[Cite as *State ex rel. Ahmed v. Costine*, 2004-Ohio-562.]

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

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| STATE EX REL. NAWAZ AHMED, | ) | |
| RELATOR, | ) | CASE NO. 02-BE-55 |
| VS. | ) | OPINION |
| | ) | and |
| HONORABLE JOHN MARK COSTINE, | ) | JOURNAL ENTRY |
| RESPONDENT. | ) | |

CHARACTER OF PROCEEDINGS: Remand from Ohio Supreme Court

JUDGMENT: Motions Denied

APPEARANCES:

For Petitioner:

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For Respondent:

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JUDGES:

Hon. Gene Donofrio

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: February 4, 2004

PER CURIAM.

**{¶1}** This matter is again before this Court on a remand issued by the Ohio Supreme Court on September 24, 2003. Pursuant to the decision announced in *State ex rel. Ahmed v. Costine* (2003), 100 Ohio St.3d 36 we now proceed to a consideration of Relator's post-dismissal motions for contempt and sanctions. A brief history of the filings in this original action is instructive.

**{¶2}** On September 30, 2002, Relator Nawaz Ahmed filed a complaint with this court seeking a writ of prohibition. Respondent Judge John Mark Costine subsequently filed a motion to dismiss on October 22, 2002. Relator next filed an amended complaint. The amended complaint was typographically dated October 20, 2002, but was filed and time-stamped on October 29, 2002. On October 29, 2002, Relator also filed what he captioned "(a) MOTION TO DEBAR PROSECUTOR'S OFFICE FROM ALL REPRESENTATION" and "(b) NOTICE OF DISMISSAL CIVIL RULE 41(A) (sic)." Respondent then filed a motion to dismiss the amended complaint on October 31,2002.

**{¶3}** This court granted Respondent's motions to dismiss the complaint and the amended complaint. See *State ex rel. Ahmed v. Costine*, 7th Dist. No. 02-BE-55, 2002-Ohio-7174. Relator appealed as of right, whereupon the Supreme Court held that Relator's voluntary dismissal via Civ.R. 41(A)(1)(a) relieved this court of any further jurisdiction over the case, thus rendering its consideration of Respondent's motions to dismiss improper. See *State ex rel. Ahmed v. Costine* (2003), 99 Ohio St.3d 212.

**{¶4}** Regardless of the voluntary dismissal and the motions to dismiss, Relator continued to file motions with this court. For instance, on January 6, 2003 Relator filed a document titled "MOTION TO TAKE JUDICIAL NOTICE OR MOTION FOR VOLUNTARY RECUSAL OR PROVIDE TESTIMONY IN A HEARING AND OPEN COURT OR PROVIDE TESTIMONY BY DEPOSITION." In the document, Relator accuses this court of being "partial and predisposed against Relator, may be (sic) due to his race, religion, origin, status as pro se and imprisonment, or otherwise as incapable of adjudicating issues and facts with serious and impartial frame of mind," and moves the judges of this

court to recuse themselves from this case. Relator declares that the judges are now witnesses to the case. In the same document, Relator also names "Mr. Irfan Ahmed of Consulate General of Pakistan, NY and Mr. Imran Ali of Pakistan Embassy in DC his representatives for taking depositions, or any other person they select, or Relator." In later documents, Relator attempted to join additional parties, add and amend claims, serve interrogatories, and serve notices of deposition. Interspersed in these filings by Relator were several motions for Civ.R. 11 sanctions and motions for findings of criminal contempt.

**{¶5}** On February 19, 2003, this court journalized the following:

**{¶6}** "Pro-se Relator continues to file motions in this closed action in prohibition. The record discloses that the complaint was dismissed by this court on December 19, 2002 and a motion to reconsider was dismissed as a nullity on January 28, 2003. This Court has no further jurisdiction to act on the motions filed since the order of dismissal. Accordingly, the current filing and any subsequent filings not permitted by the rules of civil procedure will not be ruled upon by this Court."

**{¶7}** Relator again appealed as of right to the Ohio Supreme Court. Thereupon, the Supreme Court ruled that, "Trial courts may consider collateral issues like criminal contempt and Civ.R. 11 sanctions despite a dismissal. See *State ex rel. Hummel v. Sadler* (2002), 96 Ohio St.3d 84, ¶ 23, and cases cited therein. Therefore, the court of appeals erred in holding otherwise." *State ex rel. Ahmed v. Costine* (2003), 100 Ohio St.3d 36, at ¶5. Thus the Supreme Court remanded the cause to this court for further proceedings consistent with that opinion.

**{¶8}** Indeed, *Hummel* does state that a court that otherwise lacks jurisdiction over a matter that has been dismissed retains jurisdiction over issues collateral to the merits of the action. *Hummel*, 96 Ohio St.3d 84, ¶ 23. However, *Hummel* is factually distinguishable to the case at hand. In *Hummel*, a motion for sanctions was already pending at the time that the voluntary dismissal was filed. Id. at ¶ 6-7. Additionally, the motion in *Hummel* was for sanctions under Civ.R. 45, or a motion for reimbursement. Id. at p 8. Furthermore, the motion for Civ.R. 45 sanctions was filed by a nonparty who was subpoenaed by the appellant. Id. at ¶ 24.

