

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TOBY M. MEDLEY	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-18
THOMAS RUSSELL, ET AL.,	:	
	:	
	:	
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of
Common Pleas Case No. 2008-CV-0631

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: October 15, 2009

APPEARANCES:

For Plaintiff-Appellant:

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Delaney, J.

{¶1} Plaintiff-Appellant Toby Medley appeals the decision of the Richland County Court of Common Pleas granting summary judgment in favor of Defendant-Appellees Thomas Russell and Heritage Christian Counseling.

{¶2} At all times relevant to these proceedings, Russell was a marriage and family counselor employed by Heritage Christian Counseling. In 2005, Appellant and his wife, Lynn Medley, attended marriage counseling sessions with Russell. The counseling sessions were both individual and joint.

{¶3} Appellant subsequently instituted divorce proceedings in Ashland County, Ohio. As part of the divorce proceedings, Lynn Medley subpoenaed Russell to testify on her behalf. Appellant was aware of this subpoena prior to the hearing, but failed to object to Russell's testimony prior to the hearing.

{¶4} Russell appeared in court in May, 2007, to testify regarding his sessions with Appellant and Mrs. Medley. After Russell answered several questions about his sessions with Lynn Medley, he was asked about his sessions with Appellant. During that testimony, Russell referenced some discussions in which Appellant allegedly mentioned being mistreated by his parents. Following this testimony, Appellant's attorney objected and the objection was sustained. The questions and responses relating to this alleged mistreatment were stricken from the record.

{¶5} Appellant subsequently filed a civil lawsuit against Russell and his employer, alleging that this stricken testimony damaged him by leading to additional litigation, investigation, expense and emotional distress. On March 12, 2008, a complaint was filed alleging Russell improperly testified during divorce proceedings in

violation of HIPAA and that he disclosed confidential information in violation of counselor/client privilege. Specifically, Appellant alleged that Russell negligently and/or intentionally misrepresented facts during the divorce proceedings. He additionally alleged that Russell committed a fraud upon the court in his trial testimony. He also alleged that Heritage Christian Counseling was liable for Russell's actions on the basis of respondeat superior.

{¶6} On December 9, 2008, Appellees filed a motion for summary judgment, stating that there was no evidence of any violation of any privilege by Russell and also that Appellant waived any claims based on privilege. Additionally, Appellees argued that there was no evidence to support Appellant's claims for fraud and misrepresentation. Specifically, Appellees argued that Appellant failed to establish any evidence as to the requisite element of reliance or damages based upon Russell's in court statements.

{¶7} Appellant filed a brief in opposition to Appellees' motion on January 18, 2009. On February 2, 2009, the trial court issued an order granting Appellees' motion for summary judgment. Specifically, the trial court found that Appellant failed to invoke the privilege set forth in R.C. 2317.02 and that he therefore waived it. In so finding, the court stated, "It is not disputed that Mr. Medley made no attempt to object either orally or by motion prior to the date of Mr. Russell's testimony, nor did he object at the inception of questioning regarding Mr. Russell's meetings with Mr. Medley. Mr. Russell, operating under order of a subpoena, appeared and testified as required when no privilege was invoked. A client cannot file suit against his counselor for following court orders. Accordingly, the court finds that Mr. Medley, as a matter of law, waived the

privilege with respect to his communications with Mr. Russell to the extent they were the subject of Mr. Russell's testimony prior to the objection raised by Mr. Medley's attorney."

{¶8} The court further found that Appellant did not establish any genuine issues of material fact on the basis of his claims for fraud, misrepresentation or respondeat superior.

{¶9} In so finding, the court stated, "there is nothing in this case to suggest that Mr. Medley in any way relied to his detriment upon the testimony of Mr. Russell. Alleging that other individuals may have relied on Mr. Russell's statements does not advance Mr. Medley's claim that he, himself, was the victim of fraud. Even assuming (without deciding) that there are questions of fact concerning the other elements of Mr. Medley's fraud claim, the absence of any evidence of reliance requires that this fraud claim fail as a matter of law.

{¶10} "Similarly, claims of negligent misrepresentation in Ohio require that a plaintiff show, among other factors, that he was damaged by his justifiable reliance upon the defendant's false information. To prevail in a cause of action for intentional misrepresentation, a plaintiff must, likewise, show justifiable reliance.

{¶11} "Because there are no facts in the record to support the element of Mr. Medley's reliance on Mr. Russell's in-court statements, summary judgment is appropriate as a matter of law on the claims of fraud and misrepresentation. As the actions complained of do not support causes of action against Mr. Russell, neither do they support plaintiff's assertion of liability on the part of Mr. Russell's employer, Heritage Christian Counseling. Therefore, Mr. Medley's claim under the theory of respondeat superior also fails as a matter of law."

{¶12} Appellant raises one Assignment of Error:

{¶13} “I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING THE DEFENDANT’S [SIC] MOTION FOR SUMMARY JUDGMENT.”

I.

{¶14} In his sole assignment of error, Appellant argues that the trial court erred in granting Appellees’ motion for summary judgment. We disagree.

{¶15} When reviewing the granting of a motion for summary judgment, an appellate court uses a de novo standard of review. *LaSalle Bank NA v. Tirado*, 5th Dist. No. 2009-CA-22, 2009-Ohio-2589, ¶14.

{¶16} Civil Rule 56(C) states in part:

{¶17} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law .”

{¶18} Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶19} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates the

non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶20} The trial court found, and we agree, that Appellees met their burden, demonstrating the absence of a genuine issue of material fact with respect to Appellant's allegations of fraud, misrepresentation, and respondeat superior. Moreover, the court properly found that Appellant had waived any privilege by failing to invoke the privilege.

{¶21} R.C. 2317.02 governs privileged communications and acts. This statute does not disqualify a counselor as a witness; "it merely disallows testimony concerning confidential communications. Also, a client can expressly consent to the testimony of a social worker, thereby waiving the privilege. R.C. 2317.02(G)(1)(b)." *Cervone v. Boris*, 7th Dist. No. 96CA-191.

{¶22} The existence of the privilege must be determined preliminarily by the court. Evid.R. 104(A). "In order for any reversible error in that regard to occur, the privilege must first be invoked. Failure to invoke the privilege waives it, under the well-established rule that the person entitled to the benefit can always waive it." *State v. Miller*, 2nd Dist. No. 2004 CA 16, 2005-Ohio-4032, ¶24, citing *King v. Barrett* (1860), 11 Ohio St. 261.

{¶23} In this case, Appellant's failure to invoke the privilege therefore waives the privilege. Specifically, Appellant failed to make a motion when he discovered that

Russell had been subpoenaed to testify at the hearing and he also failed to object when Russell took the stand to testify. More importantly, Appellant did not object even when Russell began to testify about his conversations with Appellant. It was not until several questions into the line of inquiry about his individual sessions with Appellant that he objected to the testimony. At that time, the trial court did sustain the objection and strike the questions and answers from the record. As such, any error, if it existed in the first place, was harmless. See Civ. R. 61; see also *Lindsay v. Baltimore & O. R. Co.* (1954) 98 Ohio App. 63, 128 N.E.2d 242 (holding that where substantial justice has been done, the court, on review, must disregard errors).

{¶24} Moreover, this matter was tried to the court and not a jury. “[I]n a bench trial, a trial court is presumed to have considered only the relevant, material and competent evidence.” *State v. Addison*, 10th Dist. No. 03AP-1102, 2004-Ohio-5154, at ¶ 10, citing *State v. Bays* (1999), 87 Ohio St.3d 15, 28, 716 N.E.2d 1126. As such, we presume that the court disregarded the stricken testimony and did not consider the stricken testimony in making its final determination in the underlying proceedings.

{¶25} Accordingly, we find that there is no issue of material fact as it relates to Appellant’s claim of privilege.

{¶26} Turning to the court’s ruling on Appellant’s claims of misrepresentation and fraud, we also find that the trial court ruled appropriately. In order to establish a cognizable claim for fraud, Appellant must prove:

{¶27} “(a) a representation or, where there is a duty to disclose, concealment of a fact,

{¶28} “(b) which is material to the transaction at hand,

{¶29} “(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,

{¶30} “(d) with the intent of misleading another into relying upon it,

{¶31} “(e) justifiable reliance upon the representation or concealment, and

{¶32} “(f) a resulting injury proximately caused by the reliance.” *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101, paragraph two of the syllabus, citing *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 10 OBR 500, 462 N.E.2d 407.

{¶33} A claim for negligent misrepresentation must show that the defendant:

{¶34} “[i]n the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.” *Rockford Homes, Inc. v. Handel*, 5th Dist. No. 07-CA-006, 2007-Ohio-2581, ¶¶42-43, citing *Delman v. Cleveland Heights* (1989), 41 Ohio St.3d 1, 4, 534 N.E.2d 835.

{¶35} Appellant failed to present any evidence preceding the granting of the motion for summary judgment that he detrimentally relied upon the statements made by Appellee Russell during the divorce proceedings. The absence of evidence regarding the element of reliance is enough to support the trial court’s granting of Appellees’ motion for summary judgment.

{¶36} Appellant argues that reliance of another person on the false statements can create a cause of action against the provider of the false information. Appellant

fails to cite, and we have not found, any controlling case law that supports this contention. As such, Appellant's claim in that regard is rejected.

{¶37} Based on the foregoing, we find that the trial court properly granted Appellees' motion for summary judgment. Appellant's assignment of error is overruled.

{¶38} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TOBY M. MEDLEY	:	
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Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
THOMAS RUSSELL, ET AL.,	:	
	:	
Defendants-Appellees	:	Case No. 09-CA-18
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN