

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

JEANETTE J. SICKLE, et al.,	:	OPINION
Plaintiffs,	:	
WILLIAM E. GERSTENSLAGER,	:	CASE NO. 2015-T-0096
Appellant/Cross-Appellee,	:	
- vs -	:	
HOWARD A. YEAGER, JR., et al.,	:	
Defendants-Appellees/ Cross-Appellants.	:	
	:	

Appeal from the Trumbull County Court of Common Pleas, Probate Division, Case No. 2014 CVA 0009.

Judgment: Affirmed.

Thomas H. Terry, III, Thomas H. Terry, III Co., LPA, 619 Cahoon Road, Bay Village, OH 44140 (For Appellant/Cross-Appellee).

Randil J. Rudloff, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendants-Appellees/Cross-Appellants).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant/cross-appellee, William E. Gerstenslager (hereinafter “appellant”), appeals from the judgment of the Trumbull County Court of Common Pleas, Probate Division, awarding appellees/cross-appellants, Howard A. Yeager, Jr., et

al. (hereinafter “appellees”), attorney fees pursuant to Civ.R. 11.¹ At issue is whether the trial court abused its discretion in concluding appellant’s conduct was willful, intentional, and therefore sanctionable. For the reasons discussed in this opinion, we affirm the trial court’s judgment.

{¶2} On March 7, 2014, the will of Dolores M. Yeager (“the decedent”) was admitted to probate. On March 17, 2014, appellant filed a complaint to contest the decedent’s will on behalf of Jeanette Sickle and Barbara Yeager, the decedent’s disinherited children. On October 16, 2014, approximately four days before commencement of trial, appellant dismissed the case, pursuant to Civ.R. 41(A). The dismissal expressly stated appellant’s intention to re-file the complaint, pursuant to R.C. 2305.19, Ohio’s savings statute. A subsequent attempt to re-file the complaint was dismissed, however, pursuant to R.C. 2107.76, which requires a suit contesting a will to be filed within three months of the filing of a certificate of notice of the admission of the will to probate. Appellant moved the court for relief from the voluntary dismissal of their first complaint, pursuant to Civ.R. 60(B). The trial court denied the motion and appellant filed an appeal to this court on behalf of Sickle and Yeager.

{¶3} In *In re Estate of Yeager*, 11th Dist. Trumbull Nos. 2014-T-0107 and 2014-T-0108, 2015-Ohio-2458, this court held the trial court did not err in denying the disinherited children’s motion for relief from judgment without a hearing because, after filing their voluntary dismissal, appellants were barred by R.C. 2107.76 from filing a second complaint to contest the will, and, because their Civ.R. 41(A) dismissal was not a “judgment” upon which Civ.R. 60(B) relief might be premised; hence, the case was, for all practical purposes, closed upon the filing of the voluntary dismissal.

1. Although Howard A. Yeager, Jr., et al., filed a cross appeal, they filed no assignments of error.

{¶4} On July 6, 2015, appellees filed a combined R.C. 2323.51 and Civ.R. 11 motion for sanctions against appellant. The trial court held a hearing and, on August 4, 2015, the probate court granted appellees' motion as it related to Civ.R. 11, but denied the motion as it pertained to R.C. 2323.51. Appellant appeals the judgment of the trial court, assigning the following error:

{¶5} "The trial court abused its discretion and committed prejudicial error by holding that Gerstenslager committed a willful violation of Civ.R. 11 in the absence of any evidence to support that finding."

{¶6} The purpose of Civ.R. 11 is to curb abuses of the judicial system resulting from baseless filings that burden courts as well as parties with unnecessary expense and delay. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). Civ.R. 11 requires attorneys, or pro se litigants, to sign every motion, pleading, or other document filed in a civil action. The signature serves as a certificate that the attorney (or pro se litigant) filing the document: "(1) has read the document; (2) that everything contained in it is true to the best of the individual's knowledge; (3) that there is a good ground to support it; and (4) that its purpose was not to delay." *Fast Prop. Solutions v. Jurczenko*, 11th Dist. Lake Nos. 2012-L-015 and 2012-L-016, 2013-Ohio-60, ¶52, citing Civ.R. 11.

{¶7} In order to justify sanctions under Civ.R. 11, a court employs a subjective bad-faith standard. *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 127 Ohio St.3d 202, 2010-Ohio-5073, ¶8. The subjective bad-faith standard is met when a violation of Civ.R. 11 is deemed willful. *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789. An attorney's actual intent or belief necessarily informs the bad

faith/willfulness inquiry. *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, ¶9 (1st Dist.)

{¶8} In *Law Office of Natalie F. Grubb v. Bolan*, 11th Dist. No. 2010-G-2965, 2011-Ohio-4302, this court explained “bad faith” and “willfulness” in the context of Civ.R. 11.

{¶9} 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.’ 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.’ (Citations omitted.) *Bolan* at ¶32.

{¶10} In finding appellant’s conduct sanctionable, the trial court observed:

{¶11} After dismissing the underlying suit without ability to bring the suit again, the Court finds that the conduct of [appellant] in pursuing relief from judgment under Civ.R. 60(B) to set aside the entry of dismissal he himself filed was intentionally taken without any basis in law for so doing. The Court finds this conduct was willful and in bad faith. The Court finds this conduct was not mere misjudgment or a tactical error but rather intentionally made without basis in law. The Court further finds that the filings seeking Civ.R. 60(B) relief from judgment served to abuse the judicial system and resulted in needless expense and delay.

{¶12} Appellant contends there was no evidence in the record supporting appellees’ position that he acted willfully and in bad faith in filing the motion for relief from judgment. He points out that appellees, in their motion, asserted they were not required to establish appellant acted willfully; moreover, appellant notes that there was nothing produced at the hearing to substantiate the position that he engaged in any conscious wrongdoing. Instead, appellant underscores the only evidence advanced at the hearing demonstrated he inadvertently filed the voluntary dismissal and the Civ.R.

60(B) motion was his only recourse to have the matter heard on the merits. Under the circumstances, therefore, appellant asserts there was insufficient evidence to establish he subjectively acted in bad faith.

{¶13} Although appellant is correct that appellees' motion and the evidence adduced at the hearing fail to directly establish subjective bad faith, the trial judge, as well as the parties, acknowledged the ultimate analysis would be premised upon the record as a whole. The circumstances prompting the Civ.R. 11 motion for sanctions demonstrate the Civ.R. 60(B) motion had no basis in law or fact. The motion was an attempt to vacate a voluntary dismissal, not a final judgment. From this, one could reasonably conclude that the motion was filed for the self-serving purpose of somehow avoiding a potential allegation of professional negligence. The only way to avoid this outcome is to argue the untenable position that a voluntary dismissal is tantamount to a final judgment.

{¶14} Appellant's counsel indicated at the hearing on sanctions that appellant's action of filing the dismissal was inadvertent; this, however, does not imply appellant was unaware that a voluntary dismissal under Civ.R. 41(A)(1) is self-executing and not a final judgment entered by the trial court. The circumstances accordingly indicate that appellant knew the Civ.R. 60(B) motion was not grounded upon a reasonable legal theory and he intentionally filed the pleading with conscious disregard for its indefensibility.

{¶15} The motion was filed without a reasonable basis and, as a result, appellees were forced to expend their time and resources unnecessarily. The record

therefore supports the court's conclusion that appellant filed the motion willfully and in bad faith.

{¶16} Appellant's first assignment of error lacks merit.

{¶17} Appellant's second assignment of error provides:

{¶18} "The trial court abused its discretion and committed prejudicial error by holding that the motion for sanctions under Civ.R. 11 was timely filed."

{¶19} Under this assignment of error, appellant asserts the trial court's judgment should be reversed because appellees' motion for sanctions pursuant to Civ.R. 11 was not filed within a reasonable time.

{¶20} R.C. 2323.51 requires a motion for an award of sanctions to be filed not more than 30 days after the entry of final judgment. R.C. 2323.51(B). In contrast, Civ. R. 11 does not specifically limit the time in which a motion must be filed. *Fast Prop Solutions, supra*, at ¶67. This court, in *Jurczenko*, nevertheless indicated a Civ.R. 11 motion should be filed within a reasonable timeframe.

{¶21} Appellant points out the trial court did not address the timeliness issue as it related to the Crim.R. 11 motion. A review of appellant's brief in opposition to appellees' motion, however, demonstrates that appellant did not raise this issue. Appellant only argued the R.C. 2323.51 motion should be denied because it was filed well beyond the 30-day timeframe set forth in the statute. A litigant's failure to raise an issue in the trial court waives his or her right to challenge that issue on appeal. *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 220 (1991), *overruled on other grounds in Collins v. Sotka*, 81 Ohio St.3d 506 (1998). Because the Civ.R. 11-timeliness argument was not raised in appellant's brief in opposition, we hold that issue is waived.

{¶22} Appellant's second assignment of error lacks merit.

{¶23} For the reasons discussed in this opinion, the judgment of the Trumbull County Court of Common Pleas, Probate Division, is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.