

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

JOHN R. BARYAK,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2017-T-0036
WERNER LANGE, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2016 CV 00455.

Judgment: Affirmed.

John H. Large, 1569 Woodland, N.E., Suite 1, Warren, OH 44483 (For Plaintiff-Appellant).

Werner Lange, pro se, 510 Superior Street, Newton Falls, OH 44444 (Defendant-Appellee).

Erin E. Kelly, and *Eric J. Williams*, Pelini, Campbell & Williams, LLC, 8040 Cleveland Avenue, N.W., Suite 400, North Canton, OH 44720 (For Defendant-Appellee Bruce Moore).

TIMOTHY P. CANNON, J.

{¶1} Appellant, John R. Baryak, appeals from the March 24, 2017 judgment of the Trumbull County Court of Common Pleas. The trial court granted monetary sanctions in favor of appellees Werner Lange and Bruce Moore against appellant and his attorney. The trial court’s judgment is affirmed for the following reasons.

{¶2} On December 14, 2014, appellant filed a complaint in the Trumbull County Court of Common Pleas against Lange and Moore (case No. 2014 CV 02269). On November 1, 2015, appellant voluntarily dismissed the action pursuant to Civ.R. 41(A)(1)(a).

{¶3} Appellant re-filed his complaint on March 15, 2016 (case No. 2016 CV 00455). The complaint alleged abuse of process, intentional infliction of emotional distress, tortious interference with business, and libel. Appellant requested compensatory damages in excess of \$100,000.00, punitive damages, attorney fees, the cost of the action, and other fair and equitable relief.

{¶4} On March 22, 2016, Lange filed a pro se answer and motion to dismiss, arguing the re-filed complaint was frivolous. Lange requested the trial court dismiss the action with prejudice, order appellant to cease filing baseless lawsuits, and grant any fair and equitable monetary relief. The trial court denied the motion to dismiss.

{¶5} Moore filed an answer on April 18, 2016, through counsel. As an affirmative defense, he alleged appellant's complaint should be dismissed with prejudice as a frivolous action pursuant to Civ.R. 11 and R.C. 2323.51. Moore requested he be awarded his attorney fees, the costs of the action, and any other fair and equitable relief.

{¶6} Lange filed a motion for judgment on the pleadings and for summary judgment on June 23, 2016. In his motion, Lange requested the action be declared frivolous and he be awarded compensation for the time and expense imposed on him by appellant's "meritless lawsuits." Appellant did not file a response.

{¶7} Moore filed a motion for summary judgment on September 26, 2016. In his motion for summary judgment, Moore requested sanctions and attorney fees pursuant to R.C. 2323.51 due to appellant's frivolous conduct. Appellant did not file a response.

{¶8} Appellant voluntarily dismissed case No. 2016 CV 00455 on October 4, 2016, pursuant to Civ.R. "41(A)."

{¶9} On November 28, 2016, Moore filed a motion for sanctions and attorney fees pursuant to R.C. 2323.51. Appellant did not file a response to the motion or appear at the December 20, 2016 hearing on the motion. The trial court granted the motion on January 4, 2017, awarding Moore his reasonable expenses and attorney fees. The trial court set a damages hearing for February 14, 2017.

{¶10} On January 10, 2017, Lange filed a pro se motion requesting sanctions and that the court declare appellant a vexatious litigator pursuant to R.C. 2323.52.

{¶11} On January 23, 2017, appellant filed a motion to vacate the trial court's judgment of January 4, 2017. Appellant claimed he did not receive notice of the December 20, 2016 hearing and requested additional time to respond to Moore's motion for sanctions and attorney fees. Moore filed a brief in opposition.

{¶12} Following the hearing on damages, the trial court entered judgment on March 24, 2017. The court denied appellant's motion to vacate, construing it as a Civ.R. 60(B) motion. The court also granted Moore's request for sanctions, finding that after the first complaint was filed, appellant knew or should have known his claim was frivolous, and that at the second filing of the complaint both appellant and his attorney knew or should have known the claim was frivolous. The trial court found Moore had demonstrated he incurred \$23,916.00 in legal fees and \$1,543.92 in expenses to defend

the entire litigation. The trial court awarded Moore \$10,306.00 against appellant for legal fees incurred defending the first complaint. It awarded Moore \$13,610.00 against appellant and his attorney, jointly and severally, for legal fees incurred defending the second complaint and \$1,543.92 in reasonable expenses incurred defending the entire litigation. The trial court further found Lange incurred \$40.50 in reasonable expenses to defend the litigation and sua sponte awarded Lange expenses against appellant and his attorney, jointly and severally.

{¶13} On April 14, 2017, appellant filed a timely notice of appeal from the trial court's March 24, 2017 judgment entry.

{¶14} This court has previously addressed the standard of review in a case such as this.

The question of what constitutes frivolous conduct may be either a factual determination, e.g. whether a party engages in conduct to harass or maliciously injure another party, or a legal determination, e.g. whether a claim is warranted under existing law. '[A] trial court's findings of fact are to be accorded substantial deference * * * and are reviewed under an abuse of discretion standard' while legal questions are 'subject to de novo review by an appellate court.' *State Farm Ins. Cos. v. Peda*, 11th Dist. No. 2004-L-082, 2005-Ohio-3405, at ¶28 (citations omitted). The ultimate decision whether to impose sanctions for frivolous conduct, however, remains wholly within the trial court's discretion. *Edwards v. Livingstone*, 11th Dist. Nos. 2001-A-0082 and 2002-A-0060, 2003-Ohio-4099, at ¶17 (citation omitted).

Curtis v. Hard Knox Energy, Inc., 11th Dist. Lake No. 2005-L-023, 2005-Ohio-6421, ¶15.

{¶15} In the present case, appellant makes no argument with regard to whether the conduct complained of was frivolous. Instead, the arguments all address whether the applicable law permitted the trial court to impose the sanctions. As a result, to the extent appellant's assignments of error pertain to the trial court's application of R.C. 2323.51 in

the present case, our standard of review is de novo. See *State v. Owen*, 11th Dist. Lake No. 2012-L-102, 2013-Ohio-2824, ¶17.

{¶16} Appellant raises five assignments of error on appeal. We address appellant's assignments of error out of order.

{¶17} Appellant's fifth assignment of error states:

The trial court erred in granted [sic] monetary sanctions pursuant to ORC 2323.51(B)(1) because Plaintiff-Appellant voluntarily dismissed his action pursuant to Ohio Rules of Civil Procedure 41(A). Said voluntarily divests the court of any further jurisdiction in the matter.

{¶18} Under his fifth assignment of error, appellant argues a voluntary dismissal terminates a case without court intervention and divests the trial court of jurisdiction to rule on any further matters in the case. Appellant maintains the trial court did not have jurisdiction to grant monetary sanctions pursuant to R.C. 2323.51 in the present case because he filed voluntary dismissals in both case No. 2014 CV 02269 and case No. 2016 CV 00455.

{¶19} Civ.R. 41(A)(1) specifically provides: "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court." The notice filed by appellant did not state whether he was attempting to dismiss with or without prejudice. However, because it was his second voluntary dismissal, it clearly operated as "an adjudication upon the merits * * *."

{¶20} Although a Civ.R. 41(A) voluntary dismissal generally divests the trial court of jurisdiction, a court may still consider collateral issues unrelated to the merits of the action, such as sanctions pursuant to Civ.R. 11 or R.C. 2323.51. *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, ¶22-23; *State ex rel. Fifth Third Mtge. Co.*

v. Russo, 129 Ohio St.3d 250, 2011-Ohio-3177, ¶13. The request for sanctions and fees was pending at the time the dismissal was filed, and the dismissal operated as an adjudication on the merits. As a result, the trial court clearly had jurisdiction to consider sanctions and attorney fees pursuant to R.C. 2323.51.

{¶21} Appellant's fifth assignment of error is without merit.

{¶22} Appellant's fourth assignment of error states:

Did the trial court erred in granted monetary sanctions pursuant to ORC 2323.51(B)(1) because ORC 2323.51(B)(1) requires a judgment to issued by a court. [sic] The case here was voluntarily dismissed by Plaintiff-Appellant.

{¶23} Appellant argues R.C. 2323.51 requires a judgment to be issued by the court before the court may address a motion for sanctions. Appellant maintains a voluntary dismissal is not considered a judgment for purposes of R.C. 2323.51 because it does not determine the rights and liabilities of the parties.

{¶24} R.C. 2323.51, which governs the filing of motions for frivolous conduct in civil actions, states, in pertinent 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." R.C. 2323.51(B)(1). Thus, a party may file a sanctions motion at any time prior to trial or within thirty days of the final judgment, i.e. the final order, rendered in the case. See *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 571, 2015-Ohio-4915, ¶10, citing *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 436 (2002).

