[Cite as *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-5573.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93058

STATE OF OHIO, EX REL., BRIAN BARDWELL

RELATOR

vs.

CUYAHOGA COUNTY BOARD OF COMMISSIONERS

RESPONDENT

JUDGMENT: SANCTION ISSUED

SANCTIONS HEARING
ORDER NO. 426798

RELEASE DATE: October 19, 2009

FOR RELATOR

Brian Bardwell, pro se
9854 Pebble Brook Lane
Strongsville, Ohio 44149

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

BY: Charles E. Hannan, Jr.
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PER CURIAM

{¶ 1} On September 22, 2009, this court held a hearing in order to determine whether sanctions should be imposed upon Brian Bardwell, a pro se litigant and the relator in the original action for a writ of mandamus as filed in *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, Cuyahoga App. No. 93058, 2009-Ohio-3273. During the course of the sanctions hearing, Bardwell and Assistant Cuyahoga County Prosecutor Charles E. Hannan, Jr. presented testimony and exhibits. Finding Bardwell filed his complaint for a writ of mandamus in bad faith, we find that sanctions are appropriate pursuant to Civ.R. 11.

Facts

Bardwell's Request for Public Records

{¶ 2} On March 26, 2009, Bardwell appeared at the office of the Cuyahoga County Prosecutor ("Prosecutor") and hand-delivered a written request that provided:

"I would like to inspect the following records:

"- records of communications from the Plain Dealer or its

attorneys regarding the release of Medical Mart contracts or drafts of those contracts

"- drafts of development agreements related to Medical Mart projects

" - your record[s] [sic] retention schedule

"Thank you."

{¶ 3} Bardwell was informed that the requested documents were not immediately available, but would be provided in a timely fashion. Bardwell offered to return on the same day to the Prosecutor's office on the afternoon of March 26, 2009. Upon his return, Bardwell was provided with a copy of the requested records retention schedule. Bardwell was also informed that copies of the requested communications would be available the next morning, March 27, 2009, but that no drafts of any development agreements would be available until the agreement was actually finalized.

{¶ 4} Bardwell returned to the Prosecutor's Office on March 27, 2009, and was provided with all copies of communication records from the Plain Dealer to Cuyahoga County, regarding the release of Medical Mart contracts and drafts. Bardwell was also provided with a written response to his request for records. The written response of March 27, 2009, further provided that the development agreement drafts were exempted records and fell within the attorney-client privilege exception. However, Bardwell was informed that "when an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available."

Complaint for a Writ of Mandamus

{¶ 5} On March 27, 2009, the same day that Bardwell received the requested records and the written response from the Prosecutor, Bardwell filed his complaint for a writ of mandamus. Bardwell's complaint was premised upon the alleged failure to provide all requested records and other alleged violations of R.C. 149.43, et seq., the Ohio Public Records Act. On June 8, 2009, the Prosecutor filed a motion for summary judgment, which was not opposed by Bardwell. On July 2, 2009, this court granted the motion for summary judgment and declined to issue a writ of mandamus on the basis that: (1) Bardwell's complaint for a writ of mandamus failed to comply with Loc.App.R. 45(B)(1)(a), which mandates that a complaint for an extraordinary writ must be supported by a sworn affidavit that specifies the details of the claim; (2) the lapse of just one day, from the making of the request for public records to the filing of the complaint for a writ of mandamus, could not be considered, under any circumstances, a failure to provide the requested records within a reasonable period of time; (3) Bardwell was promptly provided with a copy of the Prosecutor's records retention schedule, thus rendering the request moot; (4) Bardwell was promptly provided with all requested records that were not exempt from disclosure; (5) Bardwell was promptly provided with a written response which provided that the requested development agreement drafts were exempt from disclosure under the attorney-client privilege as contained within R.C. 149.43; (6) all requested drafts were provided to Bardwell by April 9, 2009, within ten business days of Bardwell's initial request for public

records; and (7) Bardwell failed to establish that a casual request for his identity resulted in the "lost use" of any requested records.

Order to Show Cause

{¶ 6} The journal entry and opinion of July 2, 2009, which declined to issue a writ of mandamus, further provided that Bardwell was ordered to show cause as to why sanctions should not be imposed pursuant to Civ.R. 11 and R.C. 2323.51. On July 15, 2009, Bardwell filed his answer to the show cause order. On July 29, 2009, the Prosecutor filed its response to Bardwell's answer to the show cause order. On August 13, 2009, this court issued an order, which provided that a hearing would be held in order to determine whether sanctions would be imposed against Bardwell under Civ.R. 11 and R.C. 2323.51. The show cause order was premised upon the possible finding that Bardwell's complaint for a writ of mandamus was: (1) filed in bad faith; (2) filed simply to harass or injure a public office; (3) not warranted under existing law; (4) caused a needless increase in the cost of litigation; (5) could not be supported by a good faith argument; and (6) contained allegations or other factual contention that had no evidentiary support. On September 3, 2009, this court issued an order that required Bardwell to supplement his answer to the show cause order with a complete list of every original action filed by Bardwell, either pro se or through counsel, in any court located within the state of Ohio. Bardwell supplemented his answer on September 21, 2009. See Exhibit 1 as attached to this judgment.

Show Cause Hearing

{¶ 7} On September 22, 2009, this court conducted a show cause hearing.[1] Bardwell appeared in his pro se capacity, while the Prosecutor was represented by Assistant Cuyahoga County Prosecutor Charles E. Hannan, Jr. and Assistant Cuyahoga Prosecutor Frederick W. Whatley. Oral testimony was received from Bardwell and Assistant Cuyahoga County Prosecutor Charles E. Hannan, Jr. Exhibits were also introduced and received on behalf of the Prosecutor.

Legal Analysis

Introduction

{¶ 8} Initially, it must be emphasized that the show cause hearing was not concerned with the right of Bardwell to seek redress with regard to an unfulfilled request for public records. This court has consistently followed established case law, which provides that Ohio's Public Records Act reflects the policy that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472. R.C. 149.43 must also be liberally construed in favor of broad access to public records, with any doubt resolved in favor of disclosure. Cf. *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1992), 82 Ohio App.3d 202, 611 N.E.2d 838. See, also, *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. Of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174; *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 1996-Ohio-214, 662 N.E.2d 334.

---

[1]The parties were provided with an opportunity to allow for the presence of an official court reporter in order to preserve the record. No party arranged for the presence of an official court reporter at the show cause hearing as held on September 22, 2009.

{¶ 9} The show cause hearing was premised upon two questions: (1) did Bardwell file his complaint for a writ of mandamus in bad faith; and (2) was Bardwell's conduct frivolous, as a result of filing the complaint for a writ of mandamus. Specifically, did Bardwell file his complaint for a writ of mandamus knowing that all requested public records had been promptly provided by the Prosecutor. Also, did Bardwell file his complaint for a writ of mandamus with the intent to harass or maliciously injure any party? Finally, did Bardwell file his complaint for a writ of mandamus for an improper purpose, which was to simply reap the maximum statutory damages of $1000 as provided by R.C. 149.43(C)(1)?

Civ.R.11 and Bad Faith Standard

{¶ 10} Civ.R. 11 provides in pertinent part:

{¶ 11} "The signature of an attorney or *pro se* party constitutes a certificate by the attorney or *party that* the attorney 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*; * * * 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 * * *" (Emphasis added.)

{¶ 12} The imposition of a sanction, pursuant to Civ.R. 11, mandates the application of a subjective bad-faith standard by requiring that any violation must be willful. *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510. The United States Supreme Court has opined that the purpose

of Fed.R.Civ.P. 11, which is similar to Civ.R. 11, is to curb the abuse of the judicial system which results from baseless filings that burden the courts and individuals with needless expense and delay. *Cooter & Gell v. Hartmarx Corp*. (1990), 496 U.S. 384, 110 S.Ct. 2247, 110 L.Ed.2d 359. The United States Supreme Court has also held that the specter of Rule 11 sanctions encourages a civil litigant to "stop, think and investigate more carefully before serving and filing papers." Id. Bad faith forms the basis for the imposition of sanctions under Civ.R. 11. The Supreme Court of Ohio, in *Slater v. Motorists Mutual Insurance Co.* (1962), 174 Ohio St. 148, 187 N.E.2d 45, defined the term bad faith and held that:

{¶ 13} "A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." Id., at paragraph two of the syllabus.

{¶ 14} In the case sub judice, we find that Bardwell willfully violated Civ.R. 11 by filing a complaint for a writ of mandamus in bad faith. Our finding of bad faith is based upon the following: (1) Bardwell failed to comply with Loc.App.R. 45(B)(1)(a), which mandates that an extraordinary writ must be supported by a sworn affidavit that specifies the details of the claim; (2) a period of only one day lapsed between the making of Bardwell's request for public records and the filing of the complaint for a writ of mandamus; (3) Bardwell was promptly provided with a copy of the requested records retention schedule, thus rendering his request

moot; (4) Bardwell was promptly provided with all public records that were not exempt from disclosure, thus rendering his request moot; (5) Bardwell was promptly provided with a detailed explanation, with supporting legal precedent, with regard to the exempted records; (6) Bardwell's request for records was not overly broad, but very specific, which did not necessitate that the Prosecutor provide an opportunity to revise the request; (7) all requested non-exempt records were promptly provided, thus negating any claim that the Prosecutor did not properly organize and maintain its records; (8) Bardwell failed to establish any "lost use" that resulted from a casual request for his identity; (9) Bardwell was provided with copies of all exempted records, within ten business days of the request; (10) Bardwell failed to amend his complaint for a writ of mandamus to take into consideration the records provided by the Prosecutor; and (11) Bardwell failed to file a brief in opposition to the Prosecutor's motion for summary judgment, which contained a properly executed sworn affidavit and other exhibits. Bardwell's filing of a complaint for mandamus, which was groundless in fact and legal argument, can only be the result of a willful action and constitutes bad faith. Thus, we find that Bardwell consciously violated Civ.R. 11 and that sanctions must be imposed. *State ex rel. Nix v. Curran* (Sept. 23, 1998), Cuyahoga App. No. 75261; *State ex rel. Harlamert v. City of Huber Hts*. (Oct. 26, 1994), Montgomery App. No. 1435. See, also, *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105.

R.C. 2323.51 and Frivolous Conduct Standard

{¶ 15} R.C. 2323.51 permits this court to sua sponte award sanctions in a civil action, when a party engages in frivolous conduct. Original actions are civil in nature and thus are subject to R.C. 2323.51. Cf. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, 797 N.E.2d 982.

{¶ 16} Frivolous conduct is defined as behavior that 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." (Emphasis added.) R.C. 2323.51(A)(2)(a)(i). Frivolous conduct is also defined as the filing of a claim that "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." R.C. 2323.51(A)(2)(a)(ii). A court must also hold a hearing in order to determine whether the conduct was frivolous, whether any party was adversely affected by the frivolous conduct, and to determine the amount of any sanction. R.C. 2323.51(B)(2)(a)-(c). *State ex rel. Ohio Dept. Of Health v. Sowald*, 65 Ohio St.3d 338, 1992-Ohio-1, 603 N.E.2d 1017; *State ex rel. Naples v. Vance*, Mahoning App. No. 02-CA-181, 2003-Ohio-4738; *State ex rel. Ward v. The Lion's Den* (Nov. 25, 1992), Ross App. No. 1867.

{¶ 17} Based upon the hearing conducted before this court on September 22, 2009, we cannot find with certainty that the behavior of Bardwell, in prosecuting the complaint for a writ of mandamus, involved frivolous conduct. However, the conduct of Bardwell does appear to be frivolous by the apparent

employment of the Ohio Public Records Act "for another improper purpose." The Supreme Court of Ohio has defined "improper purpose" as conduct that "* * * usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." *Robb v. Chagrin Lagoons Yacht Club, Inc*. (1996), 75 Ohio St.3d 264, 662 N.E.2d 9, quoting *Prosser and Keeton on Torts* (5th ED. 1984), 898, Section 121.

{¶ 18} On September 21, 2009, Bardwell filed a complete list of all original actions, as filed pro se or through counsel, within any court of original jurisdiction located within the state of Ohio. (See Exhibit 1.) Bardwell's list demonstrates that he has filed nineteen original actions against numerous municipalities and local governmental agencies. In fact, Bardwell filed ten original actions, on the same day, within the Ninth Appellate District. Bardwell has also filed five original actions within this court, each against a governmental entity and each action seeking "statutory damages" for alleged violations of the Ohio Public Records Act. Many of these original actions have "settled" or resulted in the payment of substantial "statutory damages" to Bardwell. See *State v. Bardwell v. Parma Police Dept*., Cuyahoga App. No. CA-90762; *State ex rel. Bardwell v. Rocky River Police Dept.*, Cuyahoga App. No. 91022, 2009-Ohio-727; *State ex rel. Bardwell v. North Ridgeville Police Dept*., Ninth App. No. 08-CA-9345; *State ex rel. Bardwell v. Southern Lorain Cty. Ambulance Dist*., Ninth App. No. 08-CA-9340; *State ex rel. Bardwell v. Wellington Community Fire Dist*., Ninth App. No. 08-CA-9343; and *State ex rel. Bardwell v. Wellington Police Dept*., Ninth App. No. 08-CA-9344.

{¶ 19} It must also be noted that the respondents, in *State ex rel. Bardwell v. Rocky River Police Dept*., supra, argued in their motion for summary judgment that:

{¶ 20} "It must be questioned whether Relators are presenting a matter requiring judicial declaration, or whether this is merely a 'gotcha' exercise for monetary gain. (Footnote omitted.) It is therefore submitted that statutory damages cannot be contemplated in the instant matter, as Relators appear to subterfuge the intended purpose the Public Records Act of promoting openness and public review of government activity. The form of this action contains none of the intended purposes of the Act, but only promotes the impractical or unyielding application of the Act."

{¶ 21} As stated previously, we cannot find with certainty that Bardwell, through his numerous actions for mandamus, is attempting to employ the Ohio Public Records Act for his own personal gain. Such a conclusion could be inferred, but at this juncture, we decline to make such a finding. Bardwell, however, is cautioned that the continued filing of original actions, under the guise of the Ohio Public Records Act, shall result in additional show cause hearings with the sole purpose of inquiry as to whether his conduct is frivolous under the "improper purpose" provision of R.C. 2323.51.

Inherent Authority of this Court to Control its Docket

{¶ 22} In *State ex rel. Richard v. Cuyahoga Cty. Bd. of Commrs*. (1995), 100 Ohio App.3d 592, 654 N.E.2d 443, we examined the inherent authority of this court to control its docket and held that the right of access to the courts does not

include the right to abuse the legal process and that we possess the inherent authority to prevent abuses and guarantee that justice is administered to all on an equal basis.

{¶ 23} "Frivolous conduct has no place in our judicial system, and relator's history of activity portrays a repetitious and perverse course of such conduct. * * *

{¶ 24} "Nevertheless, the inherent authority of this court exists to provide some meaningful relief against an onslaught of frivolous filings. The Supreme Court of Ohio, in explaining the difference between the jurisdiction of a court and the inherent authority of a court, stated as follows:

{¶ 25} " 'The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional governments their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. The power to maintain order, to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised.' *Hale v. State* (1896), 55 Ohio St. 210, 213, 45 N.E. 199, 200; see *Slabinski v. Servisteel Holding Co.*, supra, 33 Ohio

App.3d 345, 515 N.E.2d 1021. Thus, as a necessary function of existence, courts retain the power inherently to control their efficient and prudent operation.

{¶ 26} "Several courts in recent years, whether by statute, rule, or through their inherent authority, have levied sanctions or fashioned remedies to preclude the filing of frivolous and repetitious proceedings. (Footnote omitted.) In *Kondrat v. Byron* (1989), 63 Ohio App.3d 495, 579 N.E.2d 287, the court affirmed the issuance of a permanent injunction that enjoined Kondrat from filing future cases pro se absent certain stringent conditions. Over an eleven-year period, Kondrat filed over eighty-five actions in various courts, all of which were unsuccessful. The appellate court stated:

{¶ 27} " 'Further, in *Bd. of Cty. Commrs. v. Barday* (1979), 197 Colo. 519, at 522, 594 P.2d 1057, at 1059, it was stated:

{¶ 28} " ' "We recognize that the Colorado Constitution guarantees to every person the right of access to courts of justice in this state. Colo. Const. Art. II, Sec. 6. However, the right of access to courts does not include the right to impede the normal functioning of judicial processes. Nor does it include the right to abuse judicial processes in order to harass others. Where we find, as here, that a 'pro se' litigant's efforts to obtain relief in our courts not only hamper his own cause, but deprive other persons of precious judicial resources, we must deny his right of self-representation as a plaintiff. We note that only his right of self-representation is being denied, not his right of access to the courts; Mr. Barday is still free to proceed through an attorney of his choice, and he is still free to appear 'pro se' in his own 'defense.' Thus, this injunction works no infringement on respondent's

constitutional rights." ' *Kondrat*, supra, 63 Ohio App.3d at 498, 579 N.E.2d at 288-289.

{¶ 29} " * * *

{¶ 30} "Section 16, Article I of the Ohio Constitution provides that '[a]ll courts shall be open, and every person, for any injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.' This right of access to the courts does not include the right to abuse the judicial processes and we believe it is within the inherent authority of this court to prevent such abuses and guarantee that justice is administered to all equally." *State ex rel. Richard v. Cuyahoga Cty. Bd. of Commrs*., supra at 597.

{¶ 31} Based upon the inherent authority of this court to control its docket and to provide meaningful relief against frivolous filings, Bardwell is forewarned that the continued filing of numerous original actions, based upon alleged violations of the Ohio Public Records Act, may result in the imposition of more drastic remedies. These remedies may include a permanent injunction that prohibits Bardwell from filing future cases pro se absent specific restrictive conditions. Any exercise of the inherent authority of the court to control its docket would not encompass an attempt to prevent Bardwell from accessing the remedies of the Ohio Public Records Act, but to prevent the diminution of the court's precious judicial resources and the limited resources of the various public offices located within our jurisdiction.

Sanctions for Violation of Civ.R. 11

{¶ 32} Having previously found that Bardwell filed his complaint for a writ of mandamus in bad faith, we must determine the type and amount of sanction to be imposed for violation of Civ.R. 11. Based upon the show cause hearing held on September 22, 2009, we find that an award of attorney fees shall adequately compensate the Prosecutor for any damages that resulted from Bardwell's willful violation of Civ.R. 11. During the course of the show cause hearing, testimony and exhibits were provided to the court with regard to: (1) the amount of time expended by the Assistant Cuyahoga County Prosecutor in defending against Bardwell's complaint for a writ of mandamus; (2) the hourly wage earned by the Assistant Cuyahoga County Prosecutor that defended against Bardwell's complaint for a writ of mandamus; and (3) the hourly fringe benefits earned by the Assistant Cuyahoga County Prosecutor that defended against Bardwell's complaint for a writ of mandamus. See Exhibit 2 and Exhibit 3 as attached to this judgment.

{¶ 33} Based upon 20.5 hours of legal services, as expended in defending against the complaint for a writ of mandamus, and the total hourly compensation/benefit rate of $51.24 per hour, we find that Bardwell shall pay, to the Prosecutor, attorney fees in the total amount of $1050.42. The attorney fees shall be paid within fourteen days of the date of this entry. No other costs shall be assessed against any party.

Sanction issued.

KENNETH A. ROCCO, PRESIDING JUDGE

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, JUDGE