[Cite as *Law Office of Natalie F. Grubb v. Bolan*, 2011-Ohio-4302.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

THE LAW OFFICE OF NATALIE F. GRUBB,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2010-G-2965**
KELLY BOLAN,	:	
Defendant/Third Party Plaintiff,	:	
NATALIE F. GRUBB, ESQ.,	:	
Third Party Defendant-Appellant,	:	
(R. RUSSELL KUBYN,	:	
Appellee).	:	

Civil Appeal from the Chardon Municipal Court, Case No. 2007 CVF 520.

Judgment: Affirmed in part, reversed in part, and remanded.

Natalie F. Grubb, pro se, and *John S. Lobur*, Grubb & Associates, L.P.A., 437 West Lafayette Road, Suite 260-A, Medina, OH 44256 (For Plaintiff-Appellant and Third Party Defendant-Appellant).

R. Russell Kubyn, pro se, The Kubyn Law Firm, 8373 Mentor Avenue, Mentor, OH 44060 (Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, The Law Office of Natalie F. Grubb ("NFG") and Natalie F. Grubb, Esq. ("Attorney Grubb"), appeal from the judgment of the Chardon Municipal

Court denying their motion for sanctions, attorney fees, and costs filed against appellee, R. Russell Kubyn ("Attorney Kubyn"). For the reasons discussed below, the trial court's judgment is affirmed in part, reversed in part, and the matter is remanded for further proceedings.

{¶2} On May 3, 2007, NFG filed a complaint against Kelly Bolan for failure to pay legal services rendered. After retaining Attorney Kubyn, Ms. Bolan later filed an answer accompanied by a counterclaim, as well as a third-party complaint which named Attorney Grubb as third-party defendant. Ms. Bolan's counterclaim asserted that Attorney Grubb committed malpractice in representing her in a previous case. The counterclaim specifically alleged, in relevant part:

{¶3} "*** Bolan[] consulted with [appellants] with regard to a domestic relations action which occurred in Geauga County, Ohio.

{¶4} "***

{¶5} "As a result of the aforementioned, an attorney-client relationship was created between *** Bolan[] and [appellants] ***.

{¶6} "***

{¶7} "[Appellants'] breach of duty to exercise reasonable care, skill and diligence caused *** Bolan[] to sustain and incur monetary damages and losses.

{¶8} "The damages sustained by *** Bolan[] were proximately caused by [appellants'] breach of duty *** without any negligence contributing thereto on the part of *** Bolan.

{¶9} "[Appellants] breached their duty owed to *** Bolan[] by neglecting matters entrusted to them, rendering negligent legal advice and failing to properly resolve the legal matter they accepted.

{¶10} "[Appellants'] conduct in neglecting matters entrusted to them, rendering negligent legal advise [sic] and failing to investigate *** Bolans' [sic] legal matter that they accepted[] were [sic] a breach of [appellants'] duty to exercise reasonable care[,] skill[,] and diligence on *** Bolans' [sic] behalf.

{¶11} "As a result of [appellants'] breach of duty owed to *** Bolan, prior to, during and post litigation, *** [Bolan] sustained injury and loss." (Bolan's September 7, 2007 counterclaim/third-party complaint, ¶6-14).

{¶12} NFG and Attorney Grubb subsequently filed an answer to Ms. Bolan's counterclaim and a third-party counterclaim to Ms. Bolan's counterclaim/third-party complaint. In her third-party counterclaim, Attorney Grubb asserted a cause of action against Ms. Bolan alleging malicious prosecution. NFG and Attorney Grubb subsequently filed a motion for sanctions pursuant to Civ.R. 11 and R.C. 2323.51, alleging that Ms. Bolan's attorney, Attorney Kubyn, materially misled the trial court by signing the counterclaim/third-party complaint without grounds of support. Specifically, Attorney Grubb claimed the allegation of malpractice had no foundation because she had never met nor represented Ms. Bolan in any previous matter.

{¶13} On October 22, 2007, NFG and Attorney Grubb renewed their motion for attorney fees and costs against Attorney Kubyn pursuant to Civ.R. 11 and R.C. 2323.51. The matter was set for hearing on March 3, 2008. Prior to the hearing, Attorney Kubyn filed a motion to withdraw as Ms. Bolan's counsel, which the trial court

granted. On the day of the hearing, NFG and Attorney Grubb filed another motion for sanctions, attorney fees, and costs to "remind [the] Court that the withdrawal of an attorney has no effect on an action concerning his or her frivolous conduct in a matter." The hearing proceeded ex parte as Attorney Kubyn failed to appear.

{¶14} At the hearing, the trial court received evidence relating to appellants' frivolous conduct allegations as well as their malicious prosecution claim. Attorney Grubb testified to the services NFG provided in defending against Attorney Kubyn's alleged frivolous allegations. In total, appellants incurred $1,750 in fees and an untold amount in costs. Although not specifically relevant to the motion and third-party counterclaim, appellants also testified they incurred $10,246.78 in fees and costs in prosecuting the underlying action against Ms. Bolan.

{¶15} Subsequent to the hearing, on April 18, 2008, Ms. Bolan, via newly-retained counsel, filed a pleading captioned "Suggestion of Stay." The pleading sought to notify the trial court that a "bankruptcy stay" had been entered by the federal court pursuant to Section 362 of the United States Bankruptcy Code. The magistrate subsequently issued a ruling captioned "Magistrate's Order" in which he concluded "all proceedings in the within cause be and they are hereby stayed until further order of the court. The court shall show the within case closed and plaintiff shall be billed for any outstanding costs due to the Court." No action was taken by the trial court on the "Magistrate's Order."

{¶16} On April 23, 2008, the magistrate issued his ruling on appellants' motion and third-party counterclaim, concluding NFG and Attorney Grubb failed to prove that Attorney Kubyn violated Civ.R. 11 and also failed to show he engaged in frivolous

conduct. Appellants filed objections to the magistrate's decision. On April 27, 2008, the trial court adopted the magistrate's decision.

{¶17} On May 16, 2008, appellants filed their notice of appeal of the trial court's April 28, 2008 decision. Ms. Bolan later filed a motion to stay the appellate proceedings, asserting all further proceedings related to the underlying case should be stayed pending a final order from the United States Bankruptcy Court. On June 5, 2008, this court granted Ms. Bolan's motion. On January 28, 2009, Ms. Bolan was discharged in bankruptcy. As a result, the stay of proceedings was lifted by a judgment of this court entered on May 26, 2009. The record was subsequently transmitted and the parties filed their respective briefs.

{¶18} On March 19, 2010, in *The Law Office of Natalie F. Grubb v. Bolan*, 11th Dist. No. 2008-G-2840, 2010-Ohio-1156, this court issued a memorandum opinion dismissing appellants' appeal for lack of a final, appealable order. The trial court entered final judgment and the matter is now properly before this court. Appellants assert three assignments of error on appeal. As they are related, we shall consider them together. They respectively provide:

{¶19} "[1.] The trial court erred to the prejudice of appellants as the trial court failed to make a factual finding or legal conclusion that the appellee violated Civil Rule 11.

{¶20} "[2.] The trial court erred to the prejudice of appellants as the trial court failed to make a factual finding or legal conclusion that the appellee violated O.R.C. Section 2323.51.

{¶21} "[3.] The trial court erred to the prejudice of appellants as the trial court failed to make a factual finding or legal conclusion that the appellants presented a malicious prosecution counterclaim."

{¶22} Appellants' three assigned errors argue the trial court erred in ruling against them on the following issues: (1) appellants' Civ.R. 11 motion for damages; (2) appellants' motion for damages issuing from Attorney Kubyn's alleged frivolous conduct in violation of R.C. 2323.51; and (3) the trial court's dismissal of appellants' malicious prosecution claim.

{¶23} We initially point out that appellants' assigned errors challenge, in part, the trial court's purported failure to file findings of fact and conclusions of law. Because it bears on the scope of our review of appellants' arguments, we shall begin by analyzing this contention.

{¶24} Appellants are correct that neither the magistrate nor the trial court made formal findings of fact and conclusions of law. The record, however, does not indicate appellants specifically requested the magistrate or the trial court to make such findings. Civ.R. 52 provides, in relevant part: "When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise ***." The purpose of Civ.R. 52 is "*** to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment." *Werden v. Crawford* (1982), 70 Ohio St.2d 122, 124. Absent a request in accordance with Civ.R. 52, however, a trial court need not issue findings and conclusions. *Leikin Oldsmobile, Inc. v. Spofford Auto Sales*, 11th Dist. No. 2000-L-202,

2002-Ohio-2441, at ¶16. As the Fifth Appellate District explained in *Pettet v. Pettet* (1988), 55 Ohio App.3d 128, 130:

{¶25} "[W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence."

{¶26} In other words, because a lack of findings necessarily circumscribes appellate review, an appellate court will generally presume the trial court applied the law correctly and affirm if there is some basis in the record for doing so. *Bugg v. Fancher*, 4th Dist. No. 06CA12, 2007-Ohio-2019, at ¶10, citing *Allstate Financial Corp. v. Westfield Serv. Mgt. Co.* (1989), 62 Ohio App.3d 657, 662. Under these circumstances, therefore, we must review the record to determine whether there is "some evidence" to support the trial court's rulings.

{¶27} With this standard in mind, we shall first consider appellants' claim that the trial court erred in dismissing their malicious prosecution claim. In *Crawford v. Euclid Natl. Bank* (1985), 19 Ohio St.3d 135, 139, the Supreme Court of Ohio held that a plaintiff must satisfy four elements to establish a cause of action for malicious civil prosecution; to wit: "(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 ***." (Internal citations omitted.)

{¶28} Even assuming Attorney Grubb's third-party counterclaim contained sufficient facts to set forth a cause of action on elements (1) and (2), there are no facts that would support elements (3) and (4). With respect to the former, there was no indication, let alone an allegation, that Attorney Grubb and NSG had prevailed in a previous proceeding against Attorney Kubyn. And, furthermore, there is nothing in the record that would suggest Attorney Kubyn ever seized appellants' property or Attorney Grubb's person. Because the third-party counterclaim does not allege sufficient facts to set forth a claim for malicious prosecution, we hold the trial court properly dismissed the action as a matter of law.

{¶29} We shall next consider appellants' arguments relating to their motion for sanctions pursuant to Civ.R. 11 and R.C. 2323.51. Civ.R. 11 and R.C. 2323.51 both address the filing of frivolous claims. *State Farm Ins. Co. v. Peda*, 11th Dist. No. 2004-L-082, 2005-Ohio-3405, at ¶22. "'A frivolous claim is a claim that is not supported by facts in which the complainant has a good-faith belief, and which is not grounded in any legitimate theory of law or argument for future modification of the law.'" *Burrell v. Kassicieh* (1998), 128 Ohio App.3d 228, 230, quoting *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 12. As discussed above, because there was no request for findings of fact and conclusions of law in this case, we must affirm the trial court unless a review of the record fails to show "some evidence" to support the trial court's decision.

{¶30} Civ.R. 11 provides, in relevant part:

{¶31} "Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record. *** The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. ***"

{¶32} Civ.R. 11 measures sanctionable conduct using a subjective bad faith standard which requires all violations to be willful. *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 194, 2007-Ohio-4789. Bad faith "'is not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will. It partakes of the nature of fraud. *** It means "with actual intent to mislead or deceive another."'" *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, 151, quoting *Spiegel v. Beacon Participations, Inc.* (1937), 297 Mass. 398. Thus, "*** a court can impose sanctions only when the 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. 127 Ohio St.3d 202, 204, 2010-Ohio-5073; see, also, *Omerza v. Bryant & Stratton*, 11th Dist. No. 2006-L-147, 2007-Ohio-5216, at ¶18.

{¶33} While Attorney Kubyn's counterclaim may have been negligently drafted, we cannot conclude, as a matter of law, the allegations were plead in bad faith. Nothing indicates Attorney Kubyn engaged in conscious wrongdoing or filed the counterclaim for purposes of harassment or delay. We therefore hold the trial court properly denied appellants' Civ.R. 11 motion for sanctions.

{¶34} With respect to R.C. 2323.51, "*** a party 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 ***" if a trial court finds the movant was "adversely affected by frivolous conduct." R.C. 2323.51(B)(1). The statute further provides that "frivolous conduct" includes:

{¶35} "(a) Conduct of *** [a] party to a civil action *** or *** party's counsel of record that satisfies any of the following:

{¶36} "(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

{¶37} "(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.

{¶38} "(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.

{¶39} "(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." R.C. 2323.51(A)(2).

{¶40} Under the circumstances, the record demonstrates Attorney Grubb did not represent Ms. Bolan during her domestic proceeding and, in fact, never met Ms. Bolan. Ms. Bolan, however, via Attorney Kubyn, filed a counterclaim alleging Attorney Grubb committed malpractice in the course of representing Ms. Bolan. Such a filing is considered "conduct" under the statute. R.C. 2323.51(A)(1)(a). There is nothing in the record, however, indicating Attorney Kubyn attempted to refute or otherwise explain his reasons for leveling the allegations. Thus, a review of the record demonstrates that the counterclaim was based upon allegations and factual contentions that had no evidentiary support. See R.C. 2323.51(A)(2)(iii). Accordingly, the pleading was "conduct" that was frivolous as a matter of law. Notwithstanding our deferential standard of review, we therefore hold the trial court's decision to overrule appellants' motion for sanctions was erroneous. We therefore reverse the judgment of the trial court on this issue and remand the matter for a specific determination of the fees and costs to which appellants are entitled as a result of having to defend against the allegations.

{¶41} For the reasons discussed above, appellants' first and third assignments of error are overruled. The trial court's judgment, as it pertains to appellants' motion for sanctions pursuant to Civ.R. 11 and its dismissal of appellants' malicious prosecution claim, is therefore affirmed. Appellants' second assignment of error, however, is sustained. It is therefore the order of this court that the trial court's judgment entry

overruling appellants' motion alleging frivolous conduct pursuant to R.C. 2323.51 is reversed and the matter remanded for further proceedings in accordance with this opinion.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.