

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JULIE A. MASSOUH, et al.	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CA 00248
JULIE M. THOMAS, DDS, et al.	:	
	:	
	:	
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas, Case No. 2007CV02335

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: June 29, 2010

APPEARANCES:

For Plaintiffs-Appellants:

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Appellant:

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Delaney, J.

{¶1} Plaintiffs-Appellants, Julie A. Massouh and Christopher Massouh, filed a dental malpractice against Defendant-Appellee, Dr. Julie Thomas. Following a jury trial, a defense verdict was rendered.

{¶2} In this appeal, Appellants challenge certain rulings of the trial court on discovery, evidentiary matters and the granting of summary judgment in favor of Defendant-Appellee, Julie M. Thomas, DDS, LLC, as to a claim of negligent hiring, training, and retention.

{¶3} Cross-Appellant, Dr. Julie Thomas, has filed a cross-appeal on the trial court's decision to deny her motion for fees and costs pursuant to R.C. 2323.42 and R.C. 2323.51.

{¶4} We affirm the judgment of the trial court.

STATEMENT OF THE FACTS AND CASE

{¶5} Julie Massouh came to Dr. Thomas on October 31, 2005 for a consultation and examination to develop a treatment plan that would involve the restoration of her top and bottom teeth with porcelain veneers. Massouh had explored oral surgery and orthodontia to remedy her dental issues, but she did not wish to pursue those avenues and chose to utilize cosmetic dentistry. In November 8, 2005, Dr. Thomas started the treatment plan by preparing Massouh's teeth and placing temporary restorations on the teeth. Massouh returned on December 2, 2005, to remove the temporary restorations and to replace the temporary restorations with permanent restorations embedded with dental cement. During the process, Massouh complained of sensitivity on her teeth and required the use of multiple Novocain injections.

{¶6} Massouh came back for her post-procedure checks on December 9 and 16, 2005. At the appointments, Massouh complained of severe sensitivity in her teeth, especially when eating hot or cold foods.

{¶7} On January 11, 2006, Massouh returned to Dr. Thomas for the placement of an occlusion guard that might relieve some of Massouh's sensitivity. After this appointment, Massouh discontinued seeing Dr. Thomas. Massouh continued suffering from severe sensitivity in her teeth after the restoration process that, as she stated, affected her everyday life. She also noticed that the dental work negatively affected her speech. Massouh began seeing another dentist to remedy her dental issues.

{¶8} On June 4, 2007, Appellants filed a complaint with the Stark County Court of Common Pleas against Appellees alleging dental malpractice, lack of informed consent, vicarious liability, negligent hiring, training, and retention, and loss of consortium. Appellants filed an amended complaint on October 10, 2007, adding a claim for punitive damages.

{¶9} Appellees filed a motion for a more definite statement as to Appellants' claim for punitive damages. The trial court granted the motion and Appellants then filed a second amended complaint on December 5, 2007.

{¶10} Appellees filed a motion to dismiss the punitive damages claim pursuant to Civ.R. 12(B)(6). The trial court denied the motion on January 22, 2008, finding that the motion was premature and it did not appear beyond a doubt that Appellants could prove no set of facts in support of their claim.

{¶11} On March 10, 2008, Appellants filed a motion to compel deposition testimony of Dr. Thomas regarding a consent agreement entered into by Dr. Thomas

and the Ohio State Dental Board. Ten years earlier, on March 4, 1998, Dr. Thomas voluntarily entered into a consent agreement with the Ohio State Dental Board where Dr. Thomas's license to practice dentistry was suspended for an indefinite period of time due to Dr. Thomas's "inability to practice under accepted standards of the profession because of physical or mental disability, dependence on alcohol or other drugs, or excessive use of alcohol or other drugs." Dr. Thomas was required to participate in a drug and alcohol rehabilitation program and provide the Board with a written report demonstrating that Dr. Thomas was no longer drug or alcohol dependent. Upon reinstatement, Dr. Thomas's certificate was subject to five years of probation. Dr. Thomas complied with the terms of the consent agreement and her license was reinstated. At the time of Massouh's treatment, Dr. Thomas held a valid license.

{¶12} Appellees filed a motion for protective order on March 25, 2008, requesting a protective order against any and all discovery regarding Dr. Thomas's pre-1998 treatment of patients and the 1998 Consent Agreement.

{¶13} On April 7, 2008, the trial court denied Appellants' motion to compel deposition testimony regarding the 1998 Consent Agreement and granted Appellees' motion for protective order. The trial court denied Appellants' motion for reconsideration on April 23, 2008.

{¶14} Appellees sent Appellants a letter on May 2, 2008, requesting that they dismiss their punitive damages claim. On May 5, 2008, Appellants moved to dismiss the punitive damages claim without prejudice. The trial court granted the motion on May 27, 2008. On October 10, 2008, Appellees filed a motion for fees and costs

pursuant to R.C. 2323.42, R.C. 2323.51 and Civ.R. 11 based on their costs incurred in defending the punitive damages claim. Appellants filed a cross-motion for sanctions.

{¶15} Appellees also filed two subsequent protective orders, requesting that discovery in the areas of Dr. Thomas's drug and alcohol use within 24 hours of treating Massouh and Dr. Thomas's application for license renewal for 2006-2007 be prohibited. The trial court summarily denied the motions and allowed discovery by Appellants.

{¶16} On October 16, 2008, Appellees moved for summary judgment of Appellants' claim of negligent hiring, training, and retention against Appellee, Julie M. Thomas, DDS, LLC. In 2003, Julie M. Thomas, DDS, LLC formed with Dr. Thomas as its sole member and owner. While treating Massouh, Dr. Thomas received a draw and not a paycheck from Julie M. Thomas, DDS, LLC. The trial court found that neither an agency nor an employment relationship existed between Dr. Thomas and Julie M. Thomas, DDS, LLC, thereby preventing a claim for negligent hiring, training, and retention. The trial court granted Appellees' motion for summary judgment on December 11, 2008.

{¶17} The trial court held a hearing on Appellees' motion for fees and costs on December 12, 2008. Before the hearing, Appellees withdrew their request for Civ.R. 11 sanctions. At the conclusion of the hearing, the trial court overruled both parties' request for sanctions.

{¶18} Dr. Thomas filed a motion in limine on July 24, 2009, asking that all reference to the 1998 consent agreement be excluded from trial. The trial court granted the motion on August 5, 2009.

{¶19} The matter was assigned to a visiting judge and it proceeded to trial before a jury on August 24, 2009. On August 28, 2009, the jury returned a verdict in favor of Dr. Thomas. The jury verdict was journalized September 1, 2009.

{¶20} It is from these decisions Appellants now appeal.

ASSIGNMENTS OF ERROR

{¶21} Appellants raise three Assignments of Error:

{¶22} “I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PROHIBITED APPELLANTS FROM CROSS EXAMINING DR. THOMAS AS TO FACTS RELATED TO HER CONSENT AGREEMENT, EVIDENCING THAT DR. THOMAS DID NOT HAVE THE SPOTLESS REPUTATION AND CAREER THAT SHE HAD ORIGINALLY REPRESENTED TO THE JURY.

{¶23} “II. THE TRIAL COURT ABUSED ITS DISCRETION IT WHEN [SIC] REFUSED TO PERMIT APPELLANTS TO CONDUCT DISCOVERY RELATED TO DR. THOMAS’S CONSENT AGREEMENT WHEN SUCH INFORMATION WAS RELEVANT TO APPELLANTS’ PUNITIVE DAMAGES AND NEGLIGENT HIRING, TRAINING AND RETENTION CLAIM AND TO DR. THOMAS’S CREDIBILITY.

{¶24} “III. THE TRIAL COURT IMPROPERLY GRANTED JULIE M. THOMAS, DDS, LLC SUMMARY JUDGMENT AS TO APPELLANTS’ VICARIOUS LIABILITY AND NEGLIGENT HIRING, TRAINING AND RETENTION CLAIMS BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT DR. THOMAS WAS AN AGENT OF JULIE M. THOMAS, DDS, LLC.