**{¶9}** Despite the factual differences between *Hummel* and the case sub judice, this court recognizes that the rule authorizes courts to decide collateral matters after a case has been dismissed, including motions for Civ.R. 11 sanctions and criminal contempt. See *State ex rel. Corn v. Russo* (2000), 90 Ohio St.3d 551, 556. However, this court must also recognize the intent of permitting motions for sanctions to survive voluntary dismissal. In *State ex rel. J. Richard Gaier Co. v. Kessler*, the Second District explained that without a rule retaining jurisdiction,

**{¶10}** "[A] party could force a defendant to expend significant time and money to defend an arguably frivolous action and then dismiss that action just prior to trial with little if any consequence. In that circumstance, the goal of Civ.R. 11 and its statutory counterpart, R.C. 2323.51, which is to prevent parties from using the judicial process to harass one another, would be significantly less achievable." Id. at 785.

**{¶11}** It is readily apparent that the threat of injustice the above rule is intended to thwart is not a danger in the action before this court today. In the instant case, Relator filed a complaint and then voluntarily dismissed the complaint under Civ.R. 40(a)(1)(a).

Thus, the policy considerations contained in *Hummel* and those cases in line with it will not be served by this court's consideration of the merits of Relator's motions for sanctions. It is evident that while the general principle of law allowing a court to consider postdismissal motions is based on solid ground to prevent abuses of the judicial system, it certainly was not intended to apply in situations such as this case, to potentially reward a party who files a lawsuit and then voluntarily dismisses the suit and still seeks to impose sanctions when he has not proven the merits of his claim. Nonetheless, this court shall act in accordance with the instructions upon remand and will thus rule on the merits of certain motions filed after the October 29 voluntary dismissal.

**{¶12}** The first of these motions was filed on January 7, 2003 and was entitled: "MOTION TO TAKE JUDICIAL NOTICE AND HOLD DEPUTY CLERK JAYME STRAUS IN CONTEMPT FOR SIGNING FALSE AFFIDAVIT AND THE RESPONDENT AND HIS ATTORNEY FOR FILING FALSE AFFIDAVIT (sic)." In order to address the motion, it is necessary to review the facts of the underlying complaint in this case. Relator pursued a writ of prohibition against Respondent, the presiding judge of a case that Relator was appealing with this court, "commanding * * * that he should prohibit from subverting the appeal rights of appellant-Relator by refusing intentionally * * * to provide full, complete record of case 99-GD-49 to appellant and transfer the same to court of appeals." Respondents countered this complaint with a motion to dismiss. In support of that motion to dismiss, Respondents included an affidavit from Jayme Strauss, the Chief Deputy Clerk of the Belmont County Probate Court. In her affidavit, Strauss swore that she filed the entire record from the Probate Court for case number 00-GD-49. It is for this affidavit that Relator requests this court to hold Strauss in contempt.

**{¶13}** App.R. 9(A) instructs what a record on appeal should be composed of, stating that "[t]he original papers and exhibits hereto *filed* in the trial court * * * shall constitute the record on appeal in all cases." In the list that he compiled, Relator contends that only one of these documents was file-stamped. As the other documents were not file-stamped, it necessarily follows that they were not filed with the court as part of the record of this case. Therefore, the issue of whether the documents that are not a part of the official record were in fact transmitted to this Court is inconsequential.

**{¶14}** As to the one file-stamped document, there is no evidence that the particular document was transmitted, but rather only Relator's bare assertions. Relator made this same claim of an incomplete record repeatedly in the underlying case, mainly requesting extensions to file his brief in case number 01-BA-13 due to the allegedly incomplete record. In an August 27, 2002 journal entry, this court commented that Relator "alleges, but fails to demonstrate, how a full and complete record has not been afforded to him for his use in this appeal. An order of this Court issued August 1, 2002 directs the Clerk to provide appellant a complete record." On September 30, 2002 the Court further stated that "[t]he Clerk of the trial court has submitted to the clerk of this Court the entire record on appeal. * * * Unless appellant can demonstrate that the clerk neglected to include a specific document which has been filed of record, no order to supplement will be issued by this Court."

**{¶15}** Relator failed to make such a demonstration at a time when the record for the case was before this court. While the file-stamped document is not evidenced in the docket for the underlying case, Relator cannot prove that this was not simply a clerical error. Indeed, while considering case number 01-BA-13 for which the record on appeal

was sought by this action, this court had before it Relator's accusations that this particular document was intentionally omitted, the docket and the physical record. If the document was in fact missing from the record, this Court would have so noted and requested it of the clerk. However, as was stated above, this Court found no evidence that the complete record was not transmitted. Being as this very issue was disposed of previously in case number 01-BA-13, the motion to find Strauss in contempt is denied for lack of proof that the affidavit is false.

**{¶16}** On January 27, 2003 Relator filed another motion, this one entitled "MOTION TO CONTINUE THE CASE FOR SANCTIONS/MALICIOUS PROSECUTION FOR SIXTY DAYS TO OBTAIN AFFIDAVITS, INTERROGATORIES AND ADMISSION FROM WITNESSES TO AFFORD TIME TO RELATOR TO DEVELOP AND TRY HIS CASE ON MERITS AND WITH EDIDENCE (sic) OBTAINABLE AND REQUIRE TIME TO GET (sic)." In a succinct, one page motion, Relator asked for a continuance "for trial on the claims of Malicious prosecution, Malicious mischief, and Violation of CIVIL RULE 11 and 56(G)…" (emphasis in original). However, Relator failed to indicate the actions he finds to be in conformity with these accusations. Seeing as such, this court must deny this motion for lack of specificity upon which the motion could be granted.

**{¶17}** Finally, on October 8, 2003, Relator filed a motion captioned, "(a) RENEWED MOTION FOR SANCTIONS AND CRIMINAL CONTEMPT AGAINST PROBATE JUDGE COSTINE, CHIEF DEPUTY CLERK JAYME STRAUS, PROSECUTOR ROBERT QUIRK. AND MOTION TO RECEIVE EVIDENCE IN SUPPORT. (b) COMPLAINT FOR MALICIOUS PROSECUTION (sic)." In this fifteen

(15) page motion, Relator provides a more complete explanation of his mistaken rationale as to why Respondents, and others, should be sanctioned.

**{¶18}** While still maintaining his claims of false affidavits, Relator now claims that Respondent's post-dismissal filings were frivolous and malicious. This argument is dubious at best, as Respondent's filings were all in response to filings submitted by Relator. Even setting aside Relator's simultaneous filings of a voluntary dismissal of his complaint and a motion to amend the very same complaint, Relator has filed at least thirteen (13) motions with this court since the December 20, 2002, dismissal of the complaint. Relator also served interrogatories and requests for admission on Respondent and other persons. In light of this, an accusation of frivolous conduct against Respondent, who filed three (3) motions in that same time period, is irrational.

**{¶19}** Furthermore, Relator's claims for willful violations of Civ.R. 11 are unfounded. While Relator's arguments are difficult to follow, he seems to be claiming that because the motion to dismiss made by Respondent and granted by this court was later overturned on appeal by the Supreme Court, Respondent should be sanctioned. Civ.R. 11 provides for a court to impose sanctions if a pleading, motion, or other document is submitted to the court without the "party's knowledge, information, and belief [that] there is good ground to support it." Civ.R. 11.

**{¶20}** Simply because the position espoused by a party is ultimately determined to be incorrect does not mean that the party lacked a good faith basis and ground to support it. Such a rule would subject every party whose claim or defense failed open to further claims of Civ.R. 11 violations. As Relator provides no legal authority for the proposition

that Respondents willfully violated Civ.R. 11 by pursuing an unsuccessful defense, Relator's requests for Civ.R. 11 sanctions are meritless.

**{¶21}** Moreover, Respondent's claims were not entirely incorrect. As stated by the Supreme Court, this court retains post-dismissal jurisdiction for "collateral issues like criminal contempt and Civ.R. 11 sanctions." *State ex rel. Ahmed*, 100 Ohio St.3d 36 at paragraph 5. Thus, this court does not retain jurisdiction to act on any other of Relator's numerous post-dismissal filings. Therefore, Respondent's argument that the court lacked jurisdiction was correct in regard to the filings not considered herein.

**{¶22}** Relator's claims of malicious prosecution are also without any merit. Initially, it should be noted that Relator misstates the elements necessary to prove malicious prosecution, citing a case from North Dakota. In Ohio, it has been held that "in order to state a cause of action for malicious prosecution in Ohio, four essential elements must be alleged by the plaintiff: (1) malicious institution of prior proceedings against the plaintiff by defendant, * * * (2) lack of probable cause for the filing of the prior lawsuit, * * * (3) termination of the prior proceedings in plaintiff's favor, * * * and (4) seizure of plaintiff's person or property during the course of the prior proceedings * * *." *Robb v. Chargrin Lagoons Yacht Club, Inc.* (1995), 75 Ohio St.3d 264, 269, quoting *Crawford v. Euclid Natl. Bank* (1985), 19 Ohio St.3d 135, 139.

**{¶23}** Even if Relator had properly recognized the proper elements for a claim of malicious prosecution his claim would still fail, as each element is lacking in the present situation. There is no evidence of Respondent maliciously instituting any other proceedings against Relator, as required by element one. As there are no prior lawsuits filed by Respondent against Relator, there can be no lack of probable cause for filing

previous lawsuits, thus negating the presence of the second element as well. Likewise, there is nothing in the record to indicate the termination of prior proceedings in favor of Respondent. Finally, as there is no mention of prior proceedings, Relator makes no mention of his person or his property being seized during the course of any prior proceedings. In light of the complete lack of the required factors, Relator has no grounds to claim malicious prosecution in this action he himself instituted.

**{¶24}** For the above reasons, Relator's motions for sanctions for criminal contempt, malicious prosecution, and Civ.R. 11 violations are denied.

**{¶25}** Final order. Clerk to serve notice as provided by the civil rules.

Donofrio, Vukovich and Waite, JJ., concur.