[Cite as *Lill v. Ohio State Univ.*, 2018-Ohio-1559.]

NANCY LILL, Ph.D. Plaintiff v. THE OHIO STATE UNIVERSITY Defendant	Case No. 2015-00387JD Judge Dale A. Crawford DECISION

{¶1} This matter came to be heard on Plaintiff's, Nancy L. Lill, Ph.D., Complaint against Defendant, Ohio State University (OSU), seeking damages, along with declaratory and equitable relief, for breach of contract and conversion. The Court conducted a trial on June 20-22, 2016. After evidence was taken and arguments completed, the Court issued an oral decision granting, in part, and denying in part, Plaintiff's request for relief, and the July 12, 2016 Interim Decision memorialized the Court's findings of fact and conclusions of law. In the Interim Decision, the Court concluded that Plaintiff showed no right to relief regarding her claim of conversion, and Defendant's motion to dismiss was granted with respect to that claim. However, the Court rendered judgment in favor of Plaintiff's breach of contract claim, and sent the matter back to Defendant (the Provost) to take such steps as he or she deemed necessary to assure a new, fair and impartial evaluation with respect to Plaintiff's tenure review.

{¶2} On May 3, 2017, Plaintiff's new tenure review concluded, and Plaintiff was denied tenure. Subsequently, the parties submitted briefs with respect to damages, and on September 8, 2017, the Court issued a damages decision. The Court determined that Plaintiff was not entitled to any monetary damages as a result of OSU's breach of contract.

{¶3} On October 3, 2017, Plaintiff filed a Post-Trial Motion for Sanctions Against Defendant and its Counsel Pursuant to Ohio Rev. Code § 2323.51 and Civ.R. 11. On January 25, 2018, the Court conducted an oral hearing on Plaintiff's motion. During the hearing, Plaintiff's counsel, Jeffrey Vardaro, testified in support of Plaintiff's motion. The Court admitted Plaintiff's twenty-seven exhibits. For OSU, lead counsel Lee Ann Rabe testified. Plaintiff seeks sanctions for Defendant's conduct related to the following:

1) Defendant's blanket objections to interrogatories;

2) Defendant's March 21, 2016 Motion to Strike;

3) Defendant's blanket claim of representation of current and former Ohio State University employees requiring Plaintiff to file two motions to compel;

4) Defendant's withholding of documents during discovery;

5) Defendant's brief opposing damages that contained false statements and frivolous legal claims; and

6) Defendant's violation of Ohio's Mediation Privilege Statute by revealing confidential settlement negotiations in open court.

{¶4} On February 2, 2018, Defendant Ohio State University (OSU) filed a notice containing an e-mail chain not previously before the Court. On February 5, 2018, the Parties filed a Stipulation Related to Fees and Expenses for Purposes of Plaintiff's Motion for Sanctions. On February 8, 2018, Plaintiff filed her Post-Hearing Brief Regarding Sanctions. On February 22, 2018, OSU filed its Post-Hearing Brief. On February 28, 2018, Plaintiff filed her Post-Sanctions Hearing Reply Brief.

{¶5} "Civ.R. 11 provides that the signature of an attorney on a pleading, motion, or other document of a party "constitutes a certificate by the attorney * * * that the attorney * * * has read the document; 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. 'For a willful violation of this rule, an attorney * * * 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.' Civ.R. 11. When reviewing an alleged violation of Civ.R. 11, the trial court 'must consider whether the attorney signing the document has read the pleading, harbors good grounds to support it to the best of his or her knowledge, information, and belief, and did not file it for purposes of delay.' *Bennett v. Martin,* 10th Dist. Franklin No. 13AP-99, 2013-Ohio-5445, ¶ 33." *Pla v. Cleveland State Univ.*, 10th Dist. Franklin No. 17AP-212, 2016-Ohio-8165 ¶ 18.

{¶6} "Pursuant to R.C. 2323.51, a court may 'award court costs, reasonable attorney's 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.' 'Frivolous conduct' is defined to include conduct that: (1) serves merely to harass or maliciously injure another party to the civil action; (2) is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law; (3) consists of allegations or other factual contentions that have no evidentiary support or are not likely to have evidentiary support after a reasonable opportunity for further investigation; (4) or consists of denials that are not warranted by the evidence or are not reasonably based on a lack of information or belief. R.C. 2323.51(A)(2)(a)." *Pla v. Cleveland State Univ.*, 10th Dist. Franklin No. 17AP-212, 2016-Ohio-8165 ¶ 19.

{¶7} The Parties should understand that litigation is a search for the truth. In this search, lawyers can make the process easier, however some lawyers make the search for truth more difficult. Lawyers can choose the way that they practice law, and the way lawyers currently practice law has changed. In the past, litigation in Franklin County was collegial in nature, and attorneys on both sides knew each other. Rarely did courts get involved in discovery disputes. This practice has changed in Franklin County, and now resembles the way law is practiced in many other counties.

{¶8} The litigation in this case was contentious. Lawyers practice differently, but contentious practice does not necessarily rise to the level of unethical or sanctionable conduct. The philosophy of defense counsel is not wrong, it is office practice and the way that office chooses to practice law. Prior to a discussion of each of Plaintiff's arguments for sanctions, the Court finds that any sanctionable conduct only arises under R.C. 2323.51, not Civ.R. 11.

Plaintiff's Claims for Sanctions

1) Blanket Interrogatory Responses

{¶9} Plaintiff's motion appears to request sanctions for OSU's decision to object to almost every interrogatory, but then answer the interrogatory. While the Court finds that this practice may be objectionable, Plaintiff's counsel advised the Court that he is not seeking sanctions for that conduct. *See* 2015-00387, Court's December 8, 2015 Entry, footnote 1.

2) Motion to Strike

{¶10} Plaintiff moves the Court for sanctions related to OSU's March 21, 2016 Motion to Strike Affidavit of Jeffrey Vardaro. On March 7, 2016, Plaintiff filed a Partial Motion for Summary Judgment. In support of this motion, Plaintiff filed an affidavit of Plaintiff's counsel, which attached two exhibits relied upon in Plaintiff's Motion for Partial Summary Judgment. In its March 21, 2016 Motion to Strike Affidavit of Jeffrey Vardaro, OSU argued that Plaintiff's counsel was not competent to verify the authenticity of the two documents appended to his affidavit.

{¶11} Plaintiff asserts that "[t]he motion contained no support except cases reciting the standard for a motion to strike based on Rule 56(E)." (Motion for Sanctions, p. 7). Plaintiff relates that the premise of OSU's motion to strike "was premised on the unsupported claim that Plaintiff's counsel, as trial counsel, could not take the stand to authenticate documents, and that even if he could, he could not authenticate these

particular records for lack of knowledge." *Id.* Plaintiff's counsel testified that he contacted OSU's counsel and urged them to withdraw the motion. *See* Sanctions Hearing Exhibit 4.

{¶12} Defendant asserts that "Plaintiff's focus on this filing shows not more than a difference in opinion regarding litigation strategy and fails to support sanctions." (Memo. Opp., p. 13). The Court disagrees. Trial counsel for OSU, who filed the motion to strike, testified that she would have stipulated to the authenticity of the documents Plaintiff's counsel was authenticating via affidavit had Plaintiff's counsel asked. Further, she testified she was "blindsided" by an affidavit from an attorney, and she had never seen an affidavit from an attorney in support of a motion for summary judgment. Further, she testified that she felt that her motion to strike was legally supported. During her testimony, counsel for OSU did not identify any legal authority that she relied on in filing the motion to strike, nor did she cite any legal authority in her motion to strike. In Plaintiff's Memorandum in Opposition to Defendant's Motion to Strike Affidavit of Plaintiff's Counsel, Plaintiff's counsel cited to a variety of legal authorities in support of his affidavit.

{¶13} In Plaintiff's Post-Trial Brief Regarding Sanctions, Plaintiff's counsel explained that he did a search of his email archive and found an e-mail Plaintiff's counsel sent to lead counsel for OSU on February 11, 2016, along with a proposed stipulation, that would have alleviated the authentication issues raised in OSU's Motion to Strike. This e-mail and the proposed stipulation were filed by OSU on February 2, 2018, and labeled Exhibit 1. Plaintiff asserts that this newly discovered email, and the fact that the documents at issue were used in Dr. Alutto's deposition, shows that counsel for OSU knew what the documents were and rejected Plaintiff's counsel's attempt to get counsel for OSU to authenticate the documents.

{¶14} The Court finds that OSU's Motion to Strike Plaintiff's counsel's summary judgment affidavit was without a legal or factual basis, resulting in prejudice to Plaintiff

through the expenditure of attorney's fees to respond to the motion. There was not appropriate research done by OSU, and if appropriate research had been conducted, OSU would have determined that the motion to strike was unsupported. The motion was not warranted under existing law, and OSU failed to provide any legal authority for its motion when it presented it to the Court. *See Neubauer v. Ohio Remcon, Inc.*, 10th Dist. Franklin No. 05AP-946, 2006-Ohio-1481, ¶ 44, (counsel's failure to adequately investigate a claim can constitute frivolous conduct under the statute. *Lewis v. Celina Fin. Corp.*, 101 Ohio App.3d 464, 473, 655 N.E.2d 1333 (1995), citing *Stephens v. Crestview Cadillac, Inc.*, 64 Ohio App.3d 129, 132-133, 580 N.E.2d 842 (1989)). Accordingly, the conduct of OSU in filing the Motion to Strike and refusing to withdraw the motion was frivolous under R.C. 2323.51.

3) Motions to Compel Related to Plaintiff's Interrogatory No. 1

{¶15} Plaintiff asserts that OSU's position that it "maintains an attorney-client relationship with the employees of the University," and that Plaintiff could only contact OSU employees through OSU's counsel amounted to frivolous conduct. During litigation in this case, Plaintiff sought to interview individuals identified in Interrogatory No. 1 who were employees of OSU or previously employed by OSU. OSU advised Plaintiff that it would not allow Plaintiff to contact any individuals identified in Interrogatory No. 1 because all the individuals were represented by the Attorney General.

{¶16} As a result of this position, Plaintiff filed a Motion to Compel that the Court partially granted on December 8, 2015. The Court instructed OSU to supplement its interrogatory answer by providing contact information for all but the three protected groups of employees and explain why each protected individual fell into a specifically protected category. OSU informed Plaintiff that 23 of 26 current or former OSU employees were protected from *ex parte* communication. Plaintiff then filed a second motion to compel, however due to the discovery cutoff approaching, Plaintiff conducted

depositions of three witnesses that Plaintiff believed could have been approached *ex parte.* Plaintiff claims that OSU did not provide any legal support for its positions of blanket representation of current and former OSU employees.

{¶17} OSU asserts that it made good faith objections to Plaintiff's interrogatory, and that it declined to provide contact information because Plaintiff wanted to rely on witness statements as admissions of the university. During the sanctions hearing, lead counsel for OSU testified that aside from Plaintiff, OSU advised Plaintiff that all witnesses listed in response to Plaintiff's Interrogatory No. 1 should be contacted through her. Further, she testified that "[t]hat is typical practice for me. I've never had anyone object to it." (Sanctions Hearing Transcript, p. 152, lines 14-16). Counsel for OSU stated that these individuals "are represented by not only us if there's a lawsuit pending, but by their own internal legal counsel." (Sanctions Hearing Transcript, p. 153, lines 18-20). Counsel for OSU also stated that she found cases to support her position, but did not cite any in the documents filed related to Plaintiff's Motions to Compel.

{¶18} The Court finds that OSU's legal position did not rise to the level of frivolous conduct. The Court should have been more proactive in advising OSU that it did not have global representation of all employees at OSU. OSU was partially correct in that it represented some of the employees identified in Interrogatory No. 1. As such, the Court finds that OSU's position claiming that all witness listed in response to Interrogatory No. 1 were represented by the Attorney General's office was not frivolous conduct pursuant to R.C. 2323.51.

4) Documents Obtained from OSU Archives

{¶19} Plaintiff asserts that OSU purposely withheld relevant evidence in discovery. Specifically, Plaintiff claims that her first Motion to Compel asked the Court to order OSU to provide the legislative history of the principal rule at issue in this case, University Faculty Rule 3335-5-05. In response, OSU asserts that the discovery

request was irrelevant and would require a burdensome and painstaking review of thousands of pages of meeting minutes to hunt for a change to a specific faculty rule.

{¶20} On April 24, 2015, Plaintiff served its request for production of documents on OSU, and OSU completed its responses on August 26, 2015. Plaintiff then attempted to resolve this and other outstanding discovery disputes with OSU in accordance with Civ.R. 37(A)(1), but was unsuccessful. On October 22, 2015, Plaintiff filed her first Motion to Compel. On December 8, 2015, the Court entered an order on Plaintiff's motion to compel, and the Court ordered the following:

1) Defendant shall provide copies of the legislative history for each amendment of Rule 3335-6-05 that was in effect at any time throughout the duration of Plaintiff's employment, including any and all time in which Plaintiff was appealing the tenure decision in question;

2) Likewise, copies of the portions of Senate proceedings that occurred during the time of Plaintiff's employment that specifically relate to possible amendments to Rule 3335-6-05;

3) Copies of any and all board meeting minutes that occurred during the time of Plaintiff's employment.

{¶21} While the Parties appeared to have differing interpretations of the Court's order, Plaintiff's counsel visited the OSU archives on December 11, 2015 to review the University Senate meeting minutes. Plaintiff's counsel testified that prior to his visit, the OSU reference archivist who was communicating with him asked if he was working with Jan Neiger, internal counsel at OSU. The archivist explained to Plaintiff's counsel that the materials he was looking for were already pulled off the shelves, as Mr. Neiger had just been reviewing the meeting minutes for the same years. Plaintiff's counsel explained that when he arrived at the OSU archives, the committee reports and meeting minutes he was seeking had already been bookmarked. Shortly after Plaintiff's counsel visited the OSU archives, OSU indicated that it did not have any further legislative history to disclose to Plaintiff. These documents later became Trial Exhibit 10.

{¶22} The Court finds that the documents Plaintiff sought to obtain from OSU were publicly available documents that were available to any individual that wanted to review them. Even though some counsel may have willingly turned the documents over, it was not improper for the State to direct Plaintiff to publicly available documents in response to her request for documents. As such, the Court finds no sanctionable conduct with respect from the documents obtained from the OSU archives.

5) Demonstrably False Statements in Post-Hearing Briefs

{¶23} Plaintiff asserts that OSU's counsel filed and refused to withdraw a brief opposing damages containing demonstrably false statements and frivolous legal claims. Plaintiff identifies three areas where she believes OSU made false factual claims. OSU asserts that its briefing, and the factual and legal assertions contained therein, were reasonable, supported, and made in good faith.

{¶24} Generally, lawyers are given great latitude in their opening and closing comments. "It is well settled that counsel is accorded wide latitude in opening statement subject to the restriction that it is impermissible to comment on incompetent, inadmissible or improper evidence which is patently harmful. *Maggio v. Cleveland,* 151 Ohio St. 136, 38 O.O. 578, 84 N.E.2d 912 (1949), paragraph two of the syllabus. This same standard is applied to closing argument. *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990), paragraphs two and three of the syllabus; *Drake v. Caterpillar Tractor Co.*, 15 Ohio St.3d 346, 348, 474 N.E.2d 291, 293-94 (1984). Where counsel calls into question the integrity of a witness during closing argument which is not supported by evidence, the trial court is required to intervene so as to prevent further improper argument. *Plas v. Holmes Constr. Co.*, 157 Ohio St. 95, 47 O.O. 86, 104 N.E.2d 689 (1952), paragraph three of the syllabus." *Dillon v. Bundy*, 72 Ohio App.3d 767, 772, 596 N.E.2d 500 (10th Dist.1991).

{¶25} The Court finds that improper statements in post-trial briefing, if any, did not amount to sanctionable conduct pursuant to R.C. 2323.51. OSU cited to the trial

transcript and a trial exhibit in support of its arguments in its post-trial brief, and the Court finds that OSU's briefing did not call into question the integrity of the witness. As such, no sanctions are awarded for any briefing issues.

6) Violation of Mediation Privilege Statute

{¶26} Plaintiff asserts that OSU's counsel deliberately violated Ohio's mediation privilege statute by revealing confidential settlement negotiations in open court. Plaintiff asserts that during trial, counsel for OSU announced the substance of confidential settlement discussions that took place at a mediation between the parties related to Plaintiff's related EEOC charge. OSU asserts that statements made by counsel for OSU regarding any settlement discussions were made in response to the Court's reference to the possibility of future settlement discussions.

{¶27} Ohio's Uniform Mediation Act, R.C. Chapter 2710, provides in relevant part that "a mediation communication is * * * not subject to discovery or admissible in evidence." R.C. 2710.03(A). Plaintiff's Exhibit 26, page 598 documents the discussion at trial between counsel for the Parties and the Court regarding any settlement negotiations between the Parties. The Court noted during trial that these discussions are not admissible and moved onto a different issue. Further, the Court discussed this issue during the sanctions hearing, and informed the Parties that many judges throughout the state want the mediator to issue a report to the court before the case is tried. Additionally, the Court stated that "when judges hear things that they're not supposed to hear, they can set it aside." (Sanctions Hearing Transcript, p. 117, lines 21-22). The Court recognizes that it is inappropriate to discuss settlement progress with any finder of fact, however, any such alleged improper conduct in this case is harmless. As such, the Court finds that Plaintiff is not entitled to sanctions with respect to its argument regarding a violation of Ohio's mediation privilege statute.

Damages

{¶28} When a court makes a finding of frivolous conduct, "it must determine what amount, if any, of reasonable attorney fees to award the party aggrieved by the frivolous conduct." *Groves v. Groves*, 10th Dist. Franklin No. 09AP-1107, 2010-Ohio-4515 ¶ 16. R.C. 2323.51(5)(b) states that: "[i]n connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded court costs and other reasonable expenses incurred in connection with the civil action or appeal may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of the costs and expenses, an itemized list or other evidence of the costs and expenses that were incurred in connection with that action or appeal and that were necessitated by the frivolous conduct, including, but not limited to, expert witness fees and expenses associated with discovery." "R.C. 2323.51 does not limit an award of fees to those incurred as a result of appellant's filings only. Rather, it allows a motion for an award in the amount of costs, attorney fees, and expenses 'incurred in connection with the civil action[.]'" *Neubauer v. Ohio Remcon, Inc.*, 10th Dist. Franklin No. 05AP-946, 2006-Ohio-1481, ¶ 50.

{¶29} On February 5, 2018, the Parties filed a Stipulation Related to Fees and Expenses for Purposes of Plaintiff's Motion for Sanctions. The Parties stipulate to the amount of attorney time and attorney's fees listed as reasonable to each task, and the expenses incurred are reasonable as to their amounts. As the Court only found sanctionable conduct related to OSU's Motion to Strike, it only awards damages related to that motion. According to the Parties Stipulation, Plaintiff's counsel spent the following time related to this finding of frivolous conduct: (1) 0.8 hours to review and informal response to motion to strike summary judgment affidavit; (2) 2.0 hours for briefing in response on motion to strike. At an agreed upon rate of $200.00 per hour, Plaintiff is entitled to $560.00 in fees.

{¶30} Plaintiff is also entitled to hearing fees and expenses. As Plaintiff failed on some parts of her Motion for Sanctions, the Court finds it appropriate to reduce the sanctions award. Plaintiff obtained sanctions for one of the five aspects of her Motion for Sanctions, thus the Court reduces hearing fees for Plaintiff's counsel and co-counsel, Fred Gittes, by 80 percent. Plaintiff's counsel's time for preparation and attendance totaled 25.7 hours; an 80 percent reduction results in 5.14 hours. Co-counsel Fred Gittes' preparation and attendance totaled 17.0 hours; an 80 percent reduction results in 3.4 hours at an agreed upon rate of $450.00. As such, Plaintiff is entitled to $2,558.00 for fees related to hearing preparation and attendance. Plaintiff is also entitled to $381.50 for the partial transcript of the sanctions hearing and $733.81 for flight, hotel, and parking for the hearing.

{¶31} Plaintiff's brief separates issues by sections, and the Court allocates fees and expenses for research and drafting Plaintiff's Motion for Sanctions in the same manner as it did for hearing preparation and attendance. As such, Plaintiff is entitled to 1.52 hours for research and drafting her motion for sanctions. This same allocation applies to Plaintiff's estimated post-hearing filings, thus Plaintiff is entitled to 1 hour for post-hearing filings. Accordingly, Plaintiff is entitled to the following:

- Plaintiff's counsel's time: $1,028.00
- Fred Gittes: $1,530.00
- Partial Transcript: $381.50
- Travel Expenses: $733.81
- Research Drafting Motion for Sanctions: $304.00
- Post-Hearing Filings: $200.00

Conclusion

{¶32} In accordance with R.C. 2323.51, the Court shall grant, in part, and deny, in part, Plaintiff's Motion for Post-Trial Sanctions. However, the Court finds that none of the instances of frivolous conduct arise to the level of willfulness required by Civ.R. 11. If a Court would sanction an attorney or party for every legal or judgment error that was made during the litigation process, the sanctioning process would take longer than the litigation itself. Attorneys should be cautious in the discovery process or when filing motions when there is no legal or factual basis to sustain the claim or motion. Plaintiff is awarded a total of $4,177.31 in fees and expenses related to her Post-Hearing Motion for Sanctions.

DALE A. CRAWFORD
Judge

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NANCY LILL, Ph.D. Plaintiff v. THE OHIO STATE UNIVERSITY Defendant	Case No. 2015-00387JD Judge Dale A. Crawford JUDGMENT ENTRY

{¶33} In accordance with R.C. 2323.51, the Court GRANTS, in part, and DENIES, in part, Plaintiff's Motion for Post-Trial Sanctions. However, the Court finds that none of the instances of frivolous conduct arise to the level of willfulness required by Civ.R. 11. Plaintiff is awarded a total of $4,177.31 in fees and expenses related to her Post-Hearing Motion for Sanctions.

DALE A. CRAWFORD
Judge

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