

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

MARLA MARTELL

Plaintiff-Appellant

-vs-

MICHAEL MARTELL

Defendant-Appellee

: JUDGES:

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Hon. W. Scott Gwin, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 2018CA00017

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of  
Common Pleas, Domestic Relations  
Division, Case No. 2015DR00423

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

December 3, 2018

APPEARANCES:

For Plaintiff-Appellant:

LESLIE S. GRASKE  
120 E, Mill St., Suite 405  
Akron, OH 44308

For Defendant-Appellee:

DENISE HOUSTON  
220 Market Ave. S., 8th Floor  
Canton, OH 44702

*Delaney, J.*

{¶1} Plaintiff-Appellant Marla Martell appeals the January 22, 2018 judgment entry of the Stark County Court of Common Pleas, Domestic Relations Division.

## **FACTS AND PROCEDURAL HISTORY**

### **The Divorce**

{¶2} Plaintiff-Appellant Marla Martell and Defendant-Appellee Michael Martell were married on May 30, 1981. Wife filed a complaint for divorce on May 1, 2015.

{¶3} Wife and Husband were represented by counsel during the divorce proceedings. After 12 months, the parties entered into a Separation Agreement. The Decree of Divorce was filed on May 27, 2016.

### **Wife's Motion for Relief from Judgment**

{¶4} On January 25, 2017, Wife filed a motion under Civ.R. 60(B), requesting relief from the May 27, 2016 Decree of Divorce and Separation Agreement. Wife argued she was entitled to relief from judgment due to newly discovered evidence, fraud and/or misrepresentation, or for any other reason justifying relief from judgment. In support of her motion for relief from judgment, Wife attached her affidavit and the affidavits of her primary care physician and her therapist. She also attached a copy of an Outpatient Neuropsychological Consultation completed on June 29, 2016.

{¶5} Wife raised two issues to support her argument that she was entitled to relief from the Separation Agreement and Decree of Divorce. First, she argued that after the divorce, Wife learned Husband failed to disclose additional marital debts and assets. Wife referred to three assets and two debts she claimed Husband failed to disclose at the time of the divorce.

{¶6} Second, she argued that based on her mental health at the time of the parties' negotiations, Wife lacked the requisite mental capacity to contract when she signed the Separation Agreement. She further contended she signed the Separation Agreement and Decree of Divorce under duress. During the parties' marriage, Wife was under the care of multiple health professionals based on her diagnoses for multiple sclerosis ("MS"), rheumatoid arthritis, and depression. MS is an autoimmune disorder that causes inflammation within the central nervous system, damaging the myelin and nerve fibers. Wife claimed that her MS was in remission, but the stress of the divorce proceedings caused her MS symptoms to flare. She stated that MS has a cognitive component, which made it difficult for her to understand concepts and the effects of her decisions. On May 7, 2016, Wife was involved in a car accident. She was taken to the emergency room and admitted to the psychiatric ward until May 9, 2016. Upon her release, she was given an MRI, which showed plaque on her brain, a symptom of MS. On May 14, 2016, Wife met with her therapist, whom she saw for anxiety and depression. Wife signed the Separation Agreement on May 27, 2016.

{¶7} In support of her motion for relief from judgment, the affidavit of her primary care physician stated she noted memory impairments and memory loss due to flares in Wife's MS symptoms. The MRI scan showed plaque on Wife's brain which could cause short-term memory issues. The primary care physician concluded her affidavit with the statement that she believed Wife had memory impairment issues that would make her incapable of understanding the issues related to her divorce or entering into contracts in May 2016.

{¶8} Wife also submitted the affidavit of her therapist. Wife had been treating with the therapist since 2010 for anxiety and depression. The therapist averred that during her sessions, Wife showed signs of memory impairment, such as confusion and disorientation. It was the opinion of her therapist that Wife was in no mental condition to sign the Separation Agreement or Divorce Decree in May 2016. The therapist believed Wife was incapacitated when she signed the documents and had no cognitive understanding of what she signed.

#### **Wife Amends Motion for Relief from Judgment**

{¶9} On March 17, 2017, Wife amended her motion for relief from judgment. She withdrew her claims of fraud and misrepresentation as to the marital debts and assets. Wife stated she determined Husband had provided all information through discovery during the course of the divorce proceedings.

#### **Husband Files Motion for Sanctions and Trial Court Grants Motion**

{¶10} On June 14, 2017, Husband filed a motion for sanctions against Wife and her counsel, Corrine Hoover Six, Joseph Kaycon, and Tad Hoover. Husband alleged Wife's motion for relief from judgment was frivolous and brought in bad faith, causing him unnecessary legal expenses and costs.

{¶11} On August 15, 2017, the trial court held a hearing on Husband's motion for sanctions (and three other pending motions not relevant to this appeal). The parties presented their arguments by brief, but also presented testimony from Husband and Wife.

{¶12} On September 22, 2017, the trial court issued its judgment entry granting Husband's motion for sanctions as to Wife's motion for relief from judgment pursuant to Civ.R. 11 and R.C. 2323.51. The trial court only considered Wife's motion for relief

judgment as it pertained to whether Husband concealed marital assets and debts. The trial court considered whether Wife's counsel exercised due diligence to ascertain whether or not Wife's claims of financial misconduct by Husband had merit. In making its determination, the trial court considered the reliability of Wife's statements to her counsel based on Wife's claimed cognitive limitations. The trial court found that counsel did not exercise the required due diligence to ascertain whether Wife's claims had merit before filing her motion for relief from judgment. Accordingly, the trial court found Wife's motion for relief from judgment lacked merit and an award of attorney's fees and costs incurred by Husband was warranted.

{¶13} The trial court next analyzed the reasonableness of attorney's fees. The parties presented their claims by arguments of counsel, without requiring independent proof of reasonable hourly charges or total claim for fees and costs. Based on the representations, the trial court found that Husband was entitled to attorney's fees and costs in the amount of \$34,620.00. The trial court awarded \$34,620.00 to Husband "against Plaintiff and current counsel." (Judgment Entry, Sept. 22, 2017).

{¶14} Wife and her counsel paid the judgment of \$34,620.00 to Husband with counsel's IOLTA account.

#### **Wife Dismisses Remainder of Motion for Relief from Judgment**

{¶15} On September 27, 2017, Wife dismissed the remainder of her pending motion for relief from judgment.

#### **Husband Files Motion for Sanctions and Trial Court Grants Motion**

{¶16} Husband filed a motion for sanctions pursuant to Civ.R. 11, R.C. 2323.51, and R.C. 3105.73 on October 5, 2017. Husband argued counsel and Wife engaged in

frivolous conduct for filing a motion for relief from judgment alleging Wife was incompetent and under duress at the time she and Husband entered into the Separation Agreement and Decree of Divorce. In the motion, Husband requested attorney's fees and costs in the amount of \$85,228.17.

{¶17} The trial court held a hearing on the motion on December 14, 2017. The parties presented their arguments through briefs and statements of counsel. Testimony was heard on the issue of reasonableness of attorney's fees. At the hearing, Husband requested fees and costs in the amount of \$101,777.00.

{¶18} The trial court issued its judgment entry on January 22, 2018. In order to determine whether the Husband was entitled to sanctions under Civ.R. 11, R.C. 2323.51, and R.C. 3105.73, the trial court examined the merits of Wife's motion for relief from judgment. The trial court found the evidence submitted by Wife failed to establish she signed the Separation Agreement and Decree of Divorce under duress. The trial court next examined whether Wife was entitled to relief from the Separation Agreement and Divorce Decree because Wife was mentally incompetent in May 2016. The trial court found the evidence presented by Husband rebutted Wife's argument and supporting evidence that she was incompetent. Husband submitted the depositions of Wife's primary care physician and therapist. Their deposition testimony conflicted with their affidavit testimony and it was discovered counsel did not confer with Wife's health professionals before filing the Civ.R. 60(B) motion. The trial court found at the time of the filing of the Civ.R. 60(B) motion, Wife's counsel did not possess good grounds pursuant to Civ.R. 11 to support the argument of incompetency. The trial court next found under R.C. 2323.51, Wife and counsel engaged in frivolous conduct when they filed a motion that had no

evidentiary support. Pursuant to violations of Civ.R. 11, R.C. 2323.51, and the authority of R.C. 3105.73 to award attorney fees in post-decree motions, the trial court awarded Husband reasonable attorney fees and costs in the amount of \$80,000.00 to be paid by Wife and her counsel.

{¶19} It is from the January 22, 2018 judgment Wife now appeals. Wife has clarified in her July 25, 2018 appellate reply brief that she is not appealing the trial court's September 22, 2017 judgment entry ordering Wife and her counsel to pay \$34,620.00 to Husband. Wife and counsel paid the judgment. Wife's appeal does not raise any assignments of error as to the September 22, 2017 judgment entry. On May 18, 2018, Husband filed a motion to dismiss Wife's appeal of the September 22, 2017 judgment entry. Based on the foregoing, we find Husband's motion to dismiss Wife's appeal as to the September 22, 2017 judgment entry to be moot.

### **ASSIGNMENTS OF ERROR**

{¶20} Wife raises two Assignments of Error:

{¶21} "I. THE TRIAL COURT ERRED RULING ON MARLA MARTELL'S MOTION FOR RELIEF FROM JUDGMENT WHEN SHE HAD ALREADY DISMISSED IT.

{¶22} "II. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AGAINST MARLA MARTELL IN THE AMOUNT OF \$80,000."

### **ANALYSIS**

#### **I.**

{¶23} Wife argues in her first Assignment of Error that the trial court erred when, on January 22, 2018, it ruled on her motion for relief from judgment after Wife dismissed her motion on September 27, 2017. We disagree.

{¶24} Wife filed her original motion for relief from judgment on January 25, 2017. In her motion, she raised two issues supporting her contention the Separation Agreement and Decree of Divorce should be vacated: (1) Husband's financial misconduct, and (2) Wife's duress and mental incapacity to contract. On March 17, 2017, Wife amended her motion to withdraw her claims of financial misconduct. Husband filed a motion for sanctions as to Wife's claims for financial misconduct, which the trial court granted on September 22, 2017. Wife dismissed her motion for relief from judgment in its entirety on September 27, 2017. Husband filed a motion for sanctions as to Wife's claims of duress and mental incapacity.

{¶25} Pursuant to R.C. 2323.51(B)(1), a court may award court costs, reasonable attorney's fees, and other reasonable expenses to any party to a civil action who is adversely affected by frivolous conduct. The trial court must hold a hearing to determine (1) whether the conduct at issue was frivolous; (2) if the conduct was frivolous, whether any party was adversely affected by it; and (3) the amount of the award, if any. *Filonenko v. Smock Construction*, 10th Dist. No. 17AP-854, 2018-Ohio-3283, ¶ 12 citing *Bennett v. Martin*, 10th Dist. No. 13AP-99, 2013-Ohio-5445, ¶ 17. "Conduct" includes, "[t]he filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action \* \* \* or the taking of any other action in connection with a civil action." R.C. 2323.51(A)(1).

{¶26} Under Civ.R. 11, the court may award a party reasonable attorney's fees and expenses if an opposing attorney signed a pleading, motion, or other document in willful violation of the Civil Rule. *Id.* at ¶ 13. Civ.R. 11 requires every pleading, motion, or other document of a party represented by an attorney to be signed by at least one attorney



of record in the attorney's individual name. The attorney's signature represents the attorney's certification that: (1) the attorney has read the pleading, motion, or document; (2) to the best of the attorney's knowledge, information, and belief, there is good ground to support the pleading, motion, or document; and (3) the pleading, motion, or document is not interposed for delay. *Id.*

{¶27} The purpose of R.C. 2323.51 and Civ.R. 11 is to deter “abuse of the judicial process by penalizing sanctionable conduct that occurs during litigation.” *Id.* at ¶ 14. It has been held that motions for sanctions pursuant to R.C. 2323.51 and Civ.R. 11 are collateral to and independent of the primary action. *Id.* citing *Flatinger v. Flatinger*, 10th Dist. No. 01AP-1481, 2002-Ohio-3781, ¶ 7; *Fouad v. Velie*, 10th Dist. No. 01AP-283 (Nov. 8, 2001); *Sain v. Roo*, 10th Dist. No. 01AP-360 (Oct. 23, 2001). “While motions for sanctions arise from the primary action, the ultimate issue raised by such motions whether -- the conduct engaged in during the underlying litigation deserves sanction -- remains extant even after the primary action concludes.” *Id.* citing *Barbato v. Mercy Med. Ctr.*, 5th Dist. No. 2005 CA 00044, 2005-Ohio-5219, ¶ 30 (holding that a “jury's verdict \* \* \* did not impliedly overrule the motion for sanctions because a sanction issue is a collateral issue to the underlying proceedings”); *Sain* (holding that the defendant's motion for sanctions “clearly \* \* \* survive[d] [the granting of] a motion for summary judgment in the underlying action”); *Fant v. Greater Cleveland Regional Transit Auth.*, 8th Dist. No. 63097 (July 15, 1993) (“[A] Civ.R. 11 motion does not become moot upon the final disposition of a case.”); see also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (“[T]he imposition of a Rule 11 sanction is not a judgment on the merits of the action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process,

and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.”).

{¶28} In *Barbato v. Mercy Med. Ctr., supra*, we held if a matter is no longer pending before the trial court, either pursuant to a voluntary dismissal or jury verdict, the trial court may still address the pending motion for sanctions. *Id.* at ¶ 32. To hold otherwise “would permit a party to voluntarily dismiss an action to evade an award of sanctions under Civ.R. 11 or R.C. 2323.51.” *Id.* at ¶ 31 citing *Lewis v. Celina Financial Corp.*, 101 Ohio App.3d 464, 470, 655 N.E.2d 1333 (3rd Dist.1995).

{¶29} In this case, while Wife dismissed her motion for relief from judgment, the trial court had jurisdiction to address Husband’s motion for sanctions pursuant to R.C. 2323.51 and Civ.R. 11.

{¶30} Wife contends the trial court improperly ruled on the merits of Wife’s dismissed motion for relief from judgment in its January 22, 2018 judgment entry awarding sanctions to Husband. We agree the trial court analyzed in its January 22, 2018 judgment entry Wife’s claims of duress and mental incapacity raised in her then dismissed motion for relief. Such analysis of Wife’s claims, however, was necessary and proper pursuant to the trial court’s duties as outlined under R.C. 2323.51 and Civ.R. 11. In Wife’s second Assignment of Error, we discuss in more detail the trial court’s analytical role in determining whether Wife commenced or persisted in maintaining a frivolous action. For purposes of this Assignment of Error, we summarize that before the trial court may award sanctions, the trial court must determine whether the conduct at issue was frivolous under R.C. 2323.51 or whether the party’s counsel willfully violated Civ.R. 11. In order to make that determination, it was necessary for the trial court to examine Wife’s motion for relief

from judgment and the genesis thereof to determine whether the attorney abused the judicial process and/or the conduct at issue was frivolous in the filing of the motion pursuant to the statute and civil rule.

{¶31} The January 22, 2018 judgment entry was not a ruling on the merits of Wife's dismissed motion for relief from judgment but a determination of the collateral issue of whether Wife and her counsel engaged in frivolous conduct or abused the judicial process in the filing of the motion for relief from judgment. An analysis of the underlying motion was necessary for such a determination.

{¶32} Wife's first Assignment of Error is overruled.

## II.

{¶33} Wife contends in her second Assignment of Error the trial court erred in awarding attorney's fees in the amount of \$80,000.00 against Wife. She raises three arguments to support her Assignment of Error: (1) the trial court erred in sanctioning Wife pursuant to Civ.R. 11; (2) the trial erred in sanctioning Wife pursuant to R.C. 2323.51; and (3) the trial court erred in sanctioning Wife pursuant to R.C. 3105.73.

{¶34} Civ.R. 11 and R.C. 2323.51 are the two methods available under Ohio law for the recovery of attorney's fees for claims of frivolous conduct. "Both authorize the award of attorney fees as a sanction for frivolous conduct, [but] they have separate standards of proof and differ in application." *Lansky v. Brownlee*, 2018-Ohio-3952, -- N.E.3d --, ¶ 15 (8th Dist.) citing *Bikkani v. Lee*, 8th Dist. Cuyahoga No. 89312, 2008-Ohio-3130, ¶ 18. "A plain reading of R.C. 2323.51 and Civ.R. 11 reveals that 'both the statute and the rule impose the same requirement on an attorney: to prosecute only claims having

merit under existing law.’ “ *Lanksy, supra* at ¶ 31 citing *Sigmon v. S.W. Gen. Health Ctr.*, 8th Dist. Cuyahoga No. 88276, 2007-Ohio-2117, ¶ 14.

### **Civ.R. 11**

{¶35} Wife first argues the trial court erred in awarding Husband sanctions against Wife pursuant to Civ.R. 11. Wife states that Civ.R. 11 sanctions can only be awarded against an attorney or pro se litigant.

{¶36} Civ.R. 11 states:

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telephone number, facsimile number, if any, and business e-mail address, if any, shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. \* \* \* The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in

bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

Civ.R. 11 only authorizes sanctions against the attorney, not the client. *Stevens v. Kiraly*, 24 Ohio App.3d 211, 212, 494 N.E.2d 1160 (9th Dist.1985).

{¶37} A review of the trial court's January 22, 2018 judgment entry shows the trial court authorized sanctions pursuant to Civ.R. 11 against Wife's counsel, not Wife. The judgment entry states:

Rule 11 of the Ohio Rules of Civil Procedure certainly cautions an attorney to carefully stop and investigate a client's claim prior to filing any litigation. The Rule states as follows: \* \* \* Based on the language of Rule 11, this Court is of the opinion that at the time of the filing of the 60B Motion on the ground of incompetency, counsel for Plaintiff did not possess good ground to support the element of incompetency. Counsel for Plaintiff failed to exercise due diligence in obtaining the necessary information to determine whether or not she had good grounds to support the 60B allegation of mental incompetency on the part of the Plaintiff. The Court is of the opinion that sanctions are warranted under this Rule. \* \* \* In doing so, and in exercising judicial discretion, this Court awards Defendant the amount of \$80,000.00 as reasonable attorney fees and expenses to be paid by Plaintiff and her counsel.

(Jan. 22, 2018 Judgment Entry).

{¶38} The trial court found Wife's counsel in violation of Civ.R. 11. The judgment entry, however, did not specify whether the sanctions awarded by the trial court for

violations of Civ.R. 11 and R.C. 2323.51 were against Wife and her counsel jointly and severally. A review of the trial court record shows Wife did not raise this issue before the trial court. Wife has not raised the issue of liability for the \$80,000.00 award of attorney fees in her appeal to this Court. As such, we find Wife has waived any error on appeal as to the liability for the sanctions and we find no justification for invoking the plain error rule.

### **R.C. 2323.51**

{¶39} Wife next contends the trial court erred when it found she engaged in frivolous conduct by filing the motion for relief from judgment under R.C. 2323.51. We disagree.

{¶40} R.C. 2323.51 provides 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.

{¶41} A motion for sanctions brought under R.C. 2323.51 requires a three-step analysis by the trial court. The trial court must determine (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. *Bear v. Troyer*, 5th Dist. Guernsey Nos. 15 CA 17, 15 CA 24, 2016-Ohio-3363, ¶ 55. The presence of one of the following factors supports a finding of frivolous conduct under R.C. 2323.51(A)(2)(a):

- (i) It obviously 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.

(ii) It 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.

(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶42} Husband argued in his opposition to Wife's motion for relief from judgment that Wife's allegations had no evidentiary support. The trial court found that based its review of the evidence, the filing of Wife's motion for relief from judgment based on duress and mental incompetency was frivolous conduct because her allegations were not supported by the evidence.

{¶43} Wife's appeal requires us to examine R.C. 2323.51(A)(2)(a)(iii), which presents a factual question; namely, whether Wife's allegations and factual contentions have evidentiary support. *Carasalina, L.L.C. v. Bennett*, 10th Dist. Franklin No. 14AP-74, 2014-Ohio-5665, ¶ 32 citing *Hunt v. Allen*, 5th Dist. Licking No. 11-CA-70, 2012-Ohio-1212, ¶ 33. An allegation or factual contention need only minimal evidentiary support in order for a party or its attorney to avoid a frivolous conduct finding. *Bahgat v. Kissling*, 10th Dist. Franklin No. 17AP-641, 2018-Ohio-2317, ¶ 30 citing *Carasalina, supra* at ¶ 36.

In analyzing the correct standard to determine the level of evidentiary support needed to support an allegation or factual contention, the Tenth District Court of Appeals looked to Fed.R.Civ.P. 11(b)(3) in *Caraslina, supra*. The language in Fed.R.Civ.P. 11(b)(3) is similar to that used in R.C. 2323.51(A)(2)(a)(iii). The court stated:

Moreover, according to the Advisory Committee Notes, Fed.R.Civ.P. 11(b)(3) recognizes that “sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation.” However, if a litigant does not obtain evidentiary support after a reasonable opportunity for further investigation or discovery, “the party has a duty under [Fed.Civ.R. 11(b)(3) ] not to persist with that contention.” *Id.*

\* \* \* If a party makes an allegation or factual contention on information or belief, then the party must have the opportunity to investigate the truth of that allegation or factual contention. However, if a party persists in relying on that allegation or factual contention when no evidence supports it, then the party has engaged in frivolous conduct under R.C. 2323.51(A)(2)(a)(iii).

*Carasalina, L.L.C. v. Bennett*, 10th Dist. Franklin No. 14AP-74, 2014-Ohio-5665, ¶¶ 35-36.

{¶44} A finding of frivolous conduct under R.C. 2323.51(A)(2)(a)(iii) is a factual determination; therefore, there is a 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. *Bear v. Troyer*, 5th Dist. Guernsey Nos. 15 CA 17, 15 CA 24, 2016-Ohio-3363, ¶ 56.

{¶45} In order to review whether Wife and her counsel engaged in frivolous conduct under R.C. 2323.51(A)(2)(a)(iii), the trial court conducted a thorough review of Wife's evidentiary support for her motion for relief from judgment and the evidence presented by Husband in opposition to the motion. The trial court first reviewed the actions of Wife and counsel in preparation for her motion for relief from judgment.

{¶46} On May 10, 2016, Wife took the deposition of Wife's primary care physician as to Wife's health issues. The issue of Wife's mental competency was not raised during the deposition by counsel or by her physician. In support of her motion from relief from judgment, Wife provided the January 8, 2017, affidavit of her primary care physician that stated Wife was not competent to enter into a contract. Husband provided the September 25, 2017, deposition testimony of Wife's primary care physician regarding her affidavit. Her physician testified Wife prepared the affidavit for her signature and the physician did not review her medical notes before signing the affidavit. Wife's counsel did not contact the primary care physician before the physician signed the affidavit. Wife's counsel did not review Wife's medical records before the physician signed the affidavit. Wife was seen by the primary care physician on April 29, 2016 and June 8, 2016. The physician testified when she saw Wife on April 29, 2016 and June 8, 2016, she made no notes in the chart that she observed Wife was cognitively incompetent. On June 23, 2016, Wife's primary care physician signed a form to allow Wife driving privileges. The form stated Wife had no cognitive impairment. Wife dismissed her motion from relief from judgment two days after Husband's deposition of Wife's primary care physician.

{¶47} The trial court found Wife and her counsel engaged in frivolous conduct when they failed to contact the primary care physician to investigate Wife's allegations before filing the motion for relief from judgment. Wife's primary care physician testified she did not write the affidavit, she signed the affidavit without reviewing Wife's medical records, and she reversed her opinion as to Wife's mental incompetency after a review of Wife's medical records. The trial court was of the opinion that because of Wife's allegation she was mentally incompetent and unable to make decisions, Wife's counsel was under a greater burden to conduct a thorough and independent investigation of Wife's claims.

{¶48} The trial court next examined the January 9, 2017, affidavit provided by Wife's therapist in support of Wife's motion from relief from judgment. The therapist was deposed by Husband on August 2, 2017. The therapist saw Wife for therapy sessions on May 7, 2016, May 14, 2016, May 21, 2016, and May 28, 2016. The therapist took notes contemporaneously to Wife's therapy sessions and the notes did not reflect she had any concerns about Wife's mental competency. On May 28, 2016, the therapist met with Wife after the final hearing on the divorce. The therapist noted on that day Wife was alert and oriented and able to convince Husband to give her an additional \$10,000.00 to settle the divorce. A review of the therapist's notes showed she made an addendum in July 2017 to her May 2016 notes to address Wife's alleged cognitive issues. During her deposition, the therapist testified she felt Wife's divorce settlement was not favorable to Wife because it did not provide Wife with health insurance coverage.

{¶49} The trial court also considered the evidence presented by Husband regarding the Wife's divorce counsel and the parties' son. Wife's divorce counsel testified

by deposition that he felt Wife was mentally competent during the divorce proceedings. He noted that Wife, without the assistance of counsel, was able to obtain an additional \$10,000.00 from Husband to settle the divorce proceedings. Her divorce counsel further noted the parties' adult son was involved during the divorce proceedings in support of his mother. The son did not express to divorce counsel that Wife was mentally incompetent.

{¶50} Upon review of the evidence, we find Wife's persistence in pursuing her claim that she was mentally incompetent and could not enter into the Separation Agreement and Decree of Divorce amounted to frivolous conduct under R.C. 2323.51(A)(2)(a)(iii). While it could be argued the affidavits of Wife's primary care physician and therapist provided Wife with minimal evidentiary support for her allegations and factual contentions, that minimal evidentiary support was eliminated by the testimony of the primary care physician, therapist, and a review of their contemporaneous medical records.

{¶51} Wife attempted to remedy the situation by dismissing the motion for relief from judgment two days after Husband's deposition of the primary care physician. By that time, however, Husband had already engaged in discovery and conducted depositions of the primary care physician and therapist to challenge the remaining claims of Wife's motion for relief from judgment. The trial court noted that if Wife's counsel had investigated Wife's claims with her primary care physician and therapist prior to filing the motion for relief from judgment, counsel may have discovered Wife's claim was unsupported.

{¶52} We find no error of the trial court to determine Wife and her counsel's conduct was frivolous under R.C. 2323.51(A)(2)(a)(iii).

{¶53} The trial court awarded Husband \$80,000.00 in sanctions based on its finding that Wife and her counsel violated R.C. 2323.51(A)(2)(a)(iii). A review of Wife's appellate brief shows that Wife does not raise as error the amount of the trial court's award to Husband under R.C. 2323.51(A)(2)(a)(iii). As such, we will not address the issue because it is waived.

### **R.C. 3105.73**

{¶54} In considering the attorney fees and legal expenses, the trial court utilized R.C. 3105.73 to make its decision on the amount of sanctions. The statute states in relevant part as to an award of attorney fees:

(B) In any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets.

{¶55} An award of attorney fees related to a post-decree motion or proceeding will not be overturned absent an abuse of discretion. *Roubanes v. Roubanes*, 10th Dist. No. 14AP-183, 2014-Ohio-5163, 2014 WL 6482785, ¶ 6. While the trial court has discretion in determining the amount of attorney fees, the court must base its decision on evidence showing the reasonableness of the time spent on the matter and the hourly rate. *Bagnola v. Bagnola*, 5th Dist. Stark No.2004CA00151, 2004-Ohio-7286 at ¶ 36.

{¶56} A review of the record shows the parties provided expert testimony as to the reasonableness of the attorney fees as to the time spent on the matter and the hourly rate. Wife's expert, however, withdrew his opinion as to the reasonableness of fees during his cross-examination. Wife has not directed this Court to any part in the record to argue against the trial court's determination of the reasonableness of the attorney fees.

{¶57} Wife contends the trial court did not properly analyze the award of sanctions to Husband pursuant to R.C. 3105.73(B). She states the trial court's judgment entry is silent as to the factors mentioned in R.C. 3105.73(B).

{¶58} In making its decision as to the amount of the award, the trial court stated in its January 22, 2018 judgment entry:

Based on the totality of all the evidence, it is this Court's decision that the request for attorney fees made by the Defendant, based on the only expert testimony on that issue presented to the Court is that Defendant is entitled to be reimbursed for legal expenses and attorney fees in the amount of \$101,777.00.

In awarding attorney fees and costs, the Court has taken into consideration the language of Ohio Revised Code 3105.73 stated above in determining the equitable amount of attorney fees. In doing so, and in exercising judicial discretion, this Court awards Defendant the amount of \$80,000.00 as reasonable attorney fees and expenses to be paid by Plaintiff and her counsel.

(Jan. 22, 2018 Judgment Entry).

{¶59} We find the trial court stated in its judgment entry it considered R.C. 3105.73(B) and in fact, reduced the award of attorney fees from \$101,777.00 to \$80,000.00 based on its consideration of R.C. 3105.73(B). A review of the evidence shows the only testimony before the trial court as to the reasonableness of fees was from Husband. Wife's expert withdrew his opinion as to the reasonableness of fees during his cross-examination. We find no abuse of discretion by the trial court in determining an equitable award based on the evidence presented by the parties.

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

### **CONCLUSION**

{¶61} The judgment of the Stark County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Baldwin, J., concur.