

[Cite as *Groves v. Groves*, 2010-Ohio-4515.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Amanda Groves,	:	
Plaintiff-Appellee,	:	
v.	:	
James Groves,	:	No. 09AP-1107 (C.P.C. No. 08CVC09-13524)
Defendant,	:	(REGULAR CALENDAR)
Jodelle M. D'Amico,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 23, 2010

James W. Jordan, for appellee.

Jodelle M. D'Amico, pro se.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Jodelle M. D'Amico ("D'Amico"), appeals from a judgment of the Franklin County Court of Common Pleas denying her motion for attorney fees under R.C. 2323.51. For the following reasons, we reverse that judgment and remand this case to the trial court.

{¶2} On September 27, 2007, William Groves ("William") committed suicide after attempting to murder his estranged wife, plaintiff-appellee Amanda Groves ("Amanda").

At the time of his death, William was a participant in the Central States, Southeast and Southwest Areas Health and Welfare Fund ("Fund"), which managed the health and welfare benefits provided to William by his employer. Those benefits included a life insurance benefit, for which William had designated Amanda as the sole beneficiary.

{¶3} After William's death, his brother, James Groves ("James"), became the legal custodian of one of William's sons. James filed a claim for William's life insurance benefit with the Fund. The Fund denied James' claim, but allowed him to appeal the denial. In the meantime, Amanda also filed a claim for the life insurance benefit. While James' appeal was pending, the Fund refused to pay Amanda the proceeds of the life insurance benefit.

{¶4} James had hired an attorney, D'Amico, to assist him with certain legal issues that arose from his brother's death. In a July 25, 2008 letter to Amanda's attorney, D'Amico suggested a potential resolution of James and Amanda's dispute over the life insurance benefit. D'Amico wrote:

[James] will cease all appeals of the denial of the insurance claim if your client agrees to divide the insurance benefits between her and the minor children. She may have half and the other half will be divided between William's two (2) sons.

{¶5} Not only did Amanda reject this settlement offer, she also filed suit against both James and D'Amico. In the only claim asserted against D'Amico, Amanda alleged:

On or about July 25, 2008, defendants attempted to extort funds from plaintiff by offering to "...cease all appeals of the denial..." in exchange for paying one-half of the life insurance benefit, in violation of Ohio and Federal law, all to plaintiff's damage in an amount to be determined at the trial of this case, plus punitive damages and attorney's fees.

(Complaint at ¶11.)

{¶6} D'Amico filed a Civ.R. 12(B)(6) motion to dismiss, essentially arguing that the settlement offer did not give Amanda the basis for a legal claim against D'Amico. In response, Amanda stated that she premised her claim against D'Amico on 29 U.S.C. 1141, which Amanda claimed made it unlawful for D'Amico to interfere or attempt to interfere with her right to William's life insurance benefit.

{¶7} The trial court never ruled on D'Amico's motion to dismiss because Amanda voluntarily dismissed her claim against D'Amico. After this dismissal, D'Amico filed a motion seeking an award of attorney fees against Amanda and her attorney pursuant to R.C. 2323.51. On October 30, 2009, the trial court issued a decision and entry denying D'Amico's motion. The trial court gave two reasons for its denial of the motion: (1) D'Amico's motion did not comply with Civ.R. 7(B), which requires a motion to "state with particularity the grounds therefor," and (2) Amanda and her attorney did not engage in frivolous conduct.

{¶8} D'Amico now appeals from the October 30, 2009 judgment, and she assigns the following error:

THE TRIAL COURT ERRED WHEN IT REFUSED TO FIND THAT APPELLEE ENGAGED IN FRIVOLOUS CONDUCT IN ASSERTING CLAIMS THAT WERE NOT WARRANTED UNDER EXISTING LAW, OR CANNOT BE SUPPORTED BY A GOOD FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW OR CANNOT BE SUPPORTED BY A GOOD-FAITH ARGUMENT FOR THE ESTABLISHMENT OF NEW LAW.

{¶9} Before addressing the merits of D'Amico's argument, we must address a procedural matter. Although the trial court denied D'Amico's motion for two reasons, D'Amico's assignment of error only challenges one of those reasons. Despite this deficiency, D'Amico argues in her brief that neither reason can withstand legal scrutiny.

Amanda contends that this court should disregard D'Amico's Civ.R. 7(B) argument because D'Amico failed to include reference to it in her assignment of error.

{¶10} App.R. 16(A)(3) requires every appellant's brief to include "[a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected." Noncompliance with any Rule of Appellate Procedure is ground for an appellate court to take "such action as the court * * * deems appropriate," including refusal to consider any unassigned error. App.R. 3(A). As a general matter, appellate courts rule on assignments of error only, and will not address mere arguments. *Olentangy Condominium Assn. v. Lusk*, 10th Dist. No. 09AP-568, 2010-Ohio-1023, ¶25. However, failure to comply with App.R. 16(A)(3) does not always result in an appellate court's refusal to consider error argued, but not assigned. An appellate court may exercise its discretion to consider arguments not separately assigned in the interest of justice. *Id.*; *Discover Bank v. Heinz*, 10th Dist. No. 08AP-1001, 2009-Ohio-2850, ¶13; *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008-Ohio-5073, ¶21; *Oladele v. Adegoke-Oladele*, 10th Dist. No. 08AP-92, 2008-Ohio-4005, ¶3; *In re R.L.*, 10th Dist. No. 07AP-36, 2007-Ohio-3553, ¶5. We do so in this case.

{¶11} D'Amico first argues that her motion for attorney fees satisfied the requirements of Civ.R. 7(B). We agree.

{¶12} Pursuant to Civ.R. 7(B)(1), "[a] motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." By fulfilling this requirement, the moving party provides the non-moving party with the information necessary to formulate an appropriate response to the motion. *Campbell Oil Co. v. Shepperson*, 7th Dist. No. 05 CA 817, 2006-Ohio-1763, ¶14; *Dale v. Dale*, 10th

Dist. No. 02AP-644, 2003-Ohio-1113, ¶10. Additionally, Civ.R. 7(B)(1) ensures that the trial court can comprehend the basis of the motion and deal with it fairly. *AAA Am. Constr., Inc. v. Alpha Graphic*, 8th Dist. No. 84320, 2005-Ohio-2822, ¶10.

{¶13} In *Tosi v. Jones* (1996), 115 Ohio App.3d 396, this court considered whether a motion for attorney fees under R.C. 2323.51 met the Civ.R. 7(B)(1) requirement. There, the defendant's motion expressly alleged that the plaintiff and third party defendant asserted claims against the defendant only to "harass and maliciously injure" him, and that the claims were "not warranted under existing law and [could not] be supported by a good faith argument for an extension, modification, or reversal of existing law." *Id.* at 401. We found that these allegations were sufficient to put the plaintiff, the third party defendant, and the trial court on notice regarding the grounds for the defendant's request for attorney fees. Thus, we concluded that the motion complied with Civ.R. 7(B)(1). Our holding resulted from our recognition that, "Civ.R. 7(B)(1) requires a particularized statement only of the grounds for the motion; it does not require the movant to provide a list of the evidence in support of those grounds." *Id.*

{¶14} The situation in the case at bar is almost identical to the circumstances presented in *Tosi*. Although not lengthy, D'Amico's motion set forth the language of R.C. 2323.51 that permits a party to seek attorney fees for another party's frivolous conduct. D'Amico also quoted the statutory definition of "frivolous conduct." D'Amico then asserted that, "[a] review of the allegations in the Complaint filed by Plaintiff and her counsel against Attorney Jodelle M. D'Amico can only conclude that they are in fact frivolous, are not warranted under existing law and cannot be supported by good faith argument."

(D'Amico's motion for attorney fees at 2.) Based upon this court's holding in *Tosi*, we conclude that D'Amico's motion satisfied Civ.R. 7(B)(1).

{¶15} We next turn to D'Amico's argument that the trial court erred in concluding that Amanda's claim against her was warranted under existing law. D'Amico contends that this conclusion resulted in the trial court erroneously finding that Amanda and her attorney did not engage in frivolous conduct. We agree.

{¶16} Pursuant to R.C. 2323.51(B)(1), "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." When deciding such a motion for attorney fees, a trial court engages in a two-step process. *McCallister v. Frost*, 10th Dist. No. 07AP-884, 2008-Ohio-2457, ¶24; *Crockett v. Crockett*, 10th Dist. No. 02AP-482, 2003-Ohio-585, ¶19. First, the court must determine whether an action taken by the party against whom the motion is filed constituted frivolous conduct. *Id.* Second, if the court finds the conduct frivolous, it must determine what amount, if any, of reasonable attorney fees to award the party aggrieved by the frivolous conduct. *Id.*

{¶17} "Frivolous conduct" includes "[c]onduct of an * * * other party to a civil action" or of the "other party's counsel of record" that "is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law." R.C. 2323.51(A)(2)(a)(iii). Under this definition of "frivolous conduct," the test is whether no reasonable attorney would have brought the action in light of the existing law. *L & N Partnership v. Lakeside Forest Assn.*, 183 Ohio App.3d 125, 2009-Ohio-2987,

¶37; *Stafford v. Columbus Bonding Ctr.*, 177 Ohio App.3d 799, 2008-Ohio-3948, ¶6. "Sanctions are inappropriate when a legitimate legal goal is asserted that is not totally without justification under existing law." *Stafford* at ¶27.

{¶18} No single standard of review applies to appeals of rulings on R.C. 2323.51 motions. *Indep. Taxicab Assn. of Columbus, Inc. v. Abate*, 10th Dist. No. 08AP-44, 2008-Ohio-4070, ¶13. When considering whether the trial court erred in finding the conduct frivolous or not, the type of standard an appellate court uses depends upon whether the trial court's determination resulted from factual findings or a legal analysis. The question of what constitutes frivolous conduct may call for a factual determination, e.g., whether a party engages in conduct to harass or maliciously injure another party. Review of a trial court's factual findings requires an appellate court to employ a degree of deference, and we do not disturb those findings where the record contains competent, credible evidence to support them. *Id.*; *McCallister* at ¶25. On the other hand, the question of what constitutes frivolous conduct may call for a legal determination, e.g., whether a claim is warranted under existing law or could be supported by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. *Id.* We review questions of law under the de novo standard. *Id.* See also *L & N Partnership* at ¶37 ("Whether a claim is warranted under existing law or can be supported by a good-faith argument for an extension, modification, or reversal of existing law is a question of law, and an appellate court is not bound by the trial court's determination."). Finally, with respect to the second step of the trial court's process, we review the trial court's award of monetary sanctions under the abuse of discretion standard. *L & N Partnership* at ¶51; *Abate* at ¶13; *Crockett* at ¶19.

{¶19} Here, because D'Amico contends that Amanda's claim is unsupported by either existing law or a good faith argument for an extension of the law, we apply the de novo standard to review the trial court's denial of D'Amico's motion. The trial court denied D'Amico's motion because it held that 29 U.S.C. 1141 provides a basis for Amanda's claim. We disagree.

{¶20} Pursuant to 29 U.S.C. 1141:

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan * * *. Any person who willfully violates this section shall be fined \$100,000 or imprisoned for not more than 10 years, or both.

The "plan" referred to in 29 U.S.C. 1141 is an employee welfare benefit plan, which includes any fund established or maintained by an employer for the purpose of providing its participants, or their beneficiaries, through the purchase of insurance or otherwise, benefits in the event of sickness, accident, disability, death, or unemployment. 29 U.S.C. 1002(1) & (3). Because Amanda is a beneficiary under such a plan, 29 U.S.C. 1141 could potentially apply to the instant case. However, Amanda cannot premise her claim against D'Amico on 29 U.S.C. 1141 for two reasons. First, 29 U.S.C. 1141 makes it unlawful to restrain, coerce, or intimidate a beneficiary with "fraud, force, violence, or threat of the use of force or violence." Here, the record contains neither evidence nor allegation that D'Amico's settlement offer was fraudulent. Also, the settlement offer constitutes neither an act nor a threat of force or violence.

{¶21} Second, and more importantly, no private right of action exists for an alleged violation of 29 U.S.C. 1141. Every federal court that has considered the question

has concluded that 29 U.S.C. 1141 is a criminal provision, and thus, it is not enforceable in a civil action. *Phillips v. Amoco Oil Co.* (C.A.11, 1986), 799 F.2d 1464, 1472 ("Section 1141 is a criminal statute that provides no private right of action but allows only for criminal prosecution by the United States Attorney General."); *West v. Butler* (C.A.6, 1980), 621 F.2d 240, 246 (holding that the plaintiffs' claim based on 29 U.S.C. 1141 failed because that section "may be enforced only in a criminal proceeding instituted by the Attorney General"); *Puga v. Williamson-Dickie Mfg. Co.* (Oct. 16, 2009), N.D.Tex. No. 4:09-CV-335-A ("[Section] 1141 contains no private right of action, but is instead a criminal provision, the enforcement of which is the exclusive prerogative of the Attorney General."); *Barbera v. Minn. Mining and Mfg. Co. Long-Term Disability Plan/Preferred Works Group* (Oct. 26, 2004), D.Minn. No. Civ. 04-1598DWFSRN (dismissing the plaintiff's 29 U.S.C. 1141 claim because that section "is a criminal statute meant to give law enforcement officials the right to prosecute individuals who coercively interfere with a beneficiary's rights under a pension plan"); *Mouly v. E.I. DuPont de Nemours & Co.* (Sept. 11, 1998), W.D.Va. No. Civ.A. 98-0020-H, fn. 5 ("Section 511 of ERISA, 29 U.S.C. § 1141[,] provides criminal sanctions for certain actions and does not allow enforcement of its provisions via private causes of action."); *Korchek v. Nichols-Homeshield* (Sept. 30, 1997), N.D.Ill. No. 95 C 0025 (granting summary judgment on a claim premised on 29 U.S.C. 1141 because that section "is a criminal provision for which there is no private cause of action"); *Brownstein v. Hewlett-Packard Co.* (Mar. 18, 1997), E.D.Pa. No. CIV. A. 95-2459 ("No private right of action exists for alleged violations of § 1141."); *Levine v. Crowntuft Mfg. Corp.* (July 24, 1991), S.D.N.Y. No. 89 Civ. 7548 (MJL), fn. 2 ("29 U.S.C. § 1141, unlike § 1140, is a criminal provision of ERISA which does not provide for a

private right of action."); *Goodson v. Cigna Ins. Co.* (May 20, 1988), E.D.Pa. CIV. A. No. 85-0476 (rejecting the plaintiff's 29 U.S.C. 1141 claim because that section "does not provide a *private* cause of action; it is a criminal provision whose enforcement is the exclusive prerogative of the Attorney General") (emphasis sic); *Champ v. Am. Public Health Assn.* (June 30, 1987), D.D.C. Civ. A. No. 86-1818, affirmed by (C.A.D.C.1988), 851 F.2d 1500 (table) ("Plaintiffs, however, cannot assert a private cause of action under 29 U.S.C. § 1141 and, thus, leave shall not be granted to add this claim to the complaint."); *Phillips v. Amoco Oil Co.* (N.D.Ala.1985), 614 F.Supp. 694, 724, affirmed by (C.A.11, 1986), 799 F.2d 1464 ("As every court which has addressed this question has concluded, Section 1141 provides no private right of action whatsoever, but simply allows for criminal prosecution of certain egregious forms of conduct already prohibited by Section 1140."); *Goins v. Teamsters Loc. 639—Employers Health & Pension Trust* (D.D.C.1984), 598 F.Supp. 1151, 1155 (holding that "the plaintiffs cannot assert a private right of action under section 1141" because that section "is a criminal provision whose enforcement is the exclusive prerogative of the Attorney General").

{¶22} The trial court recognized that 29 U.S.C. 1141 is a criminal provision. The court, however, found that basing a claim on that statute was not frivolous conduct because "[f]rivolous conduct amounts to something more than filing an action where the right of enforcement is left solely to the United States Justice Department." (Decision and entry at 4.) We disagree. As we stated above, frivolous conduct occurs when a party or her attorney asserts a claim that no reasonable attorney would assert in light of the existing law. Absent express authorization, criminal statutes do not create civil causes of action. *Williams v. Griffith*, 10th Dist. No. 09AP-28, 2009-Ohio-4045, ¶8; *Williams v. Lo*,

10th Dist. No. 07AP-949, 2008-Ohio-2804, ¶25; *Biomedical Innovations, Inc. v. McLaughlin* (1995), 103 Ohio App.3d 122, 126. Accordingly, we conclude that no reasonable attorney would rely on 29 U.S.C. 1141 as a basis for asserting a civil cause of action, and thus, Amanda and her attorney acted frivolously in asserting such a claim.

{¶23} Perhaps recognizing the infirmity in the trial court's reasoning, Amanda raises a new argument on appeal. Ordinarily, failure to assert an argument at the trial court level results in forfeiture of that argument, and appellate courts will decline to consider it. *State ex rel. Ohio Civ. Serv. Emp. Assn., AFSCME, Loc. 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, ¶10. Nevertheless, we will consider Amanda's argument because she advanced it in an unrelated motion that was pending before the trial court when it decided D'Amico's motion for attorney fees.

{¶24} In her new argument, Amanda contends that R.C. 2307.60 authorizes her claim against D'Amico. Pursuant to R.C. 2307.60(A)(1), "[a]nyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law * * *." According to Amanda, D'Amico's settlement offer constituted a threat to continue committing the felony specified in 29 U.S.C. 1141. Under Ohio law, a person perpetrates the offense of extortion if she, "with purpose to obtain any valuable thing or valuable benefit * * *, [t]hreaten[s] to commit any felony." R.C. 2905.11(A)(1). Thus, Amanda argues that D'Amico acted criminally when she made the settlement offer. Amanda claims that because D'Amico's criminal act—extortion—injured her, R.C. 2307.60 entitles her to sue D'Amico.

{¶25} Amanda's argument fails for two reasons. First, as we explained above, the record contains neither evidence nor allegation that D'Amico acted fraudulently or with

force or violence. Thus, the settlement offer is not a threat to commit a felony, and consequently, it fails to qualify as an act of extortion. Second, R.C. 2307.60 does not create a cause of action. *McNichols v. Rennicker*, 5th Dist. No. 2002 AP 04 0026, 2002-Ohio-7215, ¶17; *Edwards v. Madison Twp.* (Nov. 25, 1997), 10th Dist. No. 97AP-819; *Applegate v. Weadock* (Nov. 30, 1995), 3d Dist. No. 2-95-24; *Guardianship of Newcomb v. Bowling Green* (Nov. 6, 1987), 6th Dist. No. WD-87-5. R.C. 2307.60 is only a codification of the Ohio common law rule that a civil action is not merged into a criminal prosecution for the same acts that form the basis for the civil action. *Id.* A party must rely on a separate civil cause of action, existent either in the common law or through statute, to bring a civil claim based on a criminal act. *McNichols* at ¶17; *Edwards*.

{¶26} Having addressed each of Amanda's arguments, we reach the bottom line: no civil cause of action for extortion exists. Amanda's attempts to fashion such a cause of action are all unavailing. Because Amanda's extortion claim against D'Amico cannot be justified under current law or any extension of the current law, we conclude that asserting the claim was frivolous conduct. Accordingly, we sustain D'Amico's assignment of error.

{¶27} For the foregoing reasons, we sustain the sole assignment of error, and we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for further proceedings consistent with law and this opinion.

Judgment reversed; cause remanded.

FRENCH and McGRATH, JJ., concur.