{¶25} When a case is voluntarily dismissed without prejudice, it is treated as though it was never filed, and there is no final judgment on the merits. *Merino v. Salem*

Hunting Club, 7th Dist. Columbiana No. 11 CO 2, 2012-Ohio-4553, ¶11, citing *Zimmie v. Zimmie*, 11 Ohio St.3d 94, 95 (1984). However, “when a dismissal is with prejudice, ‘the dismissed action in effect has been adjudicated upon the merits[.]’” *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, ¶10, quoting 1970 Staff Note to Civ.R. 41. “It is well established that when a plaintiff files two unilateral notices of dismissal under Civ.R. 41(A)(1)(a) regarding the same claim, the second notice of dismissal functions as an adjudication of the merits of that claim, regardless of any contrary language in the second notice stating that the dismissal is meant to be without prejudice.” *Id.*

{¶26} Appellant voluntarily dismissed case No. 2014 CV 02269 pursuant to Civ.R. 41(A)(1)(a). He re-filed the complaint in case No. 2016 CV 00455 and again voluntarily dismissed the case pursuant to Civ.R. “41(A)” without noting whether he intended to do so with or without prejudice. Regardless of his intention, the second voluntary dismissal, filed October 4, 2016, served as a final judgment on the merits of appellant’s claims. Thus, Moore and Lange were permitted to file motions for sanctions pursuant to R.C. 2323.51 at any time prior to appellant’s second voluntary dismissal or within 30 days after the second voluntary dismissal.

{¶27} Appellant’s fourth assignment of error is without merit.

{¶28} Appellant’s second assignment of error states:

The trial court erred in granted [sic] monetary sanctions to Defendant-Appellee Moore, pursuant to ORC 2323.51(B)(1) because Defendant-Appellee Moore did not file his motion requesting said sanctions until approximately 55 days after the conclusion of the case. ORC 2323.51(B)(1) requires said motion to be filed with 30 days of Judgment in a case.

{¶29} Appellant argues Moore’s motion for sanctions filed in case No. 2016 CV 00455 was untimely because it was filed more than 30 days after appellant had filed his

second voluntary dismissal. However, Moore initially requested sanctions pursuant to R.C. 2323.51 in his motion for summary judgment filed September 26, 2016, prior to appellant's second voluntary dismissal on October 4, 2016. As the trial court noted, Moore's motion filed after the notice of dismissal simply renewed the request he had made previously and that the court had not yet issued a final ruling on that request.

{¶30} Appellant's second assignment of error is without merit.

{¶31} Appellant's first assignment of error states:

The trial court erred in granted [sic] monetary sanctions pursuant to ORC 2323.51(B)(1) 'in defense of the first litigation' because Defendant-Appellee Moore did not file a motion requesting said sanctions. Further, the case had been concluded for approximately 377 days. ORC 2323.51(B)(1) requires said motion to be filed with 30 days of Judgment in a case.

{¶32} Appellant argues the trial court should not have granted monetary sanctions to Moore for costs and expenses incurred in defense of case No. 2014 CV 02269 because Moore never filed a motion for sanctions in that case, and the case had concluded long before Moore filed his motion for sanctions in case No. 2016 CV 00455.

{¶33} When an action has been voluntarily dismissed once, is re-filed, and a final order is issued in the re-filed case, the trial court may consider whether fees should be awarded pursuant to R.C. 2323.51 from the date of the initial filing until the date of final judgment. *See Merino, supra*, at ¶16. Accordingly, the trial court was permitted to consider whether fees should be awarded from the date appellant initially filed his complaint in case No. 2014 CV 02269 until the date appellant filed his second voluntary dismissal pursuant to Civ.R. 41(A)(1)(a). Moore was not required to file motions pursuant to R.C. 2323.51 in both actions.

{¶34} Appellant's first assignment of error is without merit.

{¶35} Appellant’s third assignment of error states:

{¶36} “The trial court erred in granting monetary sanctions to Defendant-Appellee Lange pursuant to 2323.51(B)(1).”

{¶37} Appellant argues the trial court should not have granted Lange’s motion for sanctions because it was untimely filed pursuant to R.C. 2323.51(B)(1).

{¶38} Lange filed an Answer and Motion to Dismiss in the case on March 22, 2016. In his prayer for relief, he cited to the frivolous nature of the lawsuit, asked appellant to be declared a vexatious litigator, and finally asked the court to award him “any monetary relief this court deems fair and equitable to compensate him” as a result of this suit. Lange’s motion for sanctions, filed January 10, 2017, was not filed pursuant to R.C. 2323.51. Further, in its March 24, 2017 judgment entry the trial court did not address Lange’s motion for sanctions. The trial court instead found “it is appropriate, sua sponte, to award Lange his reasonable expenses of \$40.50 as an additional sanction” against appellant and his attorney, jointly and severally. The trial court further stated: “Lange has represented himself throughout this entire process and is certainly entitled to reimbursement as well under the Court’s discretion pursuant to R.C. 2323.51.” In addition, the court conducted a damages hearing on February 14, 2016, and appellant has not provided us with a copy of the transcript of that hearing. We do not know what testimony or other evidence the trial court had in making the decision to award Lange with these minimal expenses. We cannot say the trial court erred in this regard.

{¶39} Appellant’s third assignment of error is without merit.

{¶40} For the foregoing reasons, the trial court properly applied the statutory provisions related to monetary sanctions. The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents.