**[Cite as *Ruggerio v. Kavlich*, 2010-Ohio-3995.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION
**No. 92909**

---

## ANTHONY RUGGERIO

PLAINTIFF-APPELLEE

vs.

## JOHN J. KAVLICH, III, M.D., ET AL.

DEFENDANTS-APPELLANTS

---

**JUDGMENT:**
**REVERSED AND REMANDED**

---

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-617462

**BEFORE:** Jones, J., Stewart, P.J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** August 26, 2010

**ATTORNEYS FOR APPELLANTS**

Mark Fusco
Aimee W. Lane
Walter & Haverfield LLP
The Tower at Erieview
1301 East Ninth Street, Suite 3500
Cleveland, Ohio 44114-1821

**ATTORNEYS FOR APPELLEE**

James E. Boulas
Jim Petropouleas
James E. Boulas Co., L.P.A.
7914 Broadview Road
Raintree Plaza
Broadview Heights, Ohio 44147-1202

LARRY A. JONES, J.:

**{¶ 1}** Defendant-appellant, John Kavlich III, M.D. ("Kavlich"), appeals the trial court's granting of summary judgment in favor of plaintiff-appellee, Anthony Ruggerio ("Ruggerio"). Finding merit to the appeal, we reverse.

**{¶ 2}** In 1996, Ruggerio sustained injuries in a car accident. Ruggerio's attorney at the time referred Ruggerio to Kavlich, a general practitioner, for treatment. Ruggerio signed a doctor's lien, which authorized Ruggerio's attorney or insurer to pay any medical bills directly out of the proceeds of any settlement, judgment, or verdict. The agreement further stated that Ruggerio understood that he was directly and fully responsible to Kavlich for all medical bills submitted by

the doctor. Kavlich provided Ruggerio medical treatment for approximately six months in 1996 with a total bill of $3,495.68.

**{¶ 3}** Ruggerio's personal injury case proceeded to trial, at which a jury returned a verdict for $500 to cover the damage to Ruggerio's car, but returned a zero verdict as to his medical claims. Subsequent to the trial, Kavlich began to bill Ruggerio for his outstanding medical expenses. Ruggerio contacted Kavlich's office and, unbeknownst to the doctor, directed an intern volunteering as a billing clerk to submit his bill to Medicare for payment. The intern submitted the bill to Medicare, and the agency paid $419 of the total bill.

**{¶ 4}** In May 2001, Kavlich filed suit, pro se, against Ruggerio in municipal court to collect on the outstanding medical bills. Ruggerio hired an attorney and counterclaimed, alleging that Kavlich violated the Federal Fair Debt Collection Practices Act ("FDCPA").

**{¶ 5}** In November 2001, the doctor, through his attorney, discovered that the intern had mistakenly submitted Ruggerio's bills to Medicare, instead of to Ruggerio's auto insurer. Within a week of discovering the mistake, Kavlich returned the $419 to the agency with a letter explaining that the bill was submitted to Medicare in error and that it was the doctor's understanding that Ruggerio "had medical payments with an automobile insurance carrier in full effect at the time of the accident and the time of his medical services." Kavlich also indicated that he had made numerous attempts to find out Ruggerio's medical pay information, but that Ruggerio had "refused to turn over" that information. The doctor concluded

the letter by stating that it was his intention to obtain the medical payments information from Ruggerio and submit "all bills of service through that insurance channel."

**{¶ 6}** The agency accepted the refund. In a letter to Kavlich, Medicare informed the doctor that he should bill Ruggerio's primary auto insurance but that "since you are a Medicare provider, you are prohibited from billing the patient more than his 20 percent coinsurance and deductible amounts."

**{¶ 7}** Kavlich proceeded with the litigation in municipal court, and the matter proceeded to trial on June 19, 2002.[1] The magistrate's decision was issued on July 21, 2002, and the trial court adopted the magistrate's report and recommendation in August 2002. Neither party appealed the court's decision.

**{¶ 8}** In a written decision, the magistrate found for Ruggerio, stating that once Kavlich's billing clerk submitted the bills to Medicare and the office accepted payment from Medicare, Kavlich was bound by the Medicare agreement and could not pursue any further payment from Ruggerio. In essence, the court ruled that Kavlich's "mistake of fact" claim could not survive because his office staff were his agents. The court also dismissed Ruggerio's counterclaim, finding that the FDCPA regulates only third-party debt collectors acting on behalf of the actual creditor.

---

[1] The transcript from the trial in municipal court was never made part of the lower court record.

**{¶ 9}** The record indicates that between the time the magistrate issued his report and recommendation and the trial court adopted the recommendation, Kavlich, in addition to objecting to the magistrate's decision, wrote another letter to Medicare. In the letter, the doctor referenced a recent phone conversation he had with a Medicare agent. The doctor also explained his ongoing issues with billing. In pertinent part, Kavlich wrote that his office keeps all billing of personal injury clients separate from the routine workers' compensation, Medicare, and medical insurance billing and that Ruggerio's bills were sent to Medicare without his knowledge and without the knowledge of the person who normally handles the billing for his personal injury clients. Kavlich then inquired whether: 1) bills should be submitted to the medical payments company before Medicare if a car accident patient has a medical payment policy; and 2) if a patient does not inform him that he or she has a policy with medical payments present, but then he becomes aware that the patient has such a policy, should any payment from Medicare be refunded to Medicare and the office then bill the auto insurer.

**{¶ 10}** It is not evident from the record what occurred between Medicare and Kavlich after this letter was sent, although Kavlich testified at trial that no audit or other action was taken against him by Medicare stemming from the Ruggerio claim.

**{¶ 11}** Three years later, in 2005, Ruggerio filed the instant lawsuit in Cuyahoga Court of Common Pleas alleging abuse of process against Kavlich, Kavlich's attorney, and the attorney's law firm. Ruggerio also alleged a federal

statutory claim under the Fair Credit Reporting Act. The attorney-defendants had their case transferred to federal court. The federal court dismissed the federal law claims and remanded the state law claims back to the trial court. In 2006, Ruggerio dismissed his lawsuit.

**{¶ 12}** In 2007, Ruggerio refiled his lawsuit again alleging abuse of process and requesting both compensatory and punitive damages. Ruggerio later dismissed Kavlich's attorney and the law firm from the lawsuit.

**{¶ 13}** Kavlich moved for summary judgment, arguing that Ruggerio did not properly plead the requisite elements of an abuse of process claim and that there was no evidence that Kavlich acted with an ulterior motive. The trial court denied the motion. The case proceeded to trial.

**{¶ 14}** At trial, Kavlich testified Ruggerio signed a doctor's lien that indicated Ruggerio was responsible for payment of the medical bills if his car insurer would not pay or if he did not recover anything from his personal injury lawsuit. He also testified that Ruggerio's medical bills were submitted to Medicare in error, that he accepted responsibility for his employee's errors, and he returned Medicare's money as soon as he found out about the error. Kavlich claimed Ruggerio's bill was submitted to Medicare in error because Ruggerio was a personal injury client and because Ruggerio never informed the doctor that he had Medicare.[2]

[2]At the time of treatment, Ruggerio was in his fifties, younger than a traditional Medicare recipient.

**{¶ 15}** During trial, Kavlich explained that Ruggerio had Medicare Part A coverage, which did not cover doctor's visits, and Kavlich's office was only a Medicare Part B provider; therefore, Medicare erred in paying on the claim. Kavlich's Medicare agreement was introduced into evidence at trial, showing that Kavlich was only a Medicare Part B provider.

**{¶ 16}** After Ruggerio closed his case, Kavlich moved for a directed verdict, arguing that the evidence presented thus far at trial was insufficient to prove a claim for abuse of process. The trial court denied the motion.

**{¶ 17}** The jury returned a verdict in favor of Ruggerio awarding him $24,000 in compensatory damages, $60,000 in punitive damages, and attorney fees.

**{¶ 18}** The trial court held a hearing on the attorney fees and granted Ruggerio attorney fees in the amount of $104,516. Kavlich filed a motion for judgment notwithstanding the verdict, or alternatively, a motion for new trial or for remittitur. The trial court denied the motion.[3]

**{¶ 19}** Kavlich filed his notice of appeal, and now raises the following three assignments of error for our review:

> "I. The trial court erred as a matter of law in denying Dr. Kavlich's motion for summary judgment and motion for directed verdict.
>
> "II. The jury verdict finding Dr. Kavlich liable for abuse of process and awarding Mr. Ruggerio $24,000 in compensatory damages is against the manifest weight of the evidence.

[3] Ruggerio passed away in 2008 and his wife, Shirley Ruggerio, has been substituted as the party in this action.

"III. The jury verdict awarding punitive damages to Mr. Ruggerio is against the manifest weight of the evidence.

"IV. The trial court's award of attorney's fees in the amount of $104,516 is unreasonable and an abuse of discretion."

**{¶ 20}** In the first assignment of error, Kavlich argues that the trial court erred in denying his motion for summary judgment and motion for a directed verdict.

**{¶ 21}** An appellate court's review of a trial court's grant of summary judgment is de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153. Civ.R. 56(C) provides that summary judgment can be granted only if (1) no genuine issue of material fact remains to be litigated, (2) viewing the evidence in a light most favorable to the nonmoving party, reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party, and (3) the moving party is entitled to summary judgment as a matter of law. See, also, *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 364 N.E.2d 267. Nevertheless, "[a]ny error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made." *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 642 N.E.2d 615, syllabus.

**{¶ 22}** Civ.R. 50(A)(4) states that "[w]hen a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

**{¶ 23}** A motion for a directed verdict tests the sufficiency of the evidence, not the weight of the evidence or the credibility of witnesses. *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119-120, 671 N.E.2d 252. When the party opposing the motion fails to produce any evidence on one or more of the essential elements of a claim, a directed verdict is appropriate. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695, 586 N.E.2d 141. A trial court's grant or denial of a motion for directed verdict presents a question of law, which an appellate court also reviews de novo. *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 257, 741 N.E.2d 155.

**{¶ 24}** Based on the evidence set forth in the motion for summary judgment and Ruggerio's brief in opposition, we find that there was a genuine issue of material fact as to whether Kavlich acted with an ulterior motive so that the case should have proceeded to trial. We find, however, that based on the evidence presented by the plaintiff at trial, the trial court should have directed a verdict for Kavlich.

**{¶ 25}** First, to prevail on a claim alleging abuse of process, the moving party must show: (1) that a legal proceeding was properly initiated and supported by probable cause; (2) that same legal proceeding was perverted by the nonmoving party in order to achieve "an ulterior purpose for which it was not designed"; and (3) that the moving party has incurred damages as a result of the nonmoving party's wrongful use of process. *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298, 1994-Ohio-503, 626 N.E.2d 115.

**{¶ 26}** An action for abuse of process is concerned with the improper use of process after it has been issued: whether there has been employment of process in a manner not contemplated by law or to obtain an object that such process is not intended by law to effect. *Bunde v. Kantorik* (May 17, 1979), Cuyahoga App. No. 38837. "['A]buse of process' differs from 'malicious prosecution' in that the former connotes the use of process properly initiated for improper purposes, while the latter relates to the malicious initiation of a lawsuit which one has no reasonable chance of winning." *Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St.3d 264, 1996-Ohio-189, 662 N.E.2d 9, quoting *Clermont Environmental Reclamation Co. v. Hancock* (1984), 16 Ohio App.3d 9, 11, 474 N.E.2d 357, 362.

**{¶ 27}** In *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 51-52, 682 N.E.2d 1006, the court explained the tort as follows:

> "Abuse of process does not lie for the wrongful bringing of an action, but for the improper use, or 'abuse,' of process. * * * Thus, if one uses process properly, but with a malicious motive, there is no abuse of process, though a

> claim for malicious prosecution may lie. * * * The tortious character of the defendant's conduct consists of his attempts to employ a legitimate process for a legitimate purpose in an improper manner[.]"

Id., citing *Clermont Environmental Reclamation Co.* at 11. Thus, "there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Jones v. Norfolk S. Ry. Co.*, Cuyahoga App. No. 84394, 2005-Ohio-879, citing *Yaklevich*, supra.

**{¶ 28}** To succeed on a claim of abuse of process, the plaintiff must show that one used process with an ulterior motive, as the gist of the offense is found in the manner in which process is used. *Nicolazzo v. Yoingco*, 149 Ohio Misc.2d 44, 2007-Ohio-7269, 898 N.E.2d 94. "'The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.' Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order." *Robb* at 271. (Internal citations omitted.)

**{¶ 29}** In his oral motion for a directed verdict, Kavlich's counsel argued that Ruggerio was unable to show that Kavlich had an ulterior motive in attempting to collect money from Ruggerio. When asked by the court what the ulterior motive was that Ruggerio was trying to prove, Ruggerio's counsel responded that Kavlich's ulterior motive was to "intimidate Tony Ruggerio to pay. It clearly cost

[Kavlich] more to defend the lawsuit than it would to pay the doctor." Counsel also stated that the "doctor intended to circumvent Medicare laws" and "collect money he was not legally entitled to. It's extortion."

**{¶ 30}** The trial court concluded:

> "I think the [municipal court] litigation was initiated to collect a valid debt. At some point it was no longer a valid debt. At some point he no longer had a right to collect a debt. He was no longer able to do what he filed a lawsuit to do.
>
> "When he realized that it was no longer a legal debt, he should have dismissed the lawsuit. Rather than that, he continued. He went through depositions, they went to trial." * * * So then the question become[s] does the [doctor's] knowledge [that Medicare paid the bill] somehow infer a perverted change in the lawsuit, an ulterior motive, hidden motive, other than collecting what he thought was a valid debt."

**{¶ 31}** In reviewing the record and testimony at trial, we find that Ruggerio has established the first and third prongs of a viable abuse of process claim. The parties stipulated at trial that the lawsuit was brought for a legitimate purpose. As to the third prong, we have said that a "viable abuse of process claim inherently suggests damages in the form of attorney fees expended while defending the action." *Goforth v. Le-Air Molded Plastics, Inc.*, Cuyahoga App. No. 83585, 2004-Ohio-3482. Ruggerio set forth evidence that he paid the attorney who represented him in municipal court $3,582.70 in attorney fees. He also testified at deposition that he saw a psychologist, but was unable to state clearly if those

visits were directly linked to his being sued by Kavlich. He also did not submit any bills or further testimony regarding his psychologist visits into evidence.

**{¶ 32}** Thus, we focus our analysis on the second element of an abuse of process claim: Ruggerio must show the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed. In other words, once Kavlich knew that Medicare had paid Ruggerio's medical bills, was the continuation of the lawsuit to its conclusion a perversion of the legal process? Again, to show the process was perverted to accomplish an ulterior purpose, a plaintiff must show both an act committed during the process that was not proper in the normal context of the proceeding and the defendant's ulterior motive. *Beamer v. NETCO Inc.*, 411 F. Supp.2d 882 (S.D. Ohio 2005); quoting *Wolfe v. Little* (Apr. 27, 2001), Montgomery App. No. 18718.

**{¶ 33}** It is the second prong that we find Ruggerio was unable to meet, that is whether the legal proceeding in municipal court was perverted by Kavlich in order to achieve "an ulterior motive for which it was not designed."

**{¶ 34}** Upon review, we disagree with the findings of the trial court. The testimony showed that upon learning of the erroneous payments by Medicare, which occurred during the litigation in municipal court, Kavlich refunded Medicare's money. It was not clear that Kavlich had no right to recover the money he thought Ruggerio owed until the municipal court ruled otherwise. The court only made that decision after a trial. We find no evidence of an ulterior purpose by Kavlich, nor do we find that Kavlich was somehow required to dismiss

his lawsuit against Ruggerio once he found out that Medicare paid his bill. Kavlich was simply seeing the litigation through to its conclusion.

**{¶ 35}** Our conclusion is supported by the evidence presented during the plaintiff's case in chief, most notably the letter Kavlich sent to Medicare after the magistrate ruled in favor of Ruggerio. The letter dated July 9, 2002, showed that the doctor was still attempting to sort out his billing issues with Medicare. The communications between Kavlich and Medicare evidence an ongoing confusion by the doctor as to how he should properly bill Medicare clients who are also personal injury clients.

**{¶ 36}** Moreover, Ruggerio testified at both of his depositions that he did not think that Kavlich had an ulterior motive. Specifically, he was asked at the April 2008 deposition:

> "Q: Are you aware of any ulterior motive for Dr. Kavlich bringing a collection action against you back in the Berea Municipal Court several years ago?
>
> "* * *
>
> "A: No.
>
> "Q: What evidence, if any, beyond your own speculation, do you have that Dr. Kavlich had any kind of ulterior motive other than collecting the money that he perceived that you owed him? * * * You have no evidence right? Is that right?
>
> "A: Right."

**{¶ 37}** A few months later, during his second deposition, Ruggerio was asked:

"Q: However, you are unaware of any ulterior motive for Dr. Kavlich bringing a collection action against you back in [2001], correct?

"A: Yes.

"Q: You are unaware of any secret or hidden purpose he had in filing suit. You just know that he thought you owed him money and you thought [you] didn't owe [him] money, correct?

"A: Correct."

**{¶ 38}** Although an ulterior motive may be inferred by circumstantial evidence, we do not find that the evidence set forth by the plaintiff shows that Kavlich possessed any ulterior motive in filing or pursuing his lawsuit against Ruggerio.

**{¶ 39}** We know of no law, nor does Ruggerio cite to any authority, that mandates that a party bringing a civil action dismiss its own suit part way through litigation if it discovers it has a losing case. Nor is there any evidence that Ruggerio filed a dispositive motion in the municipal court asking that the case be dismissed based on his Medicare argument. In fact, Ruggerio's attorney's bill does not show that any dispositive motions were filed on his behalf. Even if he filed a dispositive motion, it must have been denied, as the court proceeded to trial. Therefore, it was only after the trial court reasoned, rightly or wrongly, that Kavlich could not pursue Ruggerio for payment of his medical bills that Kavlich knew that he was "in the wrong." We find that this is not a situation in which Kavlich perverted or abused the legal process to attempt to make the court do something which the court could not do.

**{¶ 40}** Even if we were to assume that Kavlich acted spitefully in continuing the litigation because he [Kavlich] felt like he had been "kicked in the face," as argued by the appellee, an abuse of process claim still fails because "there is no liability for abuse of process where defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Yaklevich* at 298. And in this case, we do not find that Kavlich's intentions were "bad" or anything more than persistent attempts to recover what he thought was an unpaid balance on a medical bill.

**{¶ 41}** Simply put, the undisputed facts in this case show the doctor acted properly in filing the action in municipal court to protect his interests. Therefore, since Ruggerio failed in proving the second prong of his abuse-of-process claim, he is unable to overcome a motion for directed verdict.

**{¶ 42}** Accordingly, we determine that the trial court erred in overruling Kavlich's motion for a directed verdict.

**{¶ 43}** The first assignment of error is sustained. Based on the disposition of the first assignment of error, the remaining assignments of error are moot. See App.R. 12.

**{¶ 44}** Accordingly, judgment is reversed and the case is remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellants recover of appellee their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

---

LARRY A. JONES, JUDGE

MELODY J. STEWART, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR