[Cite as *Plummer v. Westfall*, 2009-Ohio-4998.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

C. KEITH PLUMMER

Plaintiff-Appellee

-vs-

JOHN T. WESTFALL

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CA 8

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 08 CV 412
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 23, 2009

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Pro se Defendant-Appellant John T. Westfall appeals the decision of the Guernsey County Court of Common Pleas which granted summary judgment in favor of Plaintiff-Appellee C. Keith Plummer.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts and procedural history are as follows:

{¶3} Plaintiff-Appellee C. Keith Plummer is an attorney licensed to practice law in the State of Ohio. In February 2000, Plummer drafted a Last Will and Testament for Dean Paul Westfall, who was the father of Defendant-Appellant, John T. Westfall, which provided for distribution of Dean Westfall's assets, including ownership of certain stocks owned by him.

{¶4} Following Dean Westfall's death, beginning in 2002, Appellant began to make numerous allegations regarding the preparation of this Last Will and Testament. Since 2002, Westfall has filed at least five civil actions, repeatedly alleging that Atty. Plummer perpetrated fraud in the preparation and/or signature of Dean Westfall's will. Appellant has filed these repeated actions in various courts including the Cambridge Municipal Court, the Guernsey County Common Pleas Court, the Fifth District Court of Appeals and the Ohio Supreme Court.

{¶5} On April 12, 2002, Appellant filed his first action regarding these allegations, being Guernsey County Common Pleas Court case number 02-CV-000182. Said case was dismissed by entry dated August 20, 2002. Appellant appealed said dismissal to the Fifth District Court of Appeals where it was assigned case number 02-CA-19. This Court affirmed the decision of the trial court by decision dated April 25,

2003. Thereafter, Appellant sought Supreme Court review. On September 10, 2003, the Ohio Supreme Court denied jurisdiction.

{¶6} On November 21, 2003, Appellant filed a request for appointment of a special prosecuting attorney in the Guernsey County Common Pleas Court. A hearing was held on that request on January 16, 2004. The trial court found no legal basis for the requested appointment and dismissed Appellant's request.

{¶7} On March 12, 2004, Appellant again requested that a criminal complaint be filed against Atty. Plummer. Said case was assigned number 04-SJ-01 by the Guernsey County Common Pleas Court. The trial court again dismissed the motion, recognizing in its entry that Appellant had previously requested the same relief, that the same matters had been heard on January 16, 2004, and that the same allegations had made up the factual basis of case number 02-CV-182.

{¶8} On September 10, 2004, Appellant filed pleadings in the Cambridge Municipal Court, Case No. 04-MSX-00001, alleging that Atty. Plummer had committed various criminal offenses. The Cambridge Municipal Court granted Atty. Plummer's request for a special prosecuting attorney and appointed T. Shawn Hervey, the duly elected Prosecuting Attorney of Harrison County. Attorney Hervey conducted an independent review of the allegations and, on February 13, 2006, submitted his findings to the Municipal Court, wherein he stated:

{¶9} "Please be advised that I shall not be seeking criminal charges in [Case No. 04MSX00001]. Upon lengthy review of all the evidence, there is not sufficient credible evidence to pursue criminal charges. This office has met with John Westfall concerning his complaint and has met with Attorney Keith Plummer.

{¶10} "Documents obtained from Mr. Westfall were forwarded to BCI & I for handwriting analysis. Said analysis was completed on January 30, 2006. BCI & I analysis provided no basis for forgery charges against any party. I am further convinced that probable cause does not exist for any other criminal charges as it relates to John Westfall's concerns. It would appear that many of these concerns are civil in nature."

{¶11} Thereafter, on February 23, 2006, the trial court issued a judgment entry on Appellant's request for a criminal complaint. In the entry, the court stated that in accordance with R.C. §2935.10, Appellant's request for a criminal complaint had been submitted to a special prosecuting attorney for a probable cause determination. The court further stated that the special prosecuting attorney reviewed the matter and "after a lengthy review of all evidence" did not find "sufficient credible evidence to pursue criminal charges." The trial court further held that based on the special prosecutor's findings, the court would not accept Appellant's filing for criminal charges for lack of probable cause. The trial court further noted that the special prosecutor's examination established that "many of these concerns are civil in nature." Based upon those findings, the case was closed.

{¶12} On February 17, 2007, Appellant again filed a civil action in the Guernsey County Common Pleas Court entitled "Request for Grand Jury Investigation", which was assigned Case No. 07-CV-000080. Said case was dismissed by entry dated April 23, 2007. On May 10, 2007, Westfall appealed that decision to the Fifth Appellate District where it was assigned case number 07-CA-000019. This Court thoroughly reviewed all of the prior pleadings and set forth a detailed recitation of Westfall's various claims and cases. Following said review, this Court affirmed the decision of the trial court.

{¶13} Appellant thereafter filed a Motion for Reconsideration on July 1, 2008, which was denied by Judgment Entry dated July 18, 2008.

{¶14} On July 29, 2008, Atty. Plummer initiated the current action by filing a complaint in the Guernsey County Common Pleas Court to have Appellant declared a vexatious litigator pursuant to R.C. §2323.52.

{¶15} Appellant filed an answer to said complaint on August 13, 2008.

{¶16} Following completion of discovery, Atty. Plummer filed a Motion for Summary Judgment on January 7, 2009.

{¶17} On January 12, 2009, Appellant filed a "Motion to Oppose Summary Judgment filed by Plaintiff."

{¶18} On January 26, 2009, Appellant filed his "Motion of Defendant's Argument to Oppose Summary Judgment."

{¶19} On January 27, 2009, Plaintiff-Appellee filed his Response to Defendant's Motion to Oppose Summary Judgment filed by Plaintiff; Motion to Strike.

{¶20} By Entry dated February 5, 2009, the trial court granted Defendant-Appellee's Motion for Summary Judgment, finding Appellant to be a "vexatious litigator" as defined in R.C. 2323.52(A)(3) and entered and Order prohibiting him from instituting or continuing any legal proceedings without first obtaining leave of court.

{¶21} It is from this decision that Appellant now appeals.

{¶22} Appellate Rule 16

{¶23} We begin by noting that Appellant has failed to comply with App.R. 16 and Local App.R. 9.

{¶24} App.R. 16(A) provides: The appellant shall include in its brief, under the headings and in the order indicated, all of the following:

{¶25} "(1) A table of contents, with page references.

{¶26} "(2) A table of cases alphabetically arranged, statutes, and other authorities cited, with references to the pages of the brief where cited.

{¶27} "(3) A statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected.

{¶28} "(4) A statement of the issues presented for review, with references to the assignments of error to which each issue relates.

{¶29} "(5) A statement of the case briefly describing the nature of the case, the course of proceedings, and the disposition in the court below.

{¶30} "(6) A statement of the facts relevant to the assignments of error presented for review, with appropriate references to the record * * *

{¶31} "(7) An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.

{¶32} "(8) A conclusion briefly stating the precise relief sought.

{¶33} Appellant's brief does not satisfy the requirements of App.R. 16 and Local App.R. 9 in that Appellant does not present this Court with a stated assignment of error.

Such deficiency is tantamount to the failure to file a brief. Although this Court has the authority under App.R. 18(C) to dismiss an appeal for failure to file a brief, we shall not do so here.

{¶34} While Appellant did not present a separate, stated assignment of error in accordance with App.R. 16(A), upon review of Appellant's Brief, it would appear that Appellant is claiming that the trial court erred in granting summary judgment in favor of Appellee in this matter.

I.

{¶35} In his sole assignment of error, Defendant-Appellant argues that the trial court erred in granting summary judgment in favor of Plaintiff-Appellee. We disagree.

{¶36} "Summary Judgment Standard"

{¶37} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

{¶38} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the

party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶39} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶40} It is based upon this standard that we review Appellant's assignments of error.

{¶41} In the case sub judice, Appellant is challenging the trial court's decision finding that he is a "vexatious litigator".

{¶42} Vexatious litigator is defined in R.C. §2323.52(A) as:

{¶43} "[A]ny person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil

action or actions. “Vexatious litigator” does not include a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio unless that person is representing or has represented self pro se in the civil action or actions.”

{¶44} Additionally, “vexatious conduct” is defined as the conduct of a party in a civil action that “obviously serves merely to harass or maliciously injure another party to the civil action,” “is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law,” or “is imposed solely for delay.” R.C. §2323.52(A)(2)(a) through (c).

{¶45} Said section further provides:

{¶46} “(D)(1) If the person alleged to be a vexatious litigator is found to be a vexatious litigator, subject to division (D)(2) of this section, the court of common pleas may enter an order prohibiting the vexatious litigator from doing one or more of the following without first obtaining the leave of that court to proceed:

{¶47} “(a) Instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court;

{¶48} “(b) Continuing any legal proceedings that the vexatious litigator had instituted in any of the courts specified in division (D)(1)(a) of this section prior to the entry of the order;

{¶49} “(c) Making any application, other than an application for leave to proceed under division (F)(1) of this section, in any legal proceedings instituted by the vexatious litigator or another person in any of the courts specified in division (D)(1)(a) of this section.

{¶50} "(2) If the court of common pleas finds a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio to be a vexatious litigator and enters an order described in division (D)(1) of this section in connection with that finding, the order shall apply to the person only insofar as the person would seek to institute proceedings described in division (D)(1)(a) of this section on a pro se basis, continue proceedings described in division (D)(1)(b) of this section on a pro se basis, or make an application described in division (D)(1)(c) of this section on a pro se basis. The order shall not apply to the person insofar as the person represents one or more other persons in the person's capacity as a licensed and registered attorney in a civil or criminal action or proceeding or other matter in a court of common pleas, municipal court, or county court or in the court of claims. Division (D)(2) of this section does not affect any remedy that is available to a court or an adversely affected party under section 2323.51 or another section of the Revised Code, under Civil Rule 11 or another provision of the Ohio Rules of Civil Procedure, or under the common law of this state as a result of frivolous conduct or other inappropriate conduct by an attorney who represents one or more clients in connection with a civil or criminal action or proceeding or other matter in a court of common pleas, municipal court, or county court or in the court of claims."

{¶51} Declaring a plaintiff to be a vexatious litigator is "an extreme measure" that should be granted only "when there is no nexus" between "the filings made by the plaintiff and [his or her] intended claims." *McClure v. Fischer Attached Homes,* 145 Ohio Misc.2d 38, 2007-Ohio-7259 at ¶ 33.

{¶52} In the case at bar, viewing the evidence in a light most favorable to Appellant, although he may have had a good faith basis for filing the original pro se complaint, he learned that he did not have any evidence of any criminal conduct having taken place with regard to the preparation of his father's will. Over seven years later, Appellant continues to pursue these claims even though he cannot present any evidence to support such claims. His claims have never been supported by a "good faith argument for an extension, modification, or reversal of existing law." R.C. §2323.52(A)(2)(b).

{¶53} Based on the foregoing, we conclude that the trial court did not err in granting summary judgment to Appellee on his vexatious litigator claim. Upon review of the record, we find overwhelming evidence, sufficient under Civ.R. 56, that Appellant habitually files unnecessary, inappropriate, or supernumerary pleadings and motions. Further, the record shows that Appellant insists on raising and re-raising arguments which have been rejected by the trial court, and this Court, sometimes repeatedly.

{¶54} While this Court is sympathetic to a party who feels he has suffered an injustice, and takes all measures *within* the law to correct such, we find that Appellant's actions have long passed this stage. His conduct in the various matters stemming from the preparation and probate proceedings concerning his father's last will and testament is "vexatious," within the meaning of the statute, in that "[t]he conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." R.C. §2323.52(A)(2)(b). His conduct is also "vexatious" insofar as some of it "is imposed solely for delay."

{¶55} Furthermore, we find that in opposing Appellee's motion for summary judgment, Appellant failed to present any evidence of the type listed in Civ.R. 56(C) to demonstrate that a genuine issue of material fact exists. Appellant's baseless claims and conduct against Appellee clearly falls within the legal definition of vexatious conduct. As such, the trial court properly declared him a vexatious litigator.

{¶56} Appellant's sole assignment of error is overruled.

{¶57} For the foregoing reasons, the judgment of the Court of Common Pleas of Guernsey County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES

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IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

C. KEITH PLUMMER	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JOHN T. WESTFALL	:	
	:	
Defendant-Appellant	:	Case No. 09 CA 8

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Guernsey County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES