[Cite as *Alsfelder v. Alkire*, 2019-Ohio-3777.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ROBERT ALSFELDER, :

Plaintiff-Appellant, :

No. 108197

v. :

RICHARD C. ALKIRE, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 19, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-15-846900

Appearances:

Robert F. Alsfelder, *pro se*.

Alkire & Nieding L.L.C., and Richard C. Alkire, *for appellees*.

PATRICIA ANN BLACKMON, J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. Plaintiff-appellant Robert Alsfelder ("Alsfelder"), appeals from the trial court's decision awarding defendant-appellee Richard C.

Alkire ("Alkire") frivolous conduct sanctions under R.C. 2323.51. Alsfelder assigns the following error for our review:

> There is not sufficient evidence in the record to support granting of appellee's motion for summary judgment.

{¶ 2} Having reviewed the record and the controlling case law, we affirm.

{¶ 3} The record indicates that Alkire represented Alsfelder during disciplinary proceedings before the Supreme Court of Ohio in *Cincinnati Bar Assn. v. Alsfelder*, 138 Ohio St.3d 333, 2014-Ohio-870, 6 N.E.3d 1162. Alkire subsequently sued Alsfelder for unpaid legal fees in Cuyahoga C.P. No. CV-13-818648. Alsfelder filed an answer and counterclaim for legal malpractice then filed a separate complaint for legal malpractice and respondeat superior liability against Alkire and Alkire Co., L.P.A. in Cuyahoga C.P. No. CV-15-846900. The two cases were later consolidated.

{¶ 4} In 2015, Alkire moved for summary judgment. The trial court granted Alkire's motion, concluding that Alsfelder's claim of legal malpractice "is neither within the ordinary knowledge of a layman nor so obvious as to constitute negligence as a matter of law," and that Alsfelder did not "produce an expert in support of his legal malpractice claim" within the court's deadline for doing so. Alkire's claim for unpaid legal fees proceeded to trial several months later. Alsfelder failed to appear at trial, and the trial court subsequently awarded Alkire and his firm judgment in the amount of $17,445.12, plus interest and costs. Alsfelder appealed,

and this court affirmed. *See Richard C. Alkire Co., L.P.A. v. Alsfelder*, 8th Dist. Cuyahoga No. 104153, 2017-Ohio-1547.

{¶ 5} Alkire moved for frivolous conduct sanctions under R.C. 2323.51, seeking to recoup his malpractice insurance deductible of $10,000. Alkire presented testimony from attorney Dan Morell who testified regarding the collection case. In addition, Alkire testified that as a result of Alsfelder's malpractice action, he incurred $10,000 in damages, the amount of his insurance deductible, and that he paid his insurance company this amount in five installments. Copies of Alkire's checks for the payments were admitted into evidence. Alsfelder did not cross-examine Alkire's witnesses and did not present testimony or evidence. In April 2019, the trial court determined that Alsfelder had engaged in frivolous conduct and awarded Alkire $10,000.

Frivolous Conduct

{¶ 6} Within his sole assigned error, Alsfelder asserts that the record does not support the $10,000 sanction for frivolous conduct under R.C. 2323.51 because Alkire's checks for the payment of his insurance deductible were not properly admitted into evidence.

{¶ 7} R.C. 2323.51(B)(1) provides in relevant part,

> [A]t any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal.

{¶ 8} A trial court has sound discretion to determine whether to award sanctions under R.C. 2323.51, and its decision will not be reversed absent an abuse of discretion. *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶ 10-11. Moreover,

> [a] motion for sanctions brought under R.C. 2323.51 requires a three-step analysis by the trial court: (1) whether the party engaged in frivolous conduct, (2) if the conduct was frivolous, whether any party was adversely affected by it, and (3) if an award is to be made, the amount of the award.

Carbone v. Nueva Constr. Group, L.L.C., 2017-Ohio-382, 83 N.E.3d 375, ¶ 23 (8th Dist.), quoting *Ferron v. Video Professor, Inc.*, 5th Dist. Delaware No. 08-CAE-09-0055, 2009-Ohio-3133, ¶ 44.

{¶ 9} As a preliminary issue, we note that "frivolous conduct" under R.C. 2323.51 includes in relevant part:

> (a) Conduct of * * * [a] party to a civil action * * * that satisfies any of the following:
>
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action * * * or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

> (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶ 10} The fact that a legal claim or defense is unsuccessful does not, in and of itself, warrant sanctions. *Altercare of Mayfield Village., Inc. v. Berner*, 2017-Ohio-958, 86 N.E.3d 649, ¶ 47 (8th Dist.), citing *Halliwell v. Bruner*, 8th Dist. Cuyahoga Nos. 76933 and 77487, 2000 Ohio App. LEXIS 5896 (Dec. 14, 2000) and *Miller v. Miller*, 5th Dist. Holmes No. 11CA020, 2012-Ohio-2905, ¶ 18. In determining whether a claim is frivolous, the test is whether, in light of existing law, no reasonable lawyer would have filed it. *The James Lumber Co. v. Nottrodt*, 8th Dist. Cuyahoga No. 97288, 2012-Ohio-1746, ¶ 25, citing *Orbit Electronics, Inc. v. Helm Instrument Co. Inc.*, 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91, ¶ 47 (8th Dist.).

{¶ 11} Here, the record indicates that Alsfelder could not articulate the basis of his claim for malpractice, and he did not provide an expert report within the deadline for doing so. Further, after it became apparent that Alsfelder's claim lacked evidentiary support, he refused to voluntarily withdraw it. The record also contains evidence that Alsfelder told Morrell that Alkire's firm should drop its collection claim because it "would spend more money defending his malpractice claim than [it] would ever get out of the [collection] case." Therefore, the evidence of record clearly indicates that Alsfelder's malpractice claim lacked a good-faith argument, was not warranted by the evidence, and lacked requisite evidentiary support after a reasonable opportunity for further investigation and discovery.

{¶ 12} Turning to the issue of whether the record supports the $10,000 sanction imposed in this matter (i.e. whether Alkire was adversely affected by the conduct and the amount of the award), we note that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978).

{¶ 13} Here, Alkire testified that he paid the $10,000 retainer by issuing checks to his insurer's representative in installments in the amounts of $1,935.00, $2,730.50, $4,020.50, $1,182.50, and $131.50. Copies of the front and back of each of the checks were submitted to the court, and the checks are also included within our record on appeal. These documents clearly show that each installment was remitted to the insurer's representative, endorsed for deposit by the representative, and deposited into the representative's account.

{¶ 14} Alsfelder insists that the installment checks were "[n]ever entered into evidence as an exhibit," in conformance with the requirements set forth in *Lewis v. Tackett*, 12th Dist. Clinton No. CA89-11-019, 1990 Ohio App. LEXIS 2743 (July 2, 1990). In *Lewis*, the court distinguished between "marking" an exhibit, and entering that exhibit into evidence by "present[ing or giving] each exhibit to the court" because the latter involves formally placing them into evidence. *Id.* at 3-4, citing *Burnside v. Cincinnati St. Ry. Co.*, 93 Ohio App. 456, 458, 113 N.E.2d 638 (1st Dist.1953). *Accord Buttner v. Renz*, 8th Dist. Cuyahoga No. 101479, 2014-Ohio-

4939, ¶ 12. Here, the record clearly shows that Alkire identified the copies of the checks as "Exhibit 1 collectively," and the court received it as "a Court's exhibit." The court clarified for Alsfelder that the exhibit "is in evidence." Therefore, the installment checks were properly authenticated, marked, and admitted into evidence.

{¶ 15} Accordingly, the judgment is supported by competence, credible evidence, and the assigned error lacks merit.

{¶ 16} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be issued out of this court 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.

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PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR