[Cite as *Callahan v. Akron Gen. Med. Ctr.*, 2009-Ohio-5148.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

BRENDA CALLAHAN

Plaintiff

and

MATTHEW FORTADO, et al.

Appellants

v.

AKRON GENERAL MEDICAL CENTER, et al.

Appellees

C.A. Nos. 24434 and 24436

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2003 07 4120

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

BELFANCE, Judge.

{¶1} Appellants Matthew Fortado, Robert McNamara, and McNamara & Freeman Co., L.P.A. appeal the rulings of the Summit County Court of Common Pleas that assessed sanctions against them payable to appellee, Dr. Mark Jaroch, M.D.

I.

{¶2} The history of this appeal begins in 1999 when Brenda Callahan was admitted to an Akron General Medical Center facility for bariatric surgery. Ms. Callahan also suffers from Reynaud's syndrome, a condition that causes decreased circulation in her extremities. The bariatric surgery was performed by Dr. Mark Jaroch with Dr. Thomas Javorsky as the

anesthesiologist. Prior to the surgery, an arterial line was placed in her left wrist. Ms. Callahan was concerned that the arterial line could further decrease the circulation to her left hand. However, the arterial line was not removed until hours after surgery and after circulatory problems were evident in her left hand. Although the bariatric surgery was successful, due to the complications from the arterial line, Ms. Callahan's thumb, two of her fingers, and a portion of a third finger were amputated.

{¶3} Ms. Callahan and her husband contacted Attorney McNamara, who had been their counsel on previous matters, seeking advice as to possible causes of action. Attorney McNamara contacted Attorney Fortado to work as trial counsel for the case. Attorney McNamara remained on the case, keeping the Callahans informed of its progress while Attorney Fortado focused on pursuing the claim. The Callahans filed suit against Akron General Medical Center ("Akron General") Dr. Mark Jaroch, M.D., Dr. Mark Jaroch, M.D., Inc. (collectively "Dr. Jaroch") Dr. Thomas Javorsky, M.D., Anesthesiology Associates of Akron, Inc. (collectively "Dr. Javorsky"), and Joanne Gross, CRNA in March 2001. The Callahans secured the opinions of two experts who found that placement of the arterial line was negligent given Ms. Callahan's circulatory problems. Dr. Jay Jacoby, an anesthesiology expert, determined that Dr. Javorsky, the anesthesiologist, deviated from the standard of care and Dr. Richard Schlanger, a surgical expert, determined that Dr. Jaroch, the surgeon who performed the surgery, also deviated from the standard of care. Both experts were Board-certified in their respective fields and both were professors of medicine at the Ohio State University. At the deposition of Dr. Schlanger, he withdrew his criticisms of Dr. Jaroch, however, immediately following conclusion of the deposition, Dr. Schlanger informed Attorney Fortado that he still believed Dr. Jaroch was negligent and requested another opportunity to assert that position. Attorney Fortado informed

him that such an opportunity was not possible. Dr. Jaroch was dismissed from the action without prejudice on July 19, 2002. The remaining defendants were later dismissed without prejudice after the death of Dr. Jacoby, the Callahans' anesthesiology expert.

{¶4} In light of Dr. Jacoby's death, the Callahans' attorneys contacted a second Board-certified anesthesiologist, Dr. George Gabrielson. Dr. Gabrielson also opined that Dr. Javorsky was negligent in placing an arterial line in Ms. Callahan's wrist. He further suggested that the positioning of Ms. Callahan's arms during surgery could have caused the complications that led to the loss of digits. Dr. Gabrielson assumed that positioning for surgery was a decision of the surgical team, the nurses and doctors involved in the surgery, and advised the Callahans' attorneys to seek the opinion of a surgical expert.

{¶5} With the statute of limitations drawing near, the attorneys decided to contact Dr. Schlanger, the previous surgical expert, for an opinion on the issue of positioning. After reviewing the pertinent information, Dr. Schlanger stated that he agreed that the positioning of Ms. Callahan's arms was a deviation from the standard of care, and further reiterated his prior criticisms of Dr. Jaroch with respect to the arterial line.

{¶6} The Callahans re-filed their action as to Akron General, Drs. Jaroch and Javorsky, and Joanne Gross, CRNA on July 15, 2003. On September 8, 2003, Dr. Jaroch filed a motion for sanctions pursuant to Ohio Rule of Civil Procedure 11. He later filed for expenses pursuant to Civ.R. 41(D). The trial court determined that these motions were premature and held its ruling in abeyance.

