[Cite as *Catudal v. Catudal*, 2015-Ohio-1559.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Chance Catudal,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-749 (C.P.C. No. 10DR-4934)
Anna C. Catudal,	:	
Defendant-Appellee.	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on April 23, 2015

Chance Catudal, pro se

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

BRUNNER, J.

{¶ 1} Plaintiff-appellant, Chance Catudal, and defendant-appellee, Anna C. Catudal, married April 1, 2009 and were divorced by decree on October 20, 2011. As we stated in our two prior decisions on appeals from judgments on post-decree motions concerning their divorce, a "deluge of filings" by appellant followed. *Catudal v. Catudal*, 10th Dist. No. 12AP-951, 2013-Ohio-2748, ¶ 2 (*"Catudal I"*); *Catudal v. Catudal*, 10th Dist. No. 13AP-492, 2013-Ohio-4801, ¶ 2 ("*Catudal II*"). Not much has changed concerning this pattern.

I. ASSIGNMENTS OF ERROR

{¶ 2} This appeal is from two aspects of an August 26, 2014 judgment entry by the Franklin County Court of Common Pleas, Division of Domestic Relations. Appellant brings the following two assignments of error:

> [I.] Judge Kim A. Browne erred and abused her discretion in denying Plaintiff-Appellant's motion for *Civ. R. 11* sanctions.

> [II.] Judge Kim A. Browne erred in determining that Plaintiff-Appellant's *Civ. R. 60(B)* motion was untimely and lacking in basis.

II. DISCUSSION

{¶ 3} Appellant has not filed the transcript of the February 11, 2014 hearing of these motions. He filed an "App. R. 9(C)(1) Statement" that the trial court's August 26, 2014 entry was "the only evidence relevant to this appeal." However, he does not aver that "no recording of the proceedings was made, * * * a transcript is unavailable, or * * * a recording was made but is no longer available for transcription." App.R. 9(C)(1). Lacking the transcript, "we cannot review any of appellant's assignments of error that rely upon factual issues in dispute, and we must presume regularity of the proceedings under such circumstances. Therefore, we may only address arguments in appellant's assignments of error that are based solely on questions of law." *Gomez v. Kiner,* 10th Dist. No. 11AP-767, 2012-Ohio-1019, ¶ 5.

A. Denial of Civ.R. 11 Sanctions

{¶ 4} In *Catudal II*, we found the trial court erred when it granted the motion by appellee to declare appellant a vexatious litigator, "for the sole reason that R.C. 2323.52 requires the filing of a complaint." *Id.* at ¶ 5. We cited our decision earlier in the same month that a party's filing of a motion in a pending case does not satisfy the requirements of the vexatious litigator statute. *Whipps v. Ryan*, 10th Dist. No. 12AP-685, 2013-Ohio-4382, ¶ 22. Appellee's motion had been filed March 13, 2013, before our October 3, 2013 decision in *Whipps* and also our vacated decision to the same effect on this point, *Whipps v. Ryan,* 10th Dist. No. 12AP-509, 2013-Ohio-2772 (decided June 28, 2013; vacated July 9, 2013).

{¶ 5} Five days after we decided *Catudal II*, appellant moved under Civ.R. 11 for sanctions against appellee's counsel for having filed the March 13, 2013 vexatious litigator motion in the trial court.

{¶ 6} As the trial court remarked in denying appellant's motion, appellant also filed a grievance with the Supreme Court of Ohio against two of appellee's attorneys. In the grievance he complained, apparently, that the attorneys participating in the court proceeding to declare appellant a vexatious litigator, "when the appellate court later

determined that the vexatious litigator action had been improperly commenced[,] amounts to ethical misconduct." (Memorandum Brief, exhibit A.) Disciplinary Counsel responded:

> Please understand that the law on how a vexatious litigator action is to be commenced under R.C. §2323.52 is not well-settled as it has not yet been determined by the Supreme Court of Ohio. While the Tenth District Court of Appeals has determined that a separate civil action must be commenced (See, *Whipps v. Ryan, et al, 2013 WL 3356613*), the Eight[h] District Court of Appeals has determined that a motion within a pending proceeding is sufficient (See, *In re s/o ex rel. Tauwab v. Ambrose*, 2012 WL 682220). Since the Supreme Court of Ohio has not made a determination on the issue, we cannot say that this attorney, who participated in a vexatious litigator proceeding against you that was commenced via motion rather than by separate civil action did anything ethically improper.
>
> For the aforementioned reasons, your grievance is dismissed and our file on this matter is closed.

(Memorandum Brief, exhibit A.)

{¶ 7} Appellant is correct that, in denying a writ of prohibition to prevent the trial court from ruling on a motion to declare a party named "Tauwab" a vexatious litigator, the Eighth District held only that "the authorities cited by Tauwab fail[ed] to establish that a motion to declare a person a vexatious litigator in a pending case is so improper as to deprive the trial court of jurisdiction to consider the matter." *State ex rel. Tauwab v. Ambrose*, 8th Dist. No. 97472, 2012-Ohio-817, ¶ 8. Although the trial court appears to have agreed with Disciplinary Counsel's statement of the holding in *Tauwab*, the trial court (quoting Disciplinary Counsel) correctly noted that the Supreme Court has not settled the issue.

{¶ 8} The Eighth District did discuss Tauwab's citations to other cases covering attempts to declare a person a vexatious litigator without a complaint:

> In *State ex rel. Naples v. Vance*, 7th Dist. No. 02-CA-181, 2003-Ohio-4738, the court of appeals in a mandamus action ruled that it could not declare the relator a vexatious litigator through the means of an affirmative defense. In *Kinstle v. Union Cty. Sheriff's Office*, 3d Dist. No. 14-07-16, 2007-

> Ohio-6024, the court ruled on appeal that a motion to declare a person a vexatious litigator does not constitute a civil action, and thus, the trial court erred in declaring Kinstle a vexatious litigator upon a motion. Finally, in *Howard v. Indus. Comm. of Ohio*, 6th Dist. No. L-04-1037, 2004-Ohio-5672, the court of appeals ruled that it could not declare a person a vexatious litigator when counsel for appellee made an oral motion during oral argument on appeal to declare Howard a vexatious litigator.

Id. at ¶ 4. Whether a vexatious litigator declaration might be obtained in the absence of a complaint has been a fairly contested matter. The trial court found no proof that either attorney "knowingly or willfully misfiled the matter as a motion as opposed to a complaint." (Judgment Entry, 3.)

{¶ 9} We agree. Civ.R. 11 states, in pertinent part:

> 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. * * * 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.

{¶ 10} The standard of review of the decision to award or not award sanctions pursuant to Civ.R. 11 is whether the trial court abused its discretion. *Kemp, Schaeffer & Rowe Co., L.P.A. v. Frecker*, 70 Ohio App.3d 493, 498 (10th Dist.1990). "An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.*, citing *Beacon Journal Pub. Co. v. Stow*, 25 Ohio St.3d 347 (1986). We find the trial court did not abuse its discretion by declining to award Civ.R. 11 sanctions. Appellee and her counsel could assert good ground for the application by motion to declare appellant a vexatious litigator. While seeking the declaration by way of motion rather than a separate complaint was retrospectively in error, under our holding in *Whipps*, and considering other districts'

appellate decisions, there exists no evidence in the record to support a willful violation of Civ.R. 11.

{¶ 11} *Carr v. Riddle,* 136 Ohio App.3d 700 (8th Dist.2000), presented a similar situation. The complaint to declare the appellee a vexatious litigator was based on conduct in a federal court action not within the scope of R.C. 2323.52. The Eighth District Court of Appeals affirmed dismissal of the complaint, pursuant to Civ.R. 12(B)(6), but reversed the order for Civ.R. 11 sanctions. The appellant, Mayfield Heights city law director, testified that "he was simply trying to bring a halt to a waste of time and money on behalf of the city in having to defend another frivolous suit brought by the [appellee]. Although the law director was mistaken in presuming that he could rely on the frivolous federal case, we find no animus in this conduct." *Id.* at 705. We can discern neither animus on the part of appellee's counsel in seeking to declare appellant a vexations litigator by a motion rather than a complaint, despite the procedural deficiency, nor any attempted or actual delay by counsel. *See id.*

{¶ 12} As stated in *Carr,* "filing a pleading based on a misinterpretation of existing law or grounds for extension or modification thereof, however misguided in hindsight, does not rise to the level of willfulness necessary to warrant sanctions." *Id.* at 705-06. *See also Kreger v. Spetka,* 6th Dist. No. L-05-1029, 2005-Ohio-3868, ¶ 12 (no evidence of willful violation of Civ.R. 11 although plaintiff may have been misguided in her beliefs that re-filing cause of action was timely and that expert opinion of neurosurgeon would provide good grounds for her claims); *State ex rel. Ward v. Lion's Den,* 4th Dist. No. 1867 (Nov. 25, 1992) ("the inclusion of appellant as a defendant in a nuisance abatement complaint based upon the language of R.C. 3767.02, although ultimately erroneous, does not in and of itself demonstrate as a legal matter that appellee violated Civ.R. 11") (Footnote deleted.); *Ceol v. Zion Industries, Inc.*, 81 Ohio App.3d 286, 291 (9th Dist.1992) (appellee's filing of complaint based on misinterpretation of state law did not constitute willfulness under Civ.R. 11); *Haubeil & Sons Asphalt & Materials, Inc. v. Brewer & Brewer Sons, Inc.*, 57 Ohio App.3d 22, 23 (4th Dist.1989) ("While the record below reveals appellants, for whatever reasons and to whatever degree, were mistaken in their belief that the complaint they filed was supported by good ground, we do not believe the

record contains sufficient evidence to prove appellants signed a pleading they knew to be false or which they interposed for delay.").

{¶ 13} Appellant has not shown from the record a deliberate, intentional, or purposeful violation of Civ.R. 11. We, therefore, find no abuse of discretion in the trial court's denial of appellant's motion for sanctions. The first assignment of error is overruled.

B. Denial of Civ.R. 60(B) Motion

{¶ 14} Appellant's second assignment of error seeks reversal of the trial court's denial of his motion filed November 5, 2013, pursuant to Civ.R. 60(B), for relief from the trial court's February 1, 2013 judgment entry. That judgment entry adopted and approved the decision of the trial court's magistrate to dismiss the 22 motions for contempt appellant had filed up to that time. Appellant was incarcerated and did not appear at the motion hearing on January 25, 2013. The magistrate granted appellee's oral motion to dismiss the pending motions due to appellant's failure to appear and prosecute the motions.

{¶ 15} As part of the August 26, 2014 judgment entry, the trial court agreed with appellee's argument that the Civ.R. 60(B) motion was untimely and lacking in basis. Appellant concedes in his brief, citing *Rose v. Zyniewicz*, 10th Dist. No. 10AP-91, 2011-Ohio-3702, ¶ 19, that a party may not use a Civ.R. 60(B) motion to argue issues he could have raised in an appeal from the trial court's original judgment. (Appellant's Brief, 11.) Moreover, appellant did appeal the original judgment, but, as we noted in *Catudal I* at ¶ 7-8, he failed to file a brief. Our decision did not consider the merits of his appeal from the February 1, 2013 judgment.

{¶ 16} Civ.R. 60(B) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is

> based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The Supreme Court held in *GTE Automatic Elec. v. ARC Indus., Inc.,* 47 Ohio St.2d 146 (1976), paragraph two of the syllabus:

> To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

A movant is not entitled to relief if he does not meet any one of the *GTE* factors. *Strack v. Pelton,* 70 Ohio St.3d 172, 174 (1994); *State v. Rippey,* 10th Dist. No. 06AP-1229, 2007-Ohio-4521, ¶ 15.

{¶ 17} We review the trial court's denial of a Civ.R. 60(B) motion for abuse of discretion. *Harris v. Anderson,* 109 Ohio St.3d 101, 2006-Ohio-1934; *State ex rel. Russo v. Deter*s, 80 Ohio St.3d 152, 153 (1997); *Rippey* at ¶ 16; *Oberkonz v. Gosha,* 10th Dist. No. 02AP-237, 2002-Ohio-5572, ¶ 12. Once again, and as applied to the trial court's decision on appellant's Civ.R. 60(B) motion, the phrase "abuse of discretion" connotes more than an error of law or judgment. It implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.,* 72 Ohio St.3d 106, 107 (1995); *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983).

{¶ 18} "A motion for relief from judgment is not a substitute for an appeal, and errors which could have been corrected by a timely appeal cannot be the predicate for a Civ.R. 60(B) motion for relief from judgment." *Kelm v. Kelm,* 73 Ohio App.3d 395, 399 (10th Dist.1992).

> A party generally may not raise issues in seeking relief from judgment under Civ.R. 60(B) that could have been raised upon appeal, and error that a timely appeal could have corrected cannot form the predicate for a motion under the rule. *Daroczy v. Lantz,* Franklin App. No. 02AP-31, 2002-Ohio-5417, at ¶ 34; *State ex rel. Richard v. Cuyahoga Cty. Commrs.* (2000), 89 Ohio St.3d 205. Likewise, issues that could and should have been raised in objections to a magistrate's decision, and thus are waived for purposes of appeal, generally cannot be raised subsequently in a motion for relief from judgment. *Mattingly v. Deveaux*, Franklin App. No. 03AP-793, 2004-Ohio-2506; *Brown v. Zurich US*, 150 Ohio App.3d 105, 2002-Ohio-6099, at ¶ 26.

Brunner Firm Co., L.P.A. v. Bussard, 10th Dist. No. 07AP-867, 2008-Ohio-4684, ¶ 10.

{¶ 19} In *Daroczy v. Lantz*, 10th Dist. No. 02AP-31, 2002-Ohio-5417, the appellee voluntarily dismissed its appeal from a judgment with which we found a subsequent judgment to be inconsistent. On remand, the trial court granted the appellee's Civ.R. 60(B)(5) motion to vacate the initial judgment. We reversed the trial court yet again, and held that the prior judgment "was res judicata, and appellee's only recourse would have been to file an appeal from that decision, which it did, and which it later dismissed." *Id.* at ¶ 33. "Civ.R. 60(B) relief 'is not available as a substitute for appeal * * * nor can the rule be used to circumvent or extend the time requirements for filing an appeal.' " *Id.* at ¶ 34, quoting *Blasco v. Mislik*, 69 Ohio St.2d 684, 686 (1982).

{¶ 20} As did the appellee in *Daroczy,* appellant here claims relief under Civ.R. 60(B)(5).

> Civ.R. 60(B)(5) is a "catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment." *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66, 448 N.E.2d 1365. As such, it applies only when a more specific provision does not apply. *Id.; Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174, 637 N.E.2d 914. The grounds for invoking the rule must be substantial, and relief may be granted only in unusual or extraordinary circumstances. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105, 316 N.E.2d 469; *Zollett v. Nittskoff* (Apr. 21, 1983), Cuyahoga App. No. 45336.

Id. at ¶ 39. Appellant was incarcerated from January 17, until July 11, 2013. He asserts that his incarceration was due to ineffective assistance of counsel and an unreasonably high bond amount, and that he was released upon his filing of a petition for habeas corpus. The trial court stated that appellant informed the court that he had missed the January 25, 2013 hearing "because he was incarcerated having been charged with theft, passing bad checks and tampering under his former name of Bryan E. Hall (aka) Bryan Beltran; ultimately Plaintiff plead to a theft charge." (Judgment Entry, 3.) *See State v. Hall*, 10th Dist. N0. 13AP-747, 2014-Ohi0-1647 (affirming denial of motions to withdraw guilty plea and to resolve record conflicts). He does not inform that he had filed a motion to convey or otherwise requested to be present at the hearing. *See Allen v. Allen*, 5th Dist. No. CT2013-0015, 2013-Ohio-2729, ¶ 11 ("we have frequently noted divorce is a civil proceeding and an incarcerated prisoner has no absolute due process right to attend a civil trial to which he is a party").

{¶ 21} Appellant also points to the order declaring him a vexatious litigator, which was in effect from June 3, 2013 until our reversal on October 31, 2013. The order was entered four months after the February 1, 2013 judgment entry from which appellant seeks relief. Further, the order declaring appellant a vexatious litigator did not prevent him from pursuing his appeal of the February 1, 2013 judgment entry. He declined to press his appeal or to pursue an argument that he lacked notice of the court's intended dismissal for failure to prosecute his contempt motions under Civ.R. 41(B)(1) and (3). *See Metcalf v. Ohio State Univ. Hosps.*, 2 Ohio App.3d 166, 167 (10th Dist.1981) (party is entitled to notice of Civ.R. 41(B)(1) motion to dismiss in order to have opportunity to oppose; failure to give such notice is prejudicial error).

{¶ 22} Appellant also fails to demonstrate a meritorious claim on any of his motions for contempt. A conclusory statement that the movant has a meritorious claim or defense to present is insufficient to satisfy the first prong of the *GTE* test. *Miller v. Susa Partnership, L.P.*, 10th Dist. No. 07AP-702, 2008-Ohio-1111, ¶ 16. Appellant presented no information on the substance of his motions for contempt, either on his Civ.R. 60(B) motion or presently on appeal. As was the trial court, we are at a loss to determine any substantial basis for the contempt motions denied and dismissed by the trial court in the February 1, 2013 judgment entry.

{¶ 23} We stated in *Shumate v. Gahanna*, 10th Dist. No. 02AP-881, 2003-Ohio-1329, ¶ 6:

> The burden of affirmatively demonstrating error on appeal rests solely with the appealing party, in this case, the plaintiff. App.R. 16(A)(7); App.R. 9; and *State ex rel. Fulton v. Halliday* (1944), 142 Ohio St. 548, 53 N.E.2d 521. Pursuant to App.R. 16(A)(7), plaintiff must present her contentions with respect to each assignment of error presented for review, in addition to the reasons in support of those contentions, with citations to the authorities, statutes, and parts of the record on which she relies. It is not the duty of this court to search the record for evidence to support an appellant's argument as to alleged error. *Slyder v. Slyder* (Dec. 29, 1993), Summit App. No. 16224. Absent the foregoing, unsubstantiated assertions will not be considered on appeal. *Sykes Constr. Co. v. Martell* (Jan. 18, 1992), Summit App. No. 15034. It is also not appropriate for this court to construct the legal arguments in support of plaintiff's appeal. "If an argument exists that can support this assignment of error, it is not this court's duty to root it out." *Cardone v. Cardone* (May 6, 1998), Summit App. No. 18349.

Since appellant has provided no information on the 22 motions for sanctions denied and dismissed in the judgment from which he seeks relief, he has not begun to demonstrate a meritorious claim to present for his requested relief to be granted. We find the decision of the trial court denying appellant's motion for relief under Civ.R. 60(B) neither unreasonable, arbitrary, nor unconscionable, and, finding no abuse of discretion, we therefore overrule his second assignment of error.

III. CONCLUSION

{¶ 24} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, denying sanctions and relief from judgment under Civ. R. 11 and 60(B).

Judgment affirmed.

BROWN, P.J., and TYACK, J., concur.