be able to prove no such connection.

{¶35} Consequently, appellant's fourth assignment of error is overruled.

{¶36} As a final matter, throughout his brief, appellant argues that the trial court failed to identify which of the attorney fees were necessitated by his conduct. Because appellant did not separately assign this as error, we decline to address the argument.

{¶37} Having overruled all of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and KLATT, J., concur.