{¶7} At the subsequent deposition of Dr. Schlanger, he again withdrew his opinion as to Dr. Jaroch's negligence. Dr. Jaroch was dismissed with prejudice on April 6, 2004, Joanne Gross, CRNA was also dismissed on this date. On April 14, 2004, Dr. Jaroch renewed his

motions for Civ.R. 11 sanctions and Civ.R. 41(D) expenses and moved for sanctions pursuant to R.C. 2323.51. Dr. Jaroch sought recovery solely from the Callahans' attorneys and at no time alleged misconduct on the part of the Callahans personally. Dr. Jaroch also sought discovery of Attorney Fortado's file for the Callahan matter to secure evidence to support his contentions. In its order of June 3, 2004, the trial court allowed discovery of Attorney Fortado's file. In subsequent orders, the court specified the manner in which the pertinent documents would be provided to Dr. Jaroch's attorney. Additionally, Attorneys Fortado and McNamara were deposed.

{¶8} While the parties litigated the matter with respect to sanctions, the remainder of the Callahans' claims as to Akron General and Dr. Javorsky proceeded. Akron General was eventually dismissed and the matter proceeded to jury trial as to Dr. Javorsky. The jury returned a verdict in favor of Dr. Javorsky on October 4, 2004.

{¶9} The trial court bifurcated the sanctions hearings, conducting one hearing on liability and issuing its decision, then conducting a hearing on damages and issuing a separate ruling as to the amount of sanctions to be assessed. Ultimately, Attorneys McNamara and Fortado were found jointly and severally liable for attorney's fees and costs for pursuing a claim without good grounds pursuant to Civ.R. 11 and for frivolous conduct pursuant to R.C. 2323.51. The instant appeal followed.

II.

{¶10} Attorney Fortado initially appealed the trial court's decision with respect to sanctions, then Attorney McNamara and McNamara & Freeman Co., L.P.A. filed an appeal. Because the appeals arose out of the same trial order, we consolidated them for purposes of the record, oral argument, and the decision. The parties were permitted to file separate briefs.

{¶11} Attorney Fortado argues that the trial court erred: (1) in its award of sanctions pursuant to Civ.R. 11; (2) in its award of sanctions pursuant to R.C. 2323.51, and; (3) in allowing discovery of privileged information in connection with Dr. Jaroch's motion for sanctions. Attorney McNamara and McNamara & Freeman Co., L.P.A. (collectively "Attorney McNamara") contend that: (1) the trial court erred by failing to deny Dr. Jaroch's motion for sanctions; (2) the trial court impermissibly allowed discovery of privileged information; (3) the amount awarded as sanctions must include only costs and expenses incurred as a direct result of the frivolous conduct, and; (4) the trial court erred when it did not grant appellants' motion to vacate and/or reconsider its judgment entry awarding sanctions. Dr. Jaroch initially indicated his intent to file a cross-appeal; however, he subsequently voluntarily dismissed his cross-appeal.

{¶12} We will combine some assignments of error to facilitate our review.

DISCOVERY OF PRIVILEGED INFORMATION

{¶13} Attorneys Fortado and McNamara argue that the trial court erred by allowing discovery of information protected by the attorney-client privilege and the work-product doctrine and by ordering each of them to be deposed.

{¶14} Attorneys Fortado and McNamara have argued that the trial court impermissibly allowed discovery of protected materials in its orders of November 20, 2003, June 3, 2004, May 4, 2005, May 20, 2005, March 24, 2006, July 5, 2006, and March 8, 2007. However, the trial court's orders issued on November 20, 2003 and March 8, 2007 do not address the issue of discovery of privileged information. The order of November 20, 2003 denied Dr. Jaroch's motion for summary judgment and held that his motion for Civ.R. 11 sanctions and Civ.R. 41(D) costs was premature. The order of March 8, 2007 was issued almost three years after the court permitted discovery of Attorney Fortado's file. In the order, the trial court found that sanctions

were appropriate and overruled the Callahans' motion to dismiss the motion for sanctions. Thus we confine our review to the remaining orders listed that addressed discovery.

{¶15} The order of June 3, 2004 granted discovery of Attorney Fortado's client file to Dr. Jaroch.[1] The order outlined the parameters of discovery and indicated that a deposition would be permitted, if necessary, after Dr. Jaroch's attorney reviewed the file. The trial court also stated that a hearing on sanctions and expenses would be held, if necessary. The remainder of the orders to which Attorneys Fortado and McNamara cite provided for the mechanics of the discovery process, including: when the file should be submitted to the court for *in camera* inspection and that deposition dates should be set (order of May 4, 2005); a list of documents the court determined should be released to Dr. Jaroch's attorney (May 20, 2005); an order that the trial court would hold ruling on sanctions in abeyance and amended the list of documents to be provided to Dr. Jaroch's attorney (March 24, 2006), and; a ruling that Dr. Jaroch could depose Attorneys Fortado and McNamara (July 5, 2006). Attorneys Fortado and McNamara claim that the trial court should not have ordered discovery of privileged information, they do not specifically argue that the manner in which the trial court chose to effectuate that discovery was burdensome, unreasonable, or erroneous in particular. Accordingly, we shall focus our analysis on the order issued June 3, 2004.

{¶16} This Court only has jurisdiction to review final orders of the trial courts. Section 3(B)(2), Article IV, Ohio Constitution. R.C. 2505.02, which governs final orders, provides in part:

"(A) As used in this section:

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[1] We note that the parties have not discussed whether Attorney McNamara may properly appeal an order that was specific as to discovery of Attorney Fortado's file. The record suggests that there was only one file shared by both attorneys as joint counsel. Thus, it would appear that Attorney McNamara has standing to raise the issue.

> " * * *
>
> "(3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, * * * discovery of privileged matter * * *.
>
> "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, * * * when it is one of the following:
>
> " * * *
>
> "(4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶17} We have also held that an order requiring an attorney to testify as to matters that are arguably protected by the attorney-client privilege and the work-product doctrine is a final, appealable order. *Amer Cunningham Co., L.P.A. v. Cardiothoracic & Vascular Surgery of Akron*, 9th Dist. No. 20899, 2002-Ohio-3986, at ¶11. Once privileged information is ordered to be revealed, the party who must provide the information will not have a meaningful remedy if required to wait to appeal the ruling until the final judgment of all claims. See *Wilson v. Barnesville Hosp.* (Dec. 21, 2001), 7th Dist. No. 01-BA-40, at *3. This is because the "proverbial bell cannot be unrung." *Gibson-Myers & Assoc. v. Pearce* (Oct. 27, 1999), 9th Dist. No. 19358, at *2. Thus, the trial court's order of June 3, 2004 was a final order from which an appeal could have been taken. Once the protected information was revealed, the Attorneys would have no adequate remedy if required to wait to appeal until after the trial court's final ruling on liability and damages related to sanctions. However, a notice of appeal was not filed within thirty days of the June 3, 2004 order. Thus, they are precluded from pursuing the issue of

discovery of protected information at this time, as their notice of appeal of the June 3, 2004 order is untimely. App.R. 4(A).

{¶18} For the reasons set forth above, we dismiss Attorney Fortado's third assignment of error and Attorney McNamara's second assignment of error as we lack jurisdiction to consider them.

SANCTIONS

{¶19} In his first assignment of error, Attorney Fortado asserts that the trial court erred in finding that that he violated Civ.R. 11. In his second assignment of error, he argues that the trial court also erred in finding that he violated R.C. 2323.51. In his first assignment of error, Attorney McNamara argues that the trial court erred by failing to deny Dr. Jaroch's motion for sanctions. In support of this assignment, Attorney McNamara offers various arguments as to why sanctions were not warranted pursuant to Civ.R. 11 or R.C. 2323.51.

{¶20} Dr. Jaroch initially filed a motion for Civ.R. 11 sanctions on September 8, 2003, shortly after the medical malpractice action was re-filed against him and the other defendants. The trial court held that the motion was premature. On April 14, 2004, shortly after he was dismissed from the action, Dr. Jaroch renewed his motion for Civ.R. 11 sanctions and added a request for sanctions pursuant to R.C. 2323.51. The trial court allowed discovery on the matter of sanctions. On February 1, 2007, following the completion of discovery, Dr. Jaroch filed another motion for sanctions in which he provided factual contentions with respect to the actions of Attorneys Fortado and McNamara in support of sanctions. Attorneys Fortado and McNamara filed their memorandum in opposition to sanctions and made an oral motion to dismiss Dr. Jaroch's motion for sanctions. On March 8, 2007, the trial court overruled the oral motion to dismiss.

{¶21} The trial court bifurcated the hearings and issued three orders with respect to the matter of sanctions. In its order of October 18, 2007, the trial court made extensive findings of fact and conclusions of law, ultimately ruling that Attorneys Fortado and McNamara violated Civ.R. 11 and R.C. 2323.51. Subsequent to the court's entry granting sanctions, Attorneys Fortado and McNamara filed a motion to vacate and/or reconsider in which they demonstrated that the trial court based the sanctions on a portion of R.C. 2323.51 that had not been enacted until after Dr. Jaroch was dismissed from the second action. On January 30, 2008, the court sustained the motion to reconsider, stating that it had reviewed the evidence in light of the applicable provisions of the statute and still found sanctions to be warranted; referencing law cited in the first order. On September 2, 2008, the trial court determined the exact amount of sanctions to be assessed and found Attorneys Fortado and McNamara jointly and severally liable for $31,887.25 for attorney's fees, costs, and expenses attributable to their sanctionable conduct.

{¶22} Initially, we reiterate that the first action arising from Ms. Callahan's injury was filed in March of 2001. A voluntary dismissal without prejudice was filed as to Dr. Jaroch on July 19, 2002 and a voluntary dismissal without prejudice as to the remainder of the defendants and claims was filed on October 18, 2002. The action was then filed again before the expiration of the statute of limitations pursuant to the savings statute on July 15, 2003. No motion for sanctions was filed in the first action. Additionally, the trial court's judgment entry granting sanctions in the instant matter specifically states that it is reviewing Dr. Jaroch's motion for sanctions as it relates to the case filed on July 15, 2003, not the original action filed in March of 2001. Thus, we limit our review to Attorneys Fortado's and McNamara's actions of filing a claim against Dr. Jaroch on July 15, 2003, and maintaining that claim against him until his dismissal from the action on April 6, 2004. We shall not specifically address any events that

occurred during the first action. See, *Jarina v. Fairview Hosp.*, 8th Dist. No. 91468, 2008-Ohio-6846, at ¶18 (upon the filing of a voluntary dismissal without prejudice, the case dismissed is considered a nullity, as if it had never been filed). However, to the extent that Dr. Jaroch argues that Attorneys Fortado and McNamara learned information during the discovery stage of the original action that should have informed their conduct in the second action, we will consider events from the original action for that limited purpose.

Civ. R. 11

{¶23} Civ.R. 11 mandates that an attorney must sign all documents filed with the court. The attorney's signature verifies that the attorney has read the document and "that to the best of the attorney's * * * knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Civ.R. 11. If an attorney willfully violates Civ.R. 11, the court may sanction the attorney by awarding the opposing party its expenses and attorney's fees incurred. Id.

{¶24} When considering sanctions pursuant to Civ.R. 11, the trial court evaluates whether the attorney filing the pleading or motion (1) read the document; (2) possesses good grounds for filing it, and; (3) did not file the document with a purpose to delay the proceedings. *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286, 290. If the trial court finds that the attorney violated one of the elements of Civ.R. 11, the court must then determine if the violation was willful, rather than merely negligent, before sanctions may be imposed. Id.

{¶25} In our review of the trial court's decision to grant sanctions, we must ascertain whether: (1) the attorney had "good ground" to support the claim, meaning whether the claim has any support in the law; and if not, (2) whether the trial court properly determined if there was a willful violation of the mandates of Civ.R. 11. *NationsRent v. Michael Constr. Co.* (Mar. 27,

2002), 9th Dist. No. 20755, at *2. We recognize that we generally review an award of sanctions under the abuse of discretion standard. Id. However, the first step in our analysis is to determine if the attorney had good legal grounds to support a claim and this is a question of law that we review *de novo*. *City of Lorain v. Elbert* (Apr. 22, 1998), 9th Dist. No. 97CA006747, at *2; *Wayne Mut. Ins. Co. v. Parks*, 9th Dist. No. 20945, 2002-Ohio-3990, at ¶13. See, also, *Burns v. Henne*, 115 Ohio App.3d 297, 302.

{¶26} Before re-filing the second action against Dr. Jaroch and the other defendants, Attorneys Fortado and McNamara had received opinions from two experts in the medical profession, Dr. Gabrielson and Dr. Schlanger. Dr. Gabrielson, an anesthesiology expert, concluded that Dr. Javorsky deviated from the standard of care in several respects and that these deviations were the proximate cause of Ms. Callahan's injury. He concluded that (1) Dr. Javorsky inserted the arterial line without adequate consent; (2) the use of the arterial line for monitoring blood pressure during the surgery was unnecessary and exposed Ms. Callahan to certain risks due to her Reynaud's syndrome, and that such risks were not justified even if the arterial line was used per hospital protocols; (3) once it became evident post-surgery that Ms. Callahan was suffering from severe circulation problems in her hands, the medical staff improperly delayed removal of the arterial line and treatment, and; (4) during the surgery, the position of Ms. Callahan's arms was inappropriate and dangerous given her history of circulatory problems.

{¶27} Dr. Gabrielson was the first expert to opine that the elevation of Ms. Callahan's arms during her surgery reduced circulation to her hands and contributed to the amputation of her digits. He suggested that positioning for surgery is a decision made by the "surgical team," including the anesthesiologist *and* the surgeon. Since his specialty is anesthesiology, he declined

to issue an opinion as to Dr. Jaroch's liability for positioning, and advised Attorneys Fortado and McNamara to consult a surgical expert for an opinion as to Dr. Jaroch. Dr. Gabrielson also provided Attorneys Fortado and McNamara with a written report containing his findings and opinion.

{¶28} After consideration and deliberation, Attorneys Fortado and McNamara contacted Dr. Schlanger, their previous surgical expert. They sent him Dr. Gabrielson's report and requested that he review it as well as again review Ms. Callahan's medical records. Dr. Schlanger later spoke with Attorneys Fortado and McNamara via conference call and stated that based on his experience in bariatric surgery and consultation with his colleagues, the insertion of an arterial line and the unusual position of Ms. Callahan's arms during her prolonged surgery compromised the circulation to her hands.

{¶29} Based on the above information, the case was re-filed against Akron General and Drs. Javorsky and Jaroch. We note that at the time the case was re-filed, Civ.R. 10(D)(2), requiring an affidavit of merit to be filed with a complaint containing a medical liability claim, was not yet in effect. That provision of the Civil Rules did not become effective until July 1, 2005. Civ.R 10; *Banfield v. Brodell*, 7th Dist. No. 06 MA 8, 2006-Ohio-5267, at ¶14. Thus, no specific requirements under the Civil Rules applied to filing a medical malpractice action.

{¶30} Upon careful review of the record, we conclude that at the time the second action was filed, Attorneys Fortado and McNamara had an adequate legal foundation upon which to base the claim of medical malpractice as to Dr. Jaroch. Ms. Callahan suffered an obvious injury in connection with her bariatric surgery, namely the amputation of portions of fingers and her thumb. Ms. Callahan claimed that she tried to voice her concerns regarding the placement of the arterial line due to her decreased circulation from Reynaud's syndrome to no avail. In light of

these circumstances, her attorneys submitted her medical records to a Board-certified anesthesiologist, who determined that the anesthesiologist deviated from the standard of care. Attorneys Fortado and McNamara also obtained a report from the anesthesiology expert before re-filing on July 15, 2003. When this expert advised the attorneys to contact a surgical expert, they consulted with a Board-certified surgical expert and obtained his opinion that Dr. Jaroch deviated from the standard of care. Given that the law at the time did not even require this depth of investigation and consultation before filing, we cannot say that Attorneys Fortado and McNamara lacked good ground as contemplated by Civ.R. 11 to file the claim. "Attorneys do not act in bad faith or engage in 'frivolous conduct' if they reasonably rely on the representations of the injured party and/or his or her family members or representatives to form the basis for a medical malpractice complaint." *Driskill v. Babai* (Mar. 26, 1997), 9th Dist. No. 17914, at *2. In the instant matter, Attorneys Fortado and McNamara were not only faced with a client with an obvious injury who told them that she had not been informed of the risks of using an arterial line, but they consulted with experts as to the cause of her injury, something that at the time was beyond what the law required. See *Driskill*, at *2 (sanctions not warranted even where attorneys did not consult experts to review client's medical records before filing medical malpractice action). Accordingly, we conclude that the trial court erred in assessing sanctions against Attorneys Fortado and McNamara pursuant to Civ.R. 11.

R.C. 2323.51

{¶31} R.C. 2323.51 allows a court to award attorney's fees to a party who has been adversely affected by frivolous conduct in connection with a civil action. Sanctions may be assessed against a party who has commenced or persisted in maintaining a frivolous action. *Sigmon v. Southwest Gen. Health Ctr.*, 8th Dist. No. 88276, 2007-Ohio-2117, at ¶33. See, also,

Kozar v. Bio-Medical Applications of Ohio, Inc., 9th Dist. No. 21949, 2004-Ohio-4963, at ¶20. The statute defines "conduct" as "[t]he filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, or the taking of any other action in connection with a civil action[.]" R.C. 2323.51(A)(1)(a). Pursuant to the version of the statute in effect at the time of the case *sub judice*, "frivolous conduct" included either of the following: conduct that "obviously serves merely to harass or maliciously injure another party to the civil action" or conduct that "[i]s not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." R.C. 2323.51(A)(2)(a)(i)-(ii). The relevant inquiry for an alleged violation of division (A)(2)(a)(ii) is "whether no reasonable lawyer would have brought the action in light of the existing law." *Kozar* at ¶16, quoting *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, at ¶30. In making its award, the trial court must determine that the conduct was frivolous as defined in the statute and that the opposing party was adversely affected, and if so, then it may determine what amount of fees, costs, and expenses were necessitated by the frivolous conduct. R.C. 2323.51(B)(2)(a).

{¶32} The determination that a party's or attorney's action was frivolous because the conduct served merely to harass or injure the opposing party is a factual determination. *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 233. Thus, we review such a ruling with substantial deference to the trial court's findings. Id. However, the trial court's finding that the conduct was frivolous because it is not warranted under existing law or a good faith argument for extension, requires a purely legal analysis. Id. Accordingly, our review is *de novo* as matters of law are "peculiarly within the competence of an appellate court[.]" *Passmore v. Greene Cty. Bd. of Elections* (1991), 74 Ohio App.3d 707, 712.

{¶33} In the instant matter, in its initial judgment entry the trial court did not expressly find that the conduct of Attorneys Fortado and McNamara was frivolous because they acted with purpose to harass or injure Dr. Jaroch. Nor did it find that the claim against Dr. Jaroch was not support by existing law or extension or modification of existing law. The trial court's initial entry of October 18, 2007 granting sanctions specifically finds a violation of "R.C. 2323.51(2)(iii)." We presume that the trial court attempted to cite R.C. 2323.51(A)(2)(a)(iii), which permits a finding of frivolous conduct when a party's claim lacks evidentiary support. However, that portion of the statute is inapplicable to this matter because it did not become effective until 2005, after both the filing of the second complaint against Dr. Jaroch in 2003, and his subsequent dismissal in 2004.[2]

{¶34} Additionally, the trial court's original entry of October 18, 2007 finding sanctionable conduct is replete with references to conduct that occurred during the prosecution of the first case filed in 2001. As discussed, *supra*, Dr. Jaroch did not move for sanctions in the first action and the voluntary dismissal of the first action renders the first action a "nullity." *Jarina* at ¶18. Notwithstanding, the trial court's judgment entry refers to facts occurring in the first action such as, the timing of the dismissal of Dr. Jaroch, or the failure to provide Dr. Schlanger with the deposition transcript of Dr. Jacoby. Moreover, the trial court's entry also states it "FINDS THAT [Dr. Jaroch] HAS FAILED TO PROVE THAT [Attorneys Fortado and

[2] The version of R.C. 2323.51 that was applicable at the time provided two bases for finding frivolous conduct as enumerated above. The current version of the statute that became effective in 2005 retained those two prior provisions and added two more: that the party's allegations or factual contentions have no evidentiary support and are unlikely to gain such support through further investigation, and the party's denials or factual contentions are not warranted by the evidence or reasonably based on a lack of information. See R.C. 2323.51(A)(2)(a)(i)-(iv).

McNamara] VIOLATED EITHER THE PROVISIONS OF CIVIL RULE 11 OR R.C. 2323.51 as relates to the original action." (Emphasis in original). In light of the above, the trial court's reliance on certain facts and circumstances of the first action to support its conclusion that sanctions were appropriate in the second action is misplaced because Dr. Jaroch's Civ.R. 11 motion and R.C. 2323.51 motion were brought with reference only to the second action and not the first. Furthermore, the trial court did not identify any facts in the first action that were relevant to the issue of whether Attorneys Fortado and McNamara pursued a claim in the second action that violated Civ.R. 11 or was sanctionable pursuant to R.C. 2323.51.

{¶35} Attorneys Fortado and McNamara filed a motion to vacate and/or reconsider in light of the trial court's apparent reliance on inapplicable law. The trial court sustained the motion to reconsider, recognizing that it had applied the improper version of the statute. In its entry filed on January 30, 2008, the court stated that it reconsidered the case pursuant to the appropriate sections of R.C. 2323.51 and concluded that the conduct of the Attorneys served merely to maliciously harass or injure Dr. Jaroch. The court stated that the second claim against Dr. Jaroch was initiated without significant investigation or proper support and was based solely on the oral statement of Dr. Schlanger. The trial court also stated that it was specifically reaffirming paragraphs 39 and 40 from the October 18, 2007 judgment entry. Paragraph 39 states: "THE COURT FINDS THAT THE CONDUCT OF THE DEFENSE COUNSELS, IN FILING AND PROSECUTING THE SECOND ACTION WAS FRIVOLOUS, WITHIN THE MEANING AND SCOPE OF R.C. 2323.51(2)(iii) IN THAT THEY WERE UNLIKELY TO HAVE EVIDENTIARY SUPPORT AFTER A REASONABLE OPPORTUNITY FOR FURTHER INVESTIGATION OR DISCOVERY." Thus, the trial court again based its imposition of sanctions on the wrong version of the statute. The applicable version of R.C.

2323.51 did not contain a provision allowing sanctions to be granted for a party's failure to have factual or evidentiary support for the claim. Additionally, the language refers to defense counsel, when it should refer to plaintiffs' counsel, *i.e.* Attorneys Fortado and McNamara. Paragraph 40 simply states that the motion for sanctions is sustained in part and overruled in part.

{¶36} Despite the trial court's reconsideration of the matter and our deferential standard of review as to the first prong of the statute, upon careful review of the record, we conclude that the trial court did not make adequate findings with respect to malicious conduct. In its second entry issued on January 30, 2008, the trial court did not specifically identify any actions taken by Attorneys Fortado and/or McNamara that served solely to harass or injure Dr. Jaroch. If the court had made such findings, we would be required to defer to the trial court's judgment; however, based on the record, we cannot conclude that the court found malicious conduct as defined by the statute. Instead, the trial court repeatedly focused on factors relevant to the amended version of R.C. 2323.51 and thus, again found that the conduct was frivolous because it lacked evidentiary support, a basis not provided in the relevant version of R.C. 2323.51. Although the trial court's entry suggests that Attorneys Fortado and McNamara should not have proceeded simply based on Dr. Schlanger's oral statement, the law at the time did not require any consultation with experts before filing a medical malpractice action, or any investigation beyond that which is required in other actions. Here, Attorneys Fortado and McNamara did consult with experts before filing the second action to ensure a legal basis for the Callahans' claim.

{¶37} Having determined that the trial court did not make adequate findings based on the first portion of the statute concerning harassing or injurious conduct, the remaining inquiry before this Court is whether, pursuant to the second prong of the applicable version of R.C. 2323.51, the conduct of Attorneys Fortado and McNamara was frivolous because it was "not

warranted under existing law and [not] supported by a good faith argument for an extension, modification, or reversal of existing law." R.C. 2323.51(A)(2)(a)(ii). We shall conduct this review *de novo*. See *Lable & Co.*, 104 Ohio App.3d at 233; *Passmore*, 74 Ohio App.3d at 712.

{¶38} We have held in our discussion of Civ.R. 11 that Attorneys Fortado and McNamara had adequate legal support for the claim against Dr. Jaroch at the time it was filed in July of 2003. Ms. Callahan had suffered complications during her bariatric surgery that led to the amputation of most of the digits on her left hand. Attorneys Fortado and McNamara sent her medical records to two independent medical experts for review. Although the Callahans had obtained a prior opinion from Dr. Jacoby that there was a deviation from the standard of care; prior to initiation of the second complaint, Dr. Gabrielson for the first time indicated that Ms. Callahan's position during surgery, with her arms elevated, was a deviation from the standard of care and a proximate cause of her injury. While Dr. Gabrielson was called upon to give his professional opinion of Ms. Callahan's anesthesiologist and did not directly criticize Dr. Jaroch, his findings implicated Dr. Jaroch because Dr. Gabrielson stated in his report that: "Positioning of a patient for surgery is generally the responsibility of anesthesiologists, surgeons, and nurses together. As such a joint effort, it is also a shared responsibility to ensure safe positioning." In light of this opinion, Attorneys Fortado and McNamara asked Dr. Schlanger to review Ms. Callahan's medical records again and consider Dr. Gabrielson's report.

{¶39} Dr. Schlanger later issued an opinion in which he stated that after reviewing Ms. Callahan's medical records and Dr. Gabrielson's report, he agreed with Dr. Gabrielson's criticisms that elevation of the arms was below the standard of care. Dr. Schlanger confirmed that the patient's position during surgery is a joint decision of the surgical team. He further

stated that his prior criticisms expressed in his first report remained unchanged and that the use of the arterial line in Ms. Callahan was extremely dangerous due to her Reynaud's syndrome.

{¶40} Dr. Jaroch points to various circumstances in support of his contention that Attorneys Fortado and McNamara engaged in frivolous conduct by continuing to pursue their action against Dr. Jaroch. First, he argues that Dr. Schlanger's opinion that Dr. Jaroch deviated from the standard of care because he did not alert the anesthesiologist assisting in Ms. Callahan's surgery that she had decreased circulation due to Reynaud's syndrome is invalid and based on incorrect factual assumptions. Dr. Jaroch maintains that he delivered documentation concerning Ms. Callahan's entire medical history to the anesthesiologist prior to surgery. He argues this information was never communicated to Dr. Schlanger so that he could reevaluate his opinion. However, Attorney Fortado, the lead attorney in the matter, testified that Dr. Schlanger became aware that Dr. Jaroch had sent Ms. Callahan's records to the anesthesiologist. He further stated that he had a conversation with Dr. Schlanger about his criticism on that point and understood that Dr. Schlanger had abandoned that point in light of the facts. However, Dr. Schlanger also had other criticisms of Dr. Jaroch's care, including a theory not explored during the first action, that of surgical positioning. Dr. Schlanger's entire opinion was not rendered invalid due to the initial misunderstanding of the factual background.

{¶41} Dr. Jaroch also argues that he should not be liable for the use of the arterial line because the protocols of Akron General dictate that the anesthesiologist is solely responsible for making such decisions and that Dr. Jaroch was not present when the arterial line was placed. However, both Attorney Fortado and Attorney McNamara testified that Dr. Schlanger was adamant that regardless of the protocols, Dr. Jaroch, as the surgeon, had the ultimate responsibility for the patient's care. As such, according to Dr. Schlanger, once Dr. Jaroch

discovered that the arterial line had been placed, he should have ordered it to be removed, and cancelled the surgery if the anesthesiologist refused to remove it.

{¶42} Moreover, the fact that a medical facility mandates a certain protocol does not necessarily lead to the conclusion that the protocol meets the applicable standard of care. An expert may still conclude, as Dr. Schlanger did, that a deviation from the standard of care occurred regardless of the facility's protocol.

{¶43} Dr. Jaroch contends that Attorneys Fortado and McNamara did not share the deposition transcripts of the anesthesiology experts with Dr. Schlanger. He asserts that this was frivolous conduct because it violated the office policies and procedures of Attorney McNamara. However, both Attorney Fortado and McNamara testified that there were no formal policies governing what information would be submitted to the experts, but that during their years of practice, they had developed methods of handling a case. Pursuant to those methods, Attorney Fortado testified that he gave each expert any information that he evaluated to be relevant to the expert in forming an opinion. He stated that if the transcripts of depositions were available for the other experts and were relevant, he would be sure that the information was transmitted. He also testified that he did not have specific recollection of the transmittal of each transcript due to the passage of years between the litigation of the action and the proceedings related to sanctions.

{¶44} It is clear that Dr. Schlanger received a copy of Dr. Gabrielson's report. The record contains the cover letter prepared by a paralegal on behalf of Attorney Fortado and sent to Dr. Schlanger with the report. However, Dr. Jaroch complains that the cover letter impermissibly indicates that Dr. Gabrielson deduced that Dr. Jaroch deviated from the standard of care. Dr. Gabrielson concluded in his report that the surgical positioning was inappropriate and dangerous, and that safe positioning is a responsibility of the anesthesiologist, surgeon, and

nurses. The cover letter from Attorney Fortado states that Dr. Gabrielson indicated that Dr. Jaroch and the hospital staff deviated from the standard of care. Despite the wording of the cover letter, we do not find merit in Dr. Jaroch's contention. Dr. Schlanger received the report in its entirety and further reviewed Ms. Callahan's medical records. He stated in his letter that he agreed with Dr. Gabrielson and reasserted his own prior criticisms of Dr. Jaroch's care. Dr. Jaroch has not directed us to anything in the record that demonstrates that Dr. Schlanger felt pressured or influenced by either Attorney Fortado or McNamara, nor the cover letter, to arrive at a certain opinion, nor have we discovered anything that would lead to such a conclusion.

{¶45} Dr. Jaroch further alleges that sanctions were appropriate because pursuit of the Callahans' case had a negative impact on Dr. Jaroch professionally in the form of higher malpractice insurance premiums that led to Dr. Jaroch to abandon his practice. Attorneys Fortado and McNamara admitted that the information concerning increased insurance premiums was communicated to them at some point during the litigation. However, both stated that no other evidence was offered about these negative consequences other than a statement by Dr. Jaroch's trial counsel about the increase. In his appellate brief, Dr. Jaroch does not cite any support for his argument that an injured plaintiff, or the plaintiff's attorney, engages in frivolous conduct by pursuing a claim if such a pursuit has negative consequences for the defendant. Certainly, all litigation arguably has negative consequences for a defendant. He does not explain how increased insurance costs are relevant to a determination of frivolous conduct. We find this argument to be without merit.

{¶46} Based on the above, we are not persuaded by Dr. Jaroch's arguments. R.C. 2323.51 was enacted to punish egregious, overzealous, and unjustifiable actions. *Turowski v. Johnson* (1990), 68 Ohio App.3d 704, 706. We do not find that the record supports the trial

court's conclusion that the conduct of Attorneys Fortado and McNamara rose to that level in this case. While in retrospect it may have been a tactical error to hire Dr. Schlanger for the second action when he had previously withdrawn his criticisms as a result of effective cross-examination at his deposition during the first action; such a tactical error does not equate with frivolous conduct.

{¶47} The trial court's entry finding sanctions and its entry in response to Attorney Fortado's and McNamara's motion to reconsider do not present adequate findings of frivolous conduct pursuant to the first prong of R.C. 2323.51 relating to malicious intent to injure or harass. The trial court's entry instead focuses on whether the Attorneys had sufficient evidentiary support for the second action. However, using the applicable law, the trial court should have analyzed whether pursuit of the action was warranted under existing law or a good faith argument for extension, modification, or reversal of existing law. See R.C. 2323.51(A)(2)(a)(ii). Under this second prong of the statute, the relevant inquiry is whether a reasonable attorney would have brought the action. See *Kozar* at ¶16, quoting *Riston* at ¶30. Based on the facts known to the attorneys and the opinions of the experts, we hold that it was not unreasonable for Attorneys Fortado and McNamara to file and pursue the second action against Dr. Jaroch in light of the existing law. The trial court erred in assessing sanctions pursuant to R.C. 2323.51.

{¶48} In light of our conclusion that sanctions were not warranted either pursuant to Civ.R. 11 nor R.C. 2323.51, we need not address Attorney McNamara's final two assignments of error, which concern the amount of attorney's fees awarded and the trial court's ruling on the motion to vacate and/or reconsider the ruling on sanctions.

III.

{¶49} For the reasons outlined above, the judgment of the Summit County Court of Common Pleas imposing sanctions on Attorneys Fortado and McNamara is reversed. We sustain Attorney Fortado's first and second assignment of error, and dismiss his third assignment of error. We sustain Attorney McNamara's first assignment of error and dismiss his second assignment of error. We need not reach the merits of Attorney McNamara's third and fourth assignments of error.

Appeal dismissed in part,
and judgment reversed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to all parties.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
CONCURS

MOORE, P. J.
CONCURS, SAYING:

{¶50} I concur in the majority's opinion. I write separately to make this point. Generally, the trial court's observations of the demeanor of counsel and the opportunity for the judge to make credibility determinations are extremely important factors in reviewing cases involving sanctions. Trial court judges occupy a unique position in managing trials. They sit at ground zero, ruling on every objection, observing every argument, making note of each remark and the tone of every question and answer. They are in a peculiarly appropriate position to judge the conduct of counsel during trial and their observations are to be accorded considerable weight. Under the circumstances of this case, as discussed at length in the opinion, there were errors made in the application of the law to the facts. Accordingly, I join in the decision to reverse the judgment of the trial court and to dismiss the assignments of error not properly preserved for review.

APPEARANCES:

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SIDNEY N. FREEMAN, Attorney at Law, for Appellants.

DAVID M. BEST, Attorney at Law for Appellees.

MICHAEL OCKERMAN, Attorney at Law, for Appellees.

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