[Cite as *Kozar v. Bio-Medical Applications of Ohio*, 2004-Ohio-4963.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

PETER M.KOZAR, et al.

Appellees

v

BIO-MEDICAL APPLICATIONS OF OHIO, INC., dba AKRON EAST KIDNEY CENTER

Appellee

and

OHIO EDISON COMPANY

Appellant

C.A. No. 21949

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2003-01-0551

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

{¶1} Appellant, Ohio Edison Company, appeals from the decision of the Summit County Common Pleas Court. We affirm in part, reverse in part, and remand for further consideration consistent with this opinion.

I.

{¶2} The facts of this case are not in dispute. On January 28, 2002, Nicholas Kozar, age 84, died during kidney dialysis treatment at Bio-Medical Applications of Ohio. Coincidentally, an Ohio Edison power line failed, causing temporary, accidental and unexpected power outages at the center. The county medical examiner investigated a possible link between the power outage and Mr. Kozar's death, and reported that Mr. Kozar died of natural causes associated with chronic heart disease, with no causation attributed to the concurrent power outage.

{¶3} Almost a year later, Peter M. Kozar contacted attorney Mark C. Cavanaugh, seeking to file a lawsuit and relating that an unnamed emergency room physician had alleged that the power outage caused his father's death. Relying on this information and without conducting any legal research, Cavanaugh rushed to file the complaint on January 27, 2003, naming Bio-Medical Applications of Ohio and Ohio Edison as joint defendants and claiming negligence.

{¶4} On March 13, 2003, Ohio Edison's attorney called Cavanaugh to urge the dismissal of Ohio Edison, instructing him that his claim was baseless under prevailing law and informing him of the medical examiner's conclusion. The call was formalized in a follow-up letter, which detailed the deficiencies of Cavanaugh's claim and warned that a motion for sanctions would be forthcoming unless the suit was dismissed. In his defense, Cavanaugh has insisted that he

would not dismiss an action merely on such threats, but also admitted that he did not investigate whether Ohio Edison's assertions had merit.

{¶5} Ohio Edison moved to dismiss the action on the basis that, under established Ohio law, Ohio Edison owed no duty to Mr. Kozar, a non-customer. At a subsequent deposition, Cavanaugh testified that it was at this point that he did his first legal research. Yet, even with his own research, Ohio Edison's legally compelling motion and the prior warning of insufficiency, Cavanaugh refused to concede. Rather, he opposed the motion by arguing that utilities do owe a duty to non-customers and citing non-Ohio case law. Ohio Edison replied that even these cases were inapplicable, as they addressed intentional misconduct, not negligence. On June 20, 2003, the trial court granted Ohio Edison's motion.

{¶6} As promised, Ohio Edison moved for attorney fees, under both Civ.R. 11 and R.C. 2323.51, alleging a frivolous claim. The trial court conducted a hearing, during which Ohio Edison entered evidence, without objection, of $12,683.15 in attorney fees resulting directly from the claim. The trial court denied the sanctions on January 6, 2004, but expressly ruled on only Civ.R. 11. The order concluded that it was a final appealable order with no just cause for delay, and it is from this order that Ohio Edison appeals.

{¶7} Ohio Edison timely appealed, asserting two assignments of error for review. We reverse the order of the assignments of error to facilitate review.

II.

{¶8} As a prelude to this analysis, we begin by noting that this Court has previously decided a case on point. See *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286. In *Ceol*, counsel for defendant Zion Industries wrote a letter early in the litigation articulating the insufficiency of plaintiff's evidence and the preclusive effect of the established law, and also offering to forgo a motion for sanctions if Mr. Ceol and his attorney would heed their warnings and dismiss the case. Id. at 288. Mr. Ceol resisted, and upon obtaining summary judgment, Zion Industries moved for sanctions under both Civ.R. 11 and R.C. 2323.51. Id. The trial court denied the sanctions. Id. at 289.

{¶9} On review, this Court affirmed the denial under Civ.R. 11's subjective bad-faith standard, on the basis that the trial court's refusal to assign subjective bad faith to Mr. Ceol did not rise to the level of an abuse of discretion. Id. at 290-91. However, this Court reversed the decision under R.C. 2323.51's objective measure of frivolous conduct, finding that the trial court erred as a matter of law by erroneously concluding that a misinterpretation of existing law was enough to meet the objective measure of good faith. Id. at 292-93. The case was remanded for an award of attorney fees under R.C. 2323.51. Id. at 293. The present case proceeds along similar lines, and stare decisis guides the outcome.

A.

First Assignment of Error

"THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT PLAINTIFF'S COUNSEL COMPLIED WITH CIVIL RULE 11[.]"

{¶10} Ohio Edison challenges the trial court's finding that the evidence was insufficient to demonstrate Cavanaugh's subjective bad faith under Civ.R. 11. We disagree.

{¶11} The trial court denied Ohio Edison's frivolous conduct claim under Civ.R. 11, and thus denied attorney fees. Civ.R. 11 expressly requires that the frivolous conduct must be willful; mere negligence is insufficient. *Riston v. Butler* (2002), 149 Ohio App.3d 390, 2002-Ohio-2308, at ¶9. We review a decision on Civ.R. 11 for abuse of discretion. *City of Lorain v. Elbert* (Apr. 22, 1998), 9th Dist. No. 97CA006747.

{¶12} Regarding the factual inquiry, the trial court found that Cavanaugh relied on his client's story of an unnamed emergency room physician who claimed the power outage killed his father. An attorney's reasonable reliance on the client's representations does not constitute bad faith. See *Driskill v. Babai* (Mar. 26, 1997), 9th Dist. No. 17914. Regarding the legal inquiry, Cavanaugh's failure to research his claim, his unawareness of the law, and his collection of only inapplicable, out-of-state case law appears to rest in negligence rather than willfulness. The trial court could reasonably decide that the evidence was

insufficient to establish subjective bad faith. Therefore, we cannot conclude that the trial court abused its discretion in reaching its decision with respect to the Civ.R. 11 claim.

{¶13} Ohio Edison's first assignment of error is overruled.

B.

Second Assignment of Error

"THE TRIAL COURT ERRED IN FAILING TO CONSIDER OHIO EDISON'S MOTION FOR SANCTIONS UNDER THE PROVISION OF R.C. §2323.51[.]"

{¶14} Ohio Edison asserts that Civ.R. 11 and R.C. 2323.51 are independent bases for imposing sanctions, such that the trial court erred by considering only Civ.R. 11 in its denial. We agree.

{¶15} Attorney fees may be recoverable under three separate rationales: the court's inherent power, Civ.R. 11, or R.C. 2323.51. *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 232. The trial court denied Ohio Edison's motion under Civ.R. 11, but did not expressly address R.C. 2323.51.

{¶16} Under the statute, frivolous conduct includes that which "is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." R.C. 2323.51(A)(2)(a)(ii). As opposed to Civ.R. 11's subjective test, this is a decidedly objective measure. *Ceol*, 81 Ohio App.3d at 291. The test under R.C. 2323.51 is "whether no reasonable lawyer would have brought the action in light of the

existing law." *Riston*, 2002-Ohio-2308, at ¶30. We review R.C. 2323.51(A)(2)(a)(ii) de novo, as purely a matter of law, "peculiarly within the competence of an appellate court." *Elbert*, supra.

{¶17} As a matter of law, an attorney's ignorance of the law or failure to investigate the law is not deemed objectively reasonable. See *Ceol*, 81 Ohio App.3d at 293; *Riston*, 2002-Ohio-2308, at ¶26. The Ohio Supreme Court stated:

> "When a trial court has determined that reasonable inquiry by a party's counsel of record should reveal the inadequacy of a claim, a finding that the counsel of record has engaged in frivolous conduct is justified, as is an award, made within the statutory guidelines, to any party adversely affected by the frivolous conduct." *Ron Scheiderer & Assoc. v. City of London* (1998), 81 Ohio St.3d 94, 97-98.

Thus, accepting the trial court's description of Cavanaugh's conduct, we must consider its objective reasonableness as a matter of law.

{¶18} We agree with the trial court that even if the facts had been as Cavanaugh believed them, there was no basis for recovery against Ohio Edison; and furthermore, no urgency to file the claim without conducting investigation, because the statute of limitations was actually over a year from expiring.

{¶19} Importantly, Ohio law prohibited his claim - no Ohio cases accept a negligence claim by a non-customer against a utility for a power failure. But, Cavanaugh did not know this, as he concedes that prior to Ohio Edison's motion to dismiss he did no legal research. In addition, he misapplied the medical malpractice statute of limitations to Ohio Edison, while also proving unaware of the medical malpractice 180-day letter when discussing his claim against Bio-

Medical Applications of Ohio. Finally, even after Ohio Edison had made plain the futility of his case, Cavanaugh did not heed these warnings or even investigate Ohio Edison's arguments. Rather, he contested Ohio Edison's motion to dismiss by urging inapplicable case law from New York State without offering an argument that Ohio case law warranted extension, modification or reversal. The trial court dismissed his claim.

{¶20} Considering the course of this litigation and the trial court's findings, it is apparent that a reasonable inquiry would have revealed the legal impossibility of the claim. Thus, Cavanaugh's conduct appears far below the standard expected of a reasonable attorney. We conclude that ignorance of the law, combined with the failure to conduct any legal research before proceeding with and persisting in such a claim, constitutes frivolous conduct as a matter of law. Therefore, attorney fees are warranted pursuant to R.C. 2323.51(A)(2)(a)(ii).

{¶21} As a final matter, we note that an award is appropriate when the injured party demonstrates that it incurred the claimed attorney fees as a direct result of the frivolous conduct. *Soler v. Evans, St. Clair & Kelsey*, 152 Ohio App.3d 781, 2003-Ohio-2582, at ¶11. At the hearing, Ohio Edison submitted documentation establishing that they incurred $12,683.15 in fees due to Cavanaugh's frivolous conduct. The trial court specifically asked Cavanaugh's counsel for any objection. When Cavanaugh's counsel declined to object, the trial court admitted this evidence of $12,683.15 in fees.

{¶22} Ohio Edison's second assignment of error is sustained.

III.

{¶23} Ohio Edison's first assignment of error is overruled. Ohio Edison's second assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed in part, and otherwise affirmed as it relates to Civ.R. 11. Pursuant to App.R. 12(B), we enter judgment awarding attorney fees to Ohio Edison in the amount of $12,683.15.

Judgment accordingly.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

Exceptions.

WILLIAM G. BATCHELDER
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, P. J.
CONCURS IN PART, SAYING:

{¶24} Although I concur with the majority's analysis, I would remand the matter to the trial court for an award of attorney fees.

APPEARANCES:

STEPHEN J. PRUNESKI and ROBERT F. LINTON, Attorneys at Law, 1500 One Cascade Plaza, Akron, Ohio 44308, for Appellant, Ohio Edison Company.

MARK CAVANAUGH and JULIE A. CHAFER, Attorneys at Law, 1745 W. Market Street, Akron, Ohio 44313-7001, for Appellee, Peter M. Kozar.