

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

RYAN N. DANIELS

Plaintiff-Appellee

-VS-

MICHELLE M. DANIELS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

: Case No. 14-CA-74

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of  
Common Pleas, Domestic Relations  
Division, Case No. 2011 DR 01180 DF

**JUDGMENT:**

AFFIRMED

DATE OF JUDGMENT ENTRY:

April 27, 2015

APPEARANCES:

For Plaintiff-Appellee:

For Defendant-Appellant:

JOSEPH A. NIGH  
536 S. High St.  
Columbus, OH 43215

HILLARD M. ABROMS  
753 South Front St.  
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For Appellee:

M. DAVID BURTON, PRO SE  
5890 Sawmill Road, Suite 110  
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*Delaney, J.*

{¶1} Defendant-Appellant Michelle M. Daniels appeals the July 24, 2014 judgment entry of the Licking County Court of Common Pleas, Domestic Relations Division. Appellee is M. David Burton. Burton represented Plaintiff-Appellee Ryan N. Daniels in the proceedings before the Licking County Court of Common Pleas, Domestic Relations Division.

{¶2} At the February 17, 2015 oral argument of this appeal, the parties were notified that before he was appointed to the Fifth District Court of Appeals, Judge Craig R. Baldwin was involved in the original divorce proceedings while he was a trial court judge at the Licking County Court of Common Pleas, Domestic Relations. Judge Baldwin had no involvement with the subject of the instant appeal. The presiding judge presented the parties with the option of continuing the oral argument so the matter could be assigned to a different panel or waiving their objections to the assignment of Judge Baldwin to the appeal. At the oral argument, the parties chose to waive their objections to Judge Baldwin's assignment to the appeal.

### **FACTS AND PROCEDURAL HISTORY**

{¶3} Plaintiff-Appellee filed a complaint for divorce in the Licking County Court of Common Pleas, Domestic Relations Division on August 23, 2011. Appellee M. David Burton represented Husband. Defendant-Appellant Michelle M. Daniels filed a counterclaim for divorce on November 23, 2011.

{¶4} Effective March 4, 2013, the Ohio Supreme Court appointed Judge Jackson as a visiting judge with the Licking County Court of Common Pleas, Domestic Relations Division. Judge Jackson was assigned to hear the underlying case because

the previously assigned judge was appointed to serve at the Fifth District Court of Appeals.

{¶5} The divorce trial commenced on August 8, 2013. On August 16, 2013, Burton, as counsel for Husband, and Wife, represented by her counsel, engaged in settlement negotiations. Husband and Wife dispute whether a settlement agreement was reached on August 16, 2013, but there is no dispute that the parties did not execute a settlement agreement. The trial court continued the trial until August 30, 2013.

{¶6} The parties did not execute a settlement agreement. Before August 30, 2013, Husband, through his counsel Burton, filed three motions with the trial court. He filed (1) a motion for Judge Jackson to recuse himself, (2) a motion for a mistrial, and (3) a motion to continue the trial. A hearing was held before the trial court on the motions. The trial court issued its judgment entry on August 30, 2013, denying the three motions. The trial court also ordered the entire case dismissed based on Ohio Supreme Court timing guidelines.

{¶7} Husband filed a motion seeking to reinstate the case. The trial court held a hearing on the motion and denied the motion on September 24, 2013.

{¶8} On September 30, 2013, Wife filed a motion for sanctions against Burton. Her motion pursuant to Civ.R. 11 and R.C. 2323.51 argued Burton engaged in frivolous conduct by filing the motion to recuse, motion for mistrial, and motion to continue.

{¶9} Wife appealed the August 30, 2013 judgment entry. She argued on appeal that the trial court erroneously dismissed the complaint for divorce. On January 9, 2014, this Court reversed the judgment of trial court to dismiss the complaint and remanded

the matter to the trial court for further proceedings. See *Daniels v. Daniels*, 5th Dist. Licking No. 13-CA-87, 2014-Ohio-83 ("*Daniels I*").

{¶10} During the pendency of the *Daniels I* appeal, Burton filed an Affidavit of Judicial Disqualification with the Ohio Supreme Court, requesting that Judge Jackson be disqualified from hearing the case. On January 7, 2014, the Ohio Supreme Court issued a judgment entry dismissing Burton's Affidavit of Judicial Disqualification as moot. The Ohio Supreme Court was notified that Judge Jackson voluntarily recused himself from the underlying case. The Court returned the underlying case to the Licking County Court of Common Pleas, Domestic Relations Division for assignment to another judge of that court.

{¶11} On January 22, 2014, the administrative judge of the Licking County Court of Common Pleas assigned Judge Frost to hear the case.

{¶12} The divorce trial went forward before Judge Frost on April 17, April 18, and May 7, 2014.

{¶13} The Final Decree of Divorce was filed on June 3, 2014. The parties did not appeal the Final Decree of Divorce.

{¶14} On July 17, 2014, Judge Frost held an evidentiary hearing on Wife's pending motion for sanctions. The trial court issued its judgment entry on July 24, 2014 denying Wife's motion for sanctions against Burton.

{¶15} It is from this decision Wife now appeals.

### ASSIGNMENTS OF ERROR

{¶16} Wife raises three Assignments of Error:

{¶17} "I. NEWLY APPOINTED JUDGE DUKE FROST (REPLACING JUDGE BALDWIN, NOW OF THE 5TH DISTRICT COURT OF APPEALS AND VISITING JUDGE S. FERRELL JACKSON) ERRED WHEN HE HELD ATTORNEY M. DAVID BURTON DID NOT COMMIT FRIVOLOUS OR SANCTIONABLE CONDUCT.

{¶18} "II. THE TRIAL COURT ERRED WHEN IT, JUDGE DUKE FROST, CONDUCTED THE DIVORCE HEARING AND SANCTIONS HEARING RATHER THAN VISITING JUDGE S. FERRELL JACKSON.

{¶19} "III. THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW PLAINTIFF, RYAN DANIELS, TO TESTIFY AT THE SANCTIONS HEARING ON THE BASIS OF ATTORNEY/CLIENT PRIVILEGE."

### ANALYSIS

#### I.

{¶20} Wife argues in her first Assignment of Error that the trial court erred when it found that Burton did not commit a Civ.R.11 violation or engage in frivolous conduct when he filed the motion to recuse, motion for mistrial, and motion to continue. We disagree.

#### *Civ.R. 11*

{¶21} Civ.R. 11 governs the signing of motions, pleadings, and other documents. The rule states, "[e]very pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record \* \* \*." By signing the pleading or motion, the attorney certifies that the attorney has read the

motion; to the best of the attorney's knowledge, information, and belief there is good ground to support the motion; and that the motion is not interposed for delay. See Civ.R. 11. To impose a sanction under Civ.R. 11, the trial court must determine whether the attorney met the three standards. *Namenyi v. Tomasello*, 2nd Dist. Greene No. 2013-CA-75, 2014-Ohio-4509, ¶ 14.

{¶22} "Civ.R. 11 employs a subjective bad faith standard." *Ferron v. Video Professor, Inc.*, 5th Dist. Delaware No. 08-CAE-09-0055, 2009-Ohio-3133, ¶ 77 quoting *Stone v. House of Day Funeral Serv., Inc.* 140 Ohio App.3d 713, 721, 748 N.E.2d 1200 (6th Dist.2000). "If any one of the three Civ.R. 11 requirements is not satisfied, the trial court must then determine whether the violation was willful as opposed to merely negligent." *Namenyi*, 2014-Ohio-4509 at ¶ 14 quoting *Ponder v. Kamienski*, 9th Dist. Summit No. 23270, 2007-Ohio-5035, ¶ 36. The attorney's actual intent or belief is relevant to the determination of willfulness. *Ferron*, 2009-Ohio-3133 at ¶ 77. If the trial court finds the Civ.R. 11 violation was willful, it may impose an appropriate sanction. *Namenyi*, 2014-Ohio-4509 at ¶ 14.

{¶23} The trial court's decision to impose sanctions cannot be reversed absent an abuse of discretion. *Ferron*, 2009-Ohio-3133 at ¶ 77.

#### *R.C. 2323.51*

{¶24} In contrast to Civ.R. 11, the imposition of sanctions under R.C. 2323.51 requires the trial court to find frivolous conduct. R.C. 2323.51 provides that 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. Prior to awarding damages under R.C.

2323.51, the trial court must hold a hearing “to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award[.]” R.C. 2323.51(B)(2)(a).

{¶25} “Frivolous conduct” is the conduct of a party to a civil action or of the party’s counsel that satisfies any of the following four criteria:

(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.

R.C. 2323.51(A)(2)(a)(i)-(iv).

{¶26} The question of what constitutes frivolous conduct may be either a factual determination or a legal determination. *Ferron*, 2009-Ohio-3133 at ¶ 44. No single standard of review applies in R.C. 2323.51 cases. *Wiltberger v. Davis*, 110 Ohio App.3d 46, 51, 673 N.E.2d 628 (10th Dist.1996). The finding of frivolous conduct under R.C. 2323.51 is determined without reference to what the individual knew or believed. *Namenyi*, 2014-Ohio-4509 at ¶ 16. A determination that the 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 requires a legal analysis. *Ferron*, 2009-Ohio-3133 at ¶ 44. With respect to purely legal issues, we follow a de novo standard of review and need not defer to the judgment of the trial court. *Id.* However, we do find some 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. *Id.*

#### *Sanctionable Conduct*

{¶27} Wife argues Burton violated Civ.R. 11 and R.C. 2323.51 when he filed the motion to recuse, motion for mistrial, and motion to continue. She argues Burton had no grounds or good faith basis to file the motions and he filed the motions for purposes of delay, or as Wife argued in the evidentiary hearing, Burton's tactics "derailed this train." (Hearing, p. 66).

{¶28} In its July 24, 2014 judgment entry, the trial court analyzed each factor of Civ.R. 11 and R.C. 2323.51. Based on the trial court's thorough analysis, we cannot say upon either standard of review the trial court erred in finding that Burton did not violate Civ.R. 11 or engage in frivolous conduct when he filed the three motions. It was Wife's



main argument that Burton's motions were frivolous because they derailed the process and caused the divorce to take more time than necessary. We have reviewed the record as a whole and we find the record supports the trial court's decision that Burton's motions were not filed for purposes of delay and in fact, had no real impact on the length of the divorce proceedings.

{¶29} The divorce trial commenced on August 8, 2013. On August 16, 2013, the court went into recess so the parties could work out a settlement agreement. One of the main issues was custody of the parties' children. Pursuant to Burton's testimony at the evidentiary hearing, the trial court encouraged the parties to explore a shared parenting agreement. Burton testified the judge stated to him in chambers that because of the young ages of the minor children, he was inclined to award custody to Wife unless Husband could demonstrate Wife was unfit.<sup>1</sup> The parties worked towards a settlement agreement on August 16, 2013. The trial court continued the trial until August 30, 2013.

{¶30} The parties did not execute a settlement agreement. Husband filed a motion to recuse, a motion for mistrial, and a motion to continue. The trial court held a hearing on August 30, 2013 and denied all three motions. The trial court, however, went on to dismiss the case on August 30, 2013 because the file appeared to be several months past the Ohio Supreme Court guidelines. See *Daniels I*, 2014-Ohio-83 at ¶ 4. The trial court orally advised the parties the case could be refiled by either party, but the judgment entry did not state the dismissal was without prejudice. *Id.* Husband filed a motion seeking to reinstate the case on September 6, 2013. The trial court denied the motion on September 24, 2013. On September 20, 2013, Wife filed an appeal of the August 30, 2013 judgment entry. This Court reversed the decision and remanded the

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<sup>1</sup> The June 3, 2014 Final Decree of Divorce awarded custody of the children to Husband.

case to the trial court on January 9, 2014. See *Daniels I*, 2014-Ohio-83 at ¶ 14. While the appeal was pending, Judge Jackson voluntarily recused himself from the case and the matter was reassigned to Judge Frost. After the case was remanded, the matter proceeded and the Final Divorce Decree was entered into on June 3, 2014.

{¶31} Based on the analysis of the trial court as to Civ.R. 11 and R.C. 2323.51 and the procedural history of this case, we find no error to deny Wife's motion for sanctions. Wife's first Assignment of Error is overruled.

## II.

{¶32} Wife argues in her second Assignment of Error that it was error for Judge Frost to hear the motion for sanctions, rather than Judge Jackson. We disagree.

{¶33} Judge Jackson was assigned to the divorce case as a visiting judge. On or about January 7, 2014, the Ohio Supreme Court issued its judgment entry declaring Burton's Affidavit for Disqualification was moot because Judge Jackson voluntarily recused himself from the case. The Ohio Supreme Court ordered the underlying case be returned to the Licking County Court of Common Pleas, Domestic Relations Division for assignment to another judge of the court. On January 22, 2014, the Administrative Judge of the Licking County Court of Common Pleas Court assigned Judge Frost to hear the case.

{¶34} "[A] judge's decision to voluntarily recuse himself is a matter of judicial discretion." *State v. Martinez*, 3rd Dist. Seneca Nos. 13-11-32, 13-11-21, 2012-Ohio-3750, ¶ 28 quoting *State ex rel. Gomez v. Nau*, 7th Dist. No. 08 NO 355, 2008-Ohio-5685, ¶ 19, quoting *State ex rel. Brady v. Russo*, 8th Dist. No. 89552, 2007-Ohio-3277, ¶ 22. When a judge voluntarily recuses himself, he cannot re-enter the case to rule on a

pending motion without giving the parties sufficient notice so the parties can file an affidavit of disqualification. *Caldwell v. Buckeye Rural Electric Co-op, Inc.*, 4th Dist. Gallia No. 82 CA 13, 1983 WL 3283 (Oct. 26, 1983). The voluntary recusal of a judge from a case makes all judicial acts by that judge on that case voidable, subject to a timely objection. *Tissue v. Tissue*, 8th Dist. Cuyahoga No. 83708, 2004-Ohio-5968, ¶ 12 citing *Tari v. State*, 117 Ohio St. 481, 494, 159 N.E. 594 (1927).

{¶35} Wife argues Judge Jackson only recused himself from the divorce proceedings, not from hearing the pending motion for sanctions against Burton. Wife did not file the motion for sanctions as a separate action against Burton. Wife filed the motion for sanctions as a motion within the divorce proceedings. Judge Jackson voluntarily recused himself from the divorce proceedings. The Ohio Supreme Court ordered the Licking County Court of Common Pleas, Domestic Relations Division to assign another judge to hear the divorce proceedings. Judge Frost was assigned to hear the case and preside over all aspects of the case, including pending motions.

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

### III.

{¶37} Wife contends in her third Assignment of Error the trial court erred when it sustained Burton's objections to Husband's testimony at the evidentiary hearing based on attorney client privilege. Wife argues the trial court's rulings prevented her from demonstrating Burton's frivolous conduct. We disagree.

{¶38} At the evidentiary hearing, Husband was called to testify as to the events surrounding the filing of the three motions. While on cross-examination, Burton objected to some of Husband's testimony based on the attorney client privilege. The trial court

agreed communications between Husband and Burton would be privileged. (Hearing, p. 69). However, the trial court discussed that for the basis of the motion for sanctions, Wife wanted to determine whether Burton filed the motions without Husband's consent. *Id.* The trial court offered a compromise where Husband would be asked whether he had any problem with the filing of the motions. *Id.* After a recess, Burton stated he would be willing to stipulate that Husband was sent, read, and approved of the motions. (Hearing, p. 70). Wife would not stipulate. *Id.* The trial court asked Husband if he approved of the filed motion to recuse. (Hearing, p. 71). Husband answered in the affirmative. *Id.* The trial court asked whether Husband approved of the motion to continue and motion for mistrial. *Id.* Husband answered in the affirmative. *Id.*

{¶39} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 353, 358 (1987). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142 (1983).

{¶40} Wife does not cite to any legal authority to support her argument that Husband's testimony was not protected by the attorney client privilege. Husband's testimony shows that Husband had knowledge of the three motions and approved Burton to file the motions.

{¶41} Wife's third Assignment of Error is overruled.

**CONCLUSION**

{¶42} Wife's three Assignments of Error are overruled.

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

By: Delaney, J.,

Gwin, P.J. and

Baldwin, J., concur.