{¶25} Cross-Appellant raises two Assignments of Error:

{¶26} “I. THE TRIAL COURT ERRED IN DENYING SANCTIONS PURSUANT TO OHIO REVISED CODE SECTION 2323.51 BECAUSE PLAINTIFFS’ PUNITIVE DAMAGES CLAIM WAS LEGALLY BASELESS.

{¶27} “II. THE TRIAL COURT ERRED IN DENYING SANCTIONS PURSUANT TO OHIO REVISED CODE SECTION 2323.42(A) BECAUSE THERE WAS NOT A REASONABLE, GOOD FAITH BASIS FOR PLAINTIFFS’ PUNITIVE DAMAGES CLAIM.”

I.

{¶28} Appellants argue in their first Assignment of Error that the trial court abused its discretion when it prohibited Appellants from cross-examining Dr. Thomas during trial as to the 1998 Consent Agreement.

{¶29} At trial, Dr. Thomas testified on direct examination as to her education and good reputation in the community as a dentist. On cross-examination, the following exchange took place:

{¶30} “Q. * * * And you wanted the jury to believe, and that’s why you went into specifics, that over your entire career that you have been an excellent dentist and you have a good reputation in this community. Correct?”

{¶31} “A. Yes, sir.

{¶32} “Q. Okay. And all those things were important to you in terms of the defense and justification of your care in this case, correct?”

{¶33} “A. True.

{¶34} “Q. Okay. Well, since you went into specifics over your entire career, do you mean to tell the jury that you were an excellent dentist and had a good reputation in

this community and had a good reputation with all the regulatory authorities during the period 1998 through 2003?” (T. 102-103).

{¶35} Counsel for Dr. Thomas objected. Counsel approached the bench and the following discussion ensued:

{¶36} “MR. PLAKAS: * * * I objected when I heard this long laborious specific things about how excellent she is, about her reputation, about her referrals.

{¶37} “And she just admitted on the record she did all those things because she thinks it is important to establish her reputation.

{¶38} “I never put her reputation in issue. She did. And now she wants this jury to think during the entire period that she has been this wonderful, excellent dentist; and that’s not true.

{¶39} “That’s not the fact in 1998 through 2003.

{¶40} “* * *

{¶41} “She opened the door.

{¶42} “THE COURT: She did not open the door. It has already been ruled.

{¶43} “What we are talking about in this case is at the time of the treatment in 2005 and you have already established that she thinks she is an excellent dentist during the whole time; but I will not permit you to go back previous to 2005 to get into the matters that Judge Brown has already ruled upon.

{¶44} “* * *

{¶45} “I don’t think she has opened the door at all. I think that her general reputation in responding to your questions, but we will not go beyond – I don’t mind you asking, I think you have that she has an excellent reputation during the entire time she

was in practice; but we are not going to get into the matters that Judge Brown has already ruled on.

{¶46} “MR. PLAKAS: * * * Respectfully, they went through this long laborious process. I objected, and you let them do that. But they did it for a purpose.

{¶47} “She has, on the record has put the purpose; and she wasn’t even allowed to practice during those years without supervision.

{¶48} “THE COURT: No, I understand all that. But she has no – she is going to testify to her opinion of herself; and whether that opinion was shared by other authorities during that period of time, that is separate and apart.” (T. 103-105).

{¶49} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. Cross-examination is permitted “on all relevant matters and matters affecting credibility.” Evid.R. 611(B). Evid.R. 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Pursuant to Evid.R. 403(A), “Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” The scope of cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. *State v. Slagle* (1992), 65 Ohio St.3d 597, 605, 605 N.E.2d 916, 925. “[A] reviewing court should be slow to disturb a trial court’s determination on the scope of cross-examination * * *.” *Vance v. Vance*, 151 Ohio App.3d 391, 2003-Ohio-310, 784 N.E.2d 172, ¶ 50.

{¶50} Appellants argue that Dr. Thomas opened the door to the subject of the 1998 Consent Agreement through her testimony as to her reputation and career on direct examination. Upon our review of the testimony, the trial court did not abuse its discretion when it determined that the 1998 Consent Agreement was not relevant to the dental malpractice action, which occurred in 2005. In *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, at paragraph one of the syllabus, the Supreme Court of Ohio held the following:

{¶51} “In order to establish medical malpractice, it must be shown by a preponderance of evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things.”

{¶52} The 1998 Consent Agreement dealt with Dr. Thomas’s involvement with drugs and alcohol at that time. In this case, there was no allegation that Dr. Thomas was under the influence of drugs or alcohol while she treated Massouh in 2005 or 2006. Evidence of the 1998 Consent Agreement would serve to prejudice the jury rather than provide probative evidence that Dr. Thomas fell below the standard of care and that proximately caused Massouh’s injuries. Even assuming Dr. Thomas opened the door on direct examination as to her reputation in the community, any probative value of the

1998 Consent Agreement on this issue or the issue of her credibility would be outweighed by the risk of unfair prejudice and confusion of the issues.

{¶53} Accordingly, we overrule Appellants' first Assignment of Error.

II.

{¶54} In the second Assignment of Error, Appellants argue that the trial court erred when it prohibited Appellants from engaging in pre-trial discovery regarding the 1998 Consent Agreement.

{¶55} A decision regarding the disposition of discovery issues is reviewed under an abuse of discretion standard. *Contini v. Ohio State Bd. of Edn.*, 5th Dist. No.2007CA0136, 2008-Ohio-5710, ¶ 46 citing *State ex rel. The V. Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198. Under this standard, reversal is warranted only where the trial court's attitude was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶56} Appellants contend that facts related to the 1998 Consent Agreement were relevant and/or reasonably calculated to lead to the discovery of admissible evidence on Appellants' claims of punitive damages, negligent hiring, training, and retention, and Dr. Thomas's credibility.

{¶57} We do not reach the issue whether the trial court exceeded its discretion by prohibiting discovery of prior breaches of care by Dr. Thomas, as related to Appellants' claims for punitive damages and negligent hiring, training, and retention. As noted earlier, the jury rendered a defense verdict on the underlying medical malpractice claim. Thus, Appellants failed to establish that Dr. Thomas objectively breached a duty

to Massouh. Even assuming the trial court erred in limiting discovery as to these issues, no prejudicial error occurred affecting the substantial rights of the Appellants.

{¶58} Appellants further argue that the trial court should have permitted them to engage in discovery regarding the 1998 Consent decree due to an inconsistency on Dr. Thomas's Application for 2006-2007 Biennial Dental License Renewal. On the form, Dr. Thomas stated that she had not at any time had any disciplinary action initiated against her by any state licensing board and had not at any time surrendered her license to practice dentistry. Appellants argue that this is inconsistent with the terms of the 1998 Consent Agreement. The inconsistency, Appellants argue, goes to Dr. Thomas's credibility.

{¶59} We find the trial court did not abuse its discretion in denying Appellants' Motion to Compel Discovery on this issue. As stated by Appellees, the Application form was submitted on December 14, 2005, near Dr. Thomas's last treatment with Mrs. Massouh. The matter has no relevancy as to whether Dr. Thomas's dental treatment breached the standard of care and that the breach was the proximate cause of Appellants' injuries. The issue in controversy in this case is whether Dr. Thomas's conduct constituted negligence according to Ohio law, and while she may or may not have been untruthful on the Application form, it is not probative as to whether negligence actually occurred.

{¶60} Appellants' second Assignment of Error is overruled.

III.

{¶61} Appellants argue in their third Assignment of Error that the trial court erred as a matter of law by granting Appellees' motion for summary judgment as to

Appellants' claim of vicarious liability and negligent hiring, training, and retention against Julie M. Thomas, DDS, LLC.

{¶62} In order to prevail on a claim of negligent retention, a plaintiff must establish “(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.” *Nye v. Ellis*, 5th Dist. No. 09-CA-0080, 2010-Ohio-1462, ¶48.

{¶63} It is axiomatic that a claim of negligent hiring, supervision and retention against an employer is not viable without an underlying act of negligence by an employee that causes injury or loss. *Lehner v. Safeco Ins./Am. State Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, ¶42.

{¶64} In light of our disposition of the first and second Assignments of Error and the defense verdict rendered in favor of Dr. Thomas, the third Assignment of Error is rendered moot.

Cross-Appeal I.

{¶65} Cross-Appellant, Dr. Thomas, argues that Appellants engaged in frivolous conduct when they pursued their claim of punitive damages. Appellees filed a motion for fees and costs pursuant to R.C. 2323.51 and R.C. 2323.42, which the trial court overruled after a hearing on December 12, 2008. Cross-Appellant argues the trial court's decision was in error. We disagree.

{¶66} R.C. 2323.51 provides that a court may award court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil

action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. R.C. 2323.51(A)(2)(a) defines “frivolous conduct” in the following manner:

{¶67} “(i) * * * [conduct that] 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.

{¶68} “(ii) * * * [conduct that] is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

{¶69} “(iii) * * * [conduct that] consists of allegations or other factual contentions that have no evidentiary support or, if specifically identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.”

{¶70} 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. R.C. 2323.51(B)(2)(a). The question of what constitutes frivolous conduct may be either a factual determination, or a legal determination. *Pingue v. Pingue*, 5th Dist. No. 06-CAE-10-0077, 2007-Ohio-4818, ¶ 20 citing *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 673 N.E.2d 628. A determination that the conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law requires a legal analysis. *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 233, 661 N.E.2d 782.

With respect to purely legal issues, we follow a de novo standard of review and need not defer to the judgment of the trial court. *Wiltberger*, supra, at 51-52, 673 N.E.2d 628. However, we do find some degree of deference appropriate in reviewing a trial court's factual determinations and will not disturb such factual determinations where the record contains competent, credible evidence to support such findings. *Id.*

{¶71} In determining whether conduct is frivolous, the courts must be careful to apply the statute so that legitimate claims are not chilled. *Beaver Excavating Co. v. Perry Twp.* (1992), 79 Ohio App.3d 148, 606 N.E.2d 1067. The statute was designed to chill egregious, overzealous, unjustifiable and frivolous action. *Oakley v. Nolan*, 4th Dist. No. 06CA36, 2007-Ohio-4794, ¶16 citing *Turowski v. Johnson* (1990), 68 Ohio App.3d 704, 706, 589 N.E.2d 462. “Whether a claim is warranted under existing law is an objective consideration. The test * * * is whether no reasonable lawyer would have brought the action in light of the existing law. In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim.” *Pingue*, supra, citing *Riston v. Butler*, 149 Ohio App.3d 390, 777 N.E.2d 857, 2002-Ohio-2308, at ¶ 30, quoting *Hickman v. Murray* (Mar. 22, 1996), Montgomery App. No. 15030 (citations omitted).

{¶72} Appellants’ punitive damages claim was based on the discovery of the 1998 Consent Agreement. Appellants argue that the 1998 Consent Agreement demonstrated the necessary element of conscious disregard through Dr. Thomas’s prior breaches of the standards of the care in the profession. Appellants amended their complaint on October 10, 2007 to add the punitive damages claim. Appellees moved to

dismiss the punitive damages claim, but the trial court denied the motion as being premature.

{¶73} Appellants attempted to pursue the claim through discovery until the trial court granted Appellees' protective order on April 7, 2008. Appellants moved to dismiss the punitive damages claim on May 5, 2008.

{¶74} Upon review of the record, we cannot find the Appellants' theory of punitive damages recovery was not warranted under existing law or unlikely to have evidentiary support if discovery had been permitted; nor was evidence presented that the assertion of a punitive damages claim was intended to harass or injury Dr. Thomas or for an improper purpose.

{¶75} Cross-Appellant's first Assignment of Error is overruled.

Cross-Appeal II.

{¶76} Cross-Appellant argues in her second Assignment of Error that the trial court erred in denying their motion for sanctions under R.C. 2323.42(A). We disagree.

{¶77} R.C. 2323.42 governs good faith motions. It states:

{¶78} "(A) Upon the motion of any defendant in a civil action based upon a medical claim, dental claim, optometric claim, or chiropractic claim, the court shall conduct a hearing regarding the existence or nonexistence of a reasonable good faith basis upon which the particular claim is asserted against the moving defendant. The defendant shall file the motion not earlier than the close of discovery in the action and not later than thirty days after the court or jury renders any verdict or award in the action. After the motion is filed, the plaintiff shall have not less than fourteen days to respond to the motion. Upon good cause shown by the plaintiff, the court shall grant an

extension of the time for the plaintiff to respond as necessary to obtain evidence demonstrating the existence of a reasonable good faith basis for the claim.

{¶79} “(B) At the request of any party to the good faith motion described in division (A) of this section, the court shall order the motion to be heard at an oral hearing and shall consider all evidence and arguments submitted by the parties. In determining whether a plaintiff has a reasonable good faith basis upon which to assert the claim in question against the moving defendant, the court shall take into consideration, in addition to the facts of the underlying claim, whether the plaintiff did any of the following:

{¶80} “(1) Obtained a reasonably timely review of the merits of the particular claim by a qualified medical, dental, optometric, or chiropractic expert, as appropriate;

{¶81} “(2) Reasonably relied upon the results of that review in supporting the assertion of the particular claim;

{¶82} “(3) Had an opportunity to conduct a pre-suit investigation or was afforded by the defendant full and timely discovery during litigation;

{¶83} “(4) Reasonably relied upon evidence discovered during the course of litigation in support of the assertion of the claim in question;

{¶84} “(5) Took appropriate and reasonable steps to timely dismiss any defendant on behalf of whom it was alleged or determined that no reasonable good faith basis existed for continued assertion of the claim in question.

{¶85} “(C) If the court determines that there was no reasonable good faith basis upon which the plaintiff asserted the claim in question against the moving defendant or that, at some point during the litigation, the plaintiff lacked a good faith basis for

continuing to assert that claim, the court shall award all of the following in favor of the moving defendant:

{¶86} “(1) All court costs incurred by the moving defendant;

{¶87} “(2) Reasonable attorneys' fees incurred by the moving defendant in defense of the claim after the time that the court determines that no reasonable good faith basis existed upon which to assert or continue to assert the claim;

{¶88} “(3) Reasonable attorneys' fees incurred in support of the good faith motion.

{¶89} “(D) Prior to filing a good faith motion as described in division (A) of this section, any defendant that intends to file that type of motion shall serve a ‘notice of demand for dismissal and intention to file a good faith motion.’ If, within fourteen days of service of that notice, the plaintiff dismisses the defendant from the action, the defendant after the dismissal shall be precluded from filing a good faith motion as to any attorneys' fees and other costs subsequent to the dismissal.”

{¶90} Cross-Appellant argues that Appellants did not have a reasonable good faith basis to bring a punitive damages claim. We review the trial court’s decision under an abuse of discretion standard. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore, supra*.

{¶91} As stated above in Cross-Appellant’s first Assignment of Error, we found that it was not frivolous conduct to bring the punitive damages claim. Similarly, we find that the record demonstrates that Appellants had a reasonable good faith basis to pursue the punitive damages claim, until discovery into the issue was prohibited.

Appellants dismissed the claim shortly thereafter. The trial court initially denied a motion to dismiss the punitive damages claim, finding that it would be premature because it could not be shown that Appellants could prove no set of facts to support the claim.

{¶92} Accordingly, the trial court acted within its discretion to deny the motion for sanction under R.C. 2323.42(A).

{¶93} Cross-Appellant's second Assignment of Error is overruled.

{¶94} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

PAD:kgb

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

JULIE A. MASSOUH, et al.	:	
	:	
	:	
Plaintiffs-Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JULIE M. THOMAS, DDS, et al.	:	
	:	
	:	Case No. 2009CA00248
Defendants-Appellees	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs to be split equally between Appellants and Cross-Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER