[Cite as *Aftercare of Mayfield Village, Inc. v. Berner*, 2017-Ohio-958.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104259 and 104306

ALTERCARE OF MAYFIELD VILLAGE, INC.

PLAINTIFF-APPELLEE/
CROSS-APPELLANT

vs.

SARAH BERNER, ET AL.

DEFENDANTS-APPELLANTS/
CROSS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-825602

BEFORE: McCormack, P.J., Stewart, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 9, 2017

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TIM McCORMACK, P.J.:

{¶1} Defendant-appellant/cross-appellee Sarah Berner and new party defendant-appellant Betty J. Miller, Executor of the estate of Charles Stumpf, Sr., appeal from the judgment of the trial court in favor of plaintiff-appellee/cross-appellant Altercare of Mayfield Village, Inc. ("Altercare"). In its cross-appeal, which has been consolidated herein, Altercare appeals the trial court's denial of its motions for attorney fees. For the reasons that follow, we affirm the judgment regarding Berner's and Miller's claims, as well as the court's denial of attorney fees.

Procedural History

{¶2} On April 21, 2014, Altercare filed a complaint against Sarah Berner for breach of contract and personal guarantee of payment. Altercare's complaint stems from a personal guarantee of payment executed by Berner regarding services rendered to Berner's father, Charles Stumpf, Sr., while he was a resident at Altercare's nursing home facility. Altercare sought damages in the amount of $19,074.

{¶3} Berner filed an answer and counterclaim. Berner denied personal responsibility for payment for services rendered to her father. Additionally, Berner asserted affirmative defenses to Altercare's complaint, including failure of consideration, Altercare's own negligence, breach of Altercare's duty of care under the nursing home residents' bill of rights, deceptive trade practices, and breach of contract. In her counterclaim, Berner alleged that Altercare was negligent in providing medical care to

her father and such negligence resulted in her father's wrongful death. She also claimed deceptive trade practices and breach of contract.

{¶4} Thereafter, Berner filed a motion to join her sister, Betty J. Miller, as Executor of the estate of their father, Mr. Stumpf, which the trial court granted. On August 12, 2014, Berner and Miller, on behalf of the estate, filed an amended answer and asserted amended counterclaims against Altercare. The counterclaims of Berner and the estate, which were all based upon the services rendered to Mr. Stumpf, included medical negligence, wrongful death, deceptive trade practices, breach of nursing home bill of rights, and breach of contract.

{¶5} On February 10, 2016, the matter proceeded to a jury trial. After opening statements, the trial court directed a verdict for Altercare on Berner's counterclaims, finding that Berner did not have standing to bring the claims that belonged to the estate. After Berner rested, Altercare moved for a directed verdict on its claim against Berner for breach of personal guarantee and it agreed to dismiss its claim for breach of contract against Berner. The trial court granted Altercare's motion regarding the personal guarantee. The estate then withdrew its claim of deceptive trade practices against Altercare.

{¶6} Thereafter, Altercare moved for a directed verdict on the estate's claim of breach of contract against Altercare. Finding that claim is actually a medical negligence claim, the trial court granted Altercare's motion with respect to the estate's breach of contract claim. Altercare also moved for a directed verdict on the estate's remaining

claims, including conscious pain and suffering, violation of the nursing home bill of rights, and medical negligence, which the trial court denied.

{¶7} The jury returned a verdict in favor of Altercare with respect to the remaining claims made by the estate. Altercare then filed two motions for attorney fees, both of which the trial court denied.

{¶8} This appeal and cross-appeal now follow. Berner and Miller appeal, assigning the following errors for our review:

> I. The trial court erred as a matter of law by refusing to instruct the jury that a violation of Ohio's Nursing Home Residents' Bill of Rights (R.C. 3721.13) constitutes negligence per se.
>
> II. The trial court erred as a matter of law by precluding defendant-appellant, a surety, from asserting defenses to plaintiff-appellee's complaint available to her principal on the grounds that her principal was deceased and thus erred in directing a verdict for the plaintiff-appellee on its complaint.

In its cross-appeal, Altercare assigns two errors for our review:

> I. The trial court erred in denying [its] motion for attorney fees and expenses related to frivolous claims for medicare billing fraud and lack of standing.
>
> II. The trial court erred in denying [its] motion for attorney fees and expenses related to prosecuting [Altercare's] claim for breach of guarantee, which became necessary only after Sarah Berner's assertion of frivolous defenses and improper responses to requests for admissions.

Jury Instruction

{¶9} In their first assignment of error, Berner and Miller (hereinafter "appellants") contend that Altercare violated Ohio's Nursing Home Residents' Bill of Rights, as outlined in R.C. 3721.13. These rights include: the right to a safe and clean living environment; the right to adequate and appropriate medical treatment and nursing care; the right to participate in decisions that affect the resident's life; the right to be fully informed of the cost of services provided; the right of the resident and the person paying for the care to examine the bill; and the right to have any significant change in the resident's health status reported to the resident's sponsor. R.C. 3721.13(A).

{¶10} Appellants further contend that the purported violations of the foregoing statute constituted negligence per se. Thus, they contend that the trial court erred in failing to instruct the jury on negligence per se.

{¶11} Negligence per se applies where a legislative enactment imposes a specific duty upon an individual for the safety and protection of others and that individual failed to observe his or her duty. *Jaworowski v. Med. Radiation Consultants*, 71 Ohio App.3d 320, 329, 594 N.E.2d 9 (2d Dist.1991). "Where there exists a legislative enactment commanding or prohibiting for the safety of others the doing of a specific act and there is a violation of such enactment solely by one whose duty it is to obey it, such violation constitutes negligence per se." *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 370, 119 N.E.2d 440 (1954), paragraph three of the syllabus. However, "where there exists a legislative enactment expressing for the safety of others, in general or abstract terms, a

rule of conduct, negligence per se has no application and liability must be determined by the application of the test of due care as exercised by a reasonably prudent person under the circumstances of the case." *Id.*

{¶12} Thus, a rule that requires the "intervention of human judgment or decision-making in order to comply with it" does not trigger an application of negligence per se. *Zimmerman v. St. Peter's Catholic Church*, 87 Ohio App.3d 752, 762, 622 N.E.2d 1184 (2d Dist.1993). Moreover, "if the violation has to be proved through expert testimony, it is obvious that human reasoning and judgment are involved in testing the condition against the rule." *Id.*; *Jung v. Davies*, 2d Dist. Montgomery No. 24046, 2011-Ohio-1134, ¶ 35 (finding regulations requiring expert testimony to prove a violation are too general to form the basis of negligence per se).

{¶13} According to appellants, Altercare violated the decedent's rights as outlined above and, therefore, they are entitled to an instruction that Altercare was negligent per se. In support of their argument, the appellants rely on *Slagle v. Parkview Manor, Inc.*, 5th Dist. Stark Nos. CA-6155 and CA-6159, 1983 Ohio App. LEXIS 13143 (Oct. 7, 1983), and *Sprosty v. Pearlview, Inc.*, 106 Ohio App.3d 679, 666 N.E.2d 1180 (8th Dist.1995).

{¶14} In *Slagle*, the Fifth District Court of Appeals, in addressing whether R.C. 3721.17(I) altered the common-law standard for awarding punitive damages, determined that the statute "gives 'any residents whose rights * * * are violated * * * ' a cause of action for which the court award actual and punitive damages for violation of the rights."

Slagle at 9, quoting R.C. 3721.17(I). The court found the plain language of the statute dictated that "the right to punitive damages flows directly and simply from the failure to furnish 'adequate and appropriate care.'" *Id.; see also Sprosty* at 683 (following *Slagle* and finding that R.C. 3721.17(I) "expressly provides that a violation of the rights found in R.C. 3721.10 to 3721.17 forms the basis of punitive damages" and "requires nothing more than a violation of the rights encompassed" within the statute).

{¶15} However, as correctly noted by Altercare, the Fifth District's decision in *Slagle* in 1983 relied upon a prior version of R.C. 3721.17(I), effective April 9, 1979, which provided as follows:

> Any resident whose rights under [R.C. 3721.10 to 3721.17] are violated has a cause of action against any person or home committing the violation. The action may be commenced by the resident or by his sponsor on his behalf. The court may award actual and punitive damages for violation of the rights. The court may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed.

Am. Sub. H.B. No. 600, 137 Ohio Laws, Part II, 3081-3082.

{¶16} On November 7, 2002, the General Assembly amended the statute as follows:

> (I)(1)(a) Any resident whose rights under [R.C. 3721.10 to 3721.17] are violated has a cause of action against any person or home committing the violation.
>
> * * *

> (I)(2)(a) The plaintiff in an action filed under division (I)(1) of this section may obtain injunctive relief against the violation of the resident's rights. The plaintiff also may recover compensatory damages based upon a showing, by a preponderance of the evidence, that the violation of the resident's rights resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury, death, or loss to person or property.

R.C. 3721.17(I)(1)(a) and (2)(a).

{¶17} The amended statute includes changes that are reflected in the current statute. The current statute provides that in order for a plaintiff to recover compensatory damages under R.C. 3721.17, the plaintiff must demonstrate that the violation of the resident's rights "resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury [or] death." Because the statute itself requires negligent conduct — human judgment or decision-making — in order to recover compensatory damages, negligence per se does not apply "and liability must be determined by the application of the test of due care as exercised by a reasonably prudent person under the circumstances of the case." *Eisenhuth*, 161 Ohio St. 367, 370, 119 N.E.2d 440 (1954), at paragraph three of the syllabus; *Zimmerman*, 87 Ohio App.3d 752, 762, 622 N.E.2d 1184 (2d Dist.1993).

{¶18} A trial court is required to instruct a jury with a correct and complete statement of the law. *Sharp v. Norfolk & W. Ry.*, 72 Ohio St.3d 307, 312, 649 N.E.2d

1219 (1995). "A charge to the jury should be a plain, distinct, and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." *Marshall v. Gibson*, 19 Ohio St.3d 10, 12, 482 N.E.2d 583 (1985).

{¶19} Here, the trial court instructed the jury as follows:

> Now you are also instructed that the Ohio Revised Code imposes requirements on nursing homes in Ohio known as the Nursing Home Residents' Bill of Rights. Altercare was required to comply with these requirements at all times relevant to this case.
>
> The estate of Charles Stumpf may recover compensatory damages based upon a showing * * * that the violation of the resident's rights resulted from a negligent act or omission of the person or home, and that the violation was a proximate cause of the resident's injury, death, or loss to person or property.

{¶20} The court's above instruction contains language nearly identical to the language of R.C. 3721.17(I)(2)(a). The court's instruction was therefore a correct statement of the law. Accordingly, the trial court did not err in so instructing the jury.

{¶21} Appellants' first assignment of error is overruled.

Motion for Directed Verdict

{¶22} In the second assignment of error, Berner contends that the trial court erred by directing a verdict in Altercare's favor on Altercare's claim for Berner's breach of guarantee. Specifically, Berner claims that the trial court failed to permit Berner from asserting available defenses, such as meeting of the minds, failure of consideration, and

breach of the Nursing Home Residents' Bill of Rights. According to Berner, the court's directed verdict deprived the jury of hearing the evidence that supports her defenses.

{¶23} In response, Altercare submits that substantial, competent evidence did not exist to support Berner's alleged defenses. In addition, Altercare provides that the jury did, in fact, hear all the evidence on Berner's defense that Altercare breached its contract by providing negligent care and services, and it found Altercare not negligent.

{¶24} Under Civ.R. 50(A)(4), a motion for directed verdict shall be granted when "the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party * * *." Where, however, there is "'substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions,'" directed verdict should be denied. *Integrated Payment Sys. v. A&M 87th Inc.*, 8th Dist. Cuyahoga Nos. 91454 and 91473, 2009-Ohio-2715, ¶ 39, quoting *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679, 693 N.E.2d 271 (1998).

{¶25} In considering whether the trial court properly granted a motion for directed verdict, the trial court considers, as a matter of law, the sufficiency of the evidence to present to the jury. *Siebert v. Lalich*, 8th Dist. Cuyahoga No. 87272, 2006-Ohio-6274, ¶ 14. Thus, the court necessarily "examines the materiality of the evidence, as opposed

to_the conclusions to be drawn from the evidence." *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68-69, 430 N.E.2d 935 (1982).

{¶26} We review a trial court's granting or denial of a motion for directed verdict de novo. *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 14. "A motion for directed verdict * * * does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972), paragraph three of the syllabus.

{¶27} Berner contends that the trial court's directed verdict on Altercare's claim for relief under the personal guarantee denied her the opportunity to defend her actions on the basis of the lack of meeting of the minds, the failure of consideration, and the negligent services allegedly provided by Altercare in violation of the nursing home bill of rights. In support, Berner claims that the evidence shows she was not involved in the arrangements to transfer her father from the hospital to Altercare, she was not presented with the agreement and the guarantee until two weeks after Altercare accepted her father as a resident, and she was led to believe that her father's expenses would be covered by Medicare and his Medicare supplement. She also claims that she was asked to sign the guarantee in a hurried manner, without receiving any time to review or any explanations of the document.

{¶28} Courts construe guarantee agreements in the same manner as they interpret contracts. *G.F. Business Equip. v. Liston*, 7 Ohio App. 3d 223, 224, 454 N.E.2d 1358

(10th Dist.1982). A contract is defined as a promise, or a set of promises, that is actionable upon breach. *Fine Line Communications, Inc. v. I. Schumann & Co.*, 8th Dist. Cuyahoga No. 93512, 2010-Ohio-1438, ¶ 17; *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58. A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. *Kostelnik* at ¶ 16. A meeting of the minds occurs where "'a reasonable person would find that the parties manifested a present intention to be bound to an agreement.'" *Champion Gym & Fitness, Inc. v. Crotty*, 178 Ohio App.3d 739, 2008-Ohio-5642, 900 N.E.2d 231, ¶ 12 (2d Dist.), quoting *Zelina v. Hillyer*, 165 Ohio App.3d 255, 2005-Ohio-5803, 846 N.E.2d 68, ¶ 12 (9th Dist.). Thus, courts will only consider objective manifestations of intent. *Nilavar v. Osborn*, 127 Ohio App.3d 1, 12, 711 N.E.2d 726 (2d Dist.1998). Moreover, the parties must have a "distinct and common intention" that is communicated by each party to the other. *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.*, 87 Ohio App.3d 613, 620, 622 N.E.2d 1093 (8th Dist.1993).

{¶29} A lack of a meeting of the minds can occur where there was a mutual mistake as to a material part of the contract. *Home S. & L. Co. v. Norfolk S. Ry.*, 8th Dist. Cuyahoga No. 96878, 2012-Ohio-1634, ¶ 14; *Robert's Auto Ctr., Inc. v. Helmick*, 9th Dist. Summit No. 21073, 2003-Ohio-640, ¶ 31, fn. 1. In such a case, the presence of a mutual mistake "'calls into question the very existence of the contract.'" *Home S. & L. Co.*, citing *Reitz v. West*, 9th Dist. Summit No. 19865, 2000 Ohio App. LEXIS 3913, 16 (Aug. 30, 2000). Additionally, the existence of fraud or ambiguity may also give rise to

a lack of a meeting of the minds. *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 552 N.E.2d 207 (1990) (finding fraud precludes a meeting of the minds concerning the nature or character of an agreement).

{¶30} Failure of consideration is an affirmative defense under Civ. R. 8(C). "[The] failure of consideration exists when a promise has been made to support a contract, but that promise has not been performed." *Rhodes v. Rhodes Indus., Inc.*, 71 Ohio App.3d 797, 807, 595 N.E.2d 441 (8th Dist.1991). More specifically, the failure of consideration will exist "'whenever one who has either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that performance.'" *Franklin v. Lick*, 8th Dist. Cuyahoga Nos. 37770 and 37963, 1979 Ohio App. LEXIS 9490, 7 (Apr. 19, 1979), quoting Williston, *Contracts* Section 814 (3d Ed.1962). Where a failure of consideration exists, the other party is excused from further performance. *Rhodes*.

{¶31} Here, Berner does not allege fraud or mutual mistake, or that the terms of the guarantee were ambiguous. She also concedes that she was not forced to sign any documents. Rather, she contends that she was presented with the agreement and the guarantee two weeks after Altercare accepted her father as a resident and she was led to believe that her father's expenses would be covered by Medicare and his Medicare supplement. She further claims that she signed the guarantee in a rushed manner, where Altercare's employee quickly pointed to places on the document requiring her signature.

{¶32} We are mindful, however, that every person is obligated to read a contract before signing it, and "'in the absence of fraud or mistake, or some other reason requiring equitable relief, [that individual] will be held to the terms of the contract signed.'" *Brown v. Picciano*, 8th Dist. Cuyahoga No. 48371, 1984 Ohio App. LEXIS 12087, 3 (Dec. 20, 1984), quoting *Hughes v. Cardinal Fed. S. & L. Assn.*, 566 F.Supp. 834, 844, (S.D.Ohio 1983). Where the parties have signed an agreement, it is presumed that their minds have met. *Parklawn Manor, Inc. v. Jennings-Lawrence Co.*, 119 Ohio App. 151, 156, 197 N.E.2d 390 (10th Dist.1962). "'If a person can read and is not prevented from reading what he signs, he alone is responsible for his omission to read what he signs.'" *Haller*, 50 Ohio St.3d 10, 552 N.E.2d 207, at 14, quoting *Dice v. Akron, Canton & Youngstown RR. Co.*, 155 Ohio St. 185, 191, 98 N.E.2d 301 (1951).

{¶33} In this case, the evidence demonstrated that Berner did, in fact, sign the guarantee that stated: (1) the guarantor voluntarily guarantees payment to the facility for all services and supplies that have been provided or will be provided in the future to the resident; (2) the guarantor agrees to be jointly and severally liable for the resident's financial obligations; (3) the guarantor understands that he or she is not required by law or by Altercare to personally guarantee payment, and (4) the guarantor is agreeing to be liable along with and in addition to the resident for all charges incurred by the resident at facility on a voluntary basis.

{¶34} Additionally, the evidence demonstrated that Berner was aware, as guarantor, that she would be responsible for the payment of services rendered to Mr.

Stumpf should Medicare or Medicaid deny payment. The residency agreement, that Berner acknowledged signing, stated: (1) you agree to apply promptly for any applicable Medicare benefits; (2) Altercare makes no guarantee that resident will be covered by Medicare, or if initially covered, will continue to be covered; and (3) you are required to pay Altercare at the private pay rate for all charges incurred by the resident in the event that a resident's application for Medicare coverage is denied or if the resident's eligibility for Medicare coverage expires. Further, Berner admitted at trial that she was informed that Medicare benefits would cease on January 15, 2013; that either she or the family or her father would be required to pay for care after that date; and that she was aware that she had signed a personal guarantee of payment. Finally, there is no evidence of fraud, mutual mistake, or ambiguity in the contract. Consequently, after construing the evidence most strongly in favor of Berner, we conclude that reasonable minds could only conclude that there was a meeting of the minds when Berner executed the personal guarantee such that she was liable to Altercare on the guarantee.

{¶35} Berner also asserts that she was denied the opportunity to present a defense based upon the failure of consideration and Altercare's material breach of the residency agreement. Specifically, Berner alleges that Altercare was negligent and it breached the duty of care under the nursing home residents' bill of rights. Thus, as Berner contends, there was a failure of consideration for the agreement and the agreement was materially breached. However, even if Berner had been denied the opportunity to present such

defenses by the court's directed verdict, we find the error is harmless, because there was a full and fair consideration by the jury of the issues presented by the appellants.

{¶36} Berner alleges that Altercare's negligence, as demonstrated in the implementation of the bowel and bladder plan to prevent falls, the charting and documentation of care, and whether the charted amount of physical therapy was actually provided, resulted in a material breach of its duty to Mr. Stumpf. At trial, the appellants presented the testimony of Danielle Musleve, Altercare's interim director of nursing. Musleve testified concerning physical therapy, charting, the assessment of Mr. Stumpf's risk of falls, and the circumstances surrounding each of Mr. Stumpf's falls. Musleve also testified regarding Altercare's obligations under the nursing home residents' bill of rights. For example, Musleve agreed that Altercare was obligated to report any significant change in a resident's health status. She stated that although the staff did not "check the box," new safety interventions such as reevaluating Mr. Stumpf's bowel and bladder pattern were implemented. Additionally, Berner testified concerning the circumstances surrounding her signing the residency agreement and her understanding of how Altercare would receive payment for services to her father, as well as the circumstances regarding her father's falls.

{¶37} At the close of all the evidence, the issue of Altercare's alleged negligence was submitted to the jury and the jury found Altercare not negligent in rendering care to Mr. Stumpf. As the transcript reveals, the issues Berner claims she was deprived of presenting in defense of her claim of the breach of the guarantee (and the residency

agreement) were the very issues presented by the estate at trial, and the jury found no merit to those claims. And in a trial, judgment is rendered after the evidence is more completely presented and the parties have been cross-examined, as opposed to the limited factual evidence presented at the time a motion for directed verdict is made. Any error by the trial court in granting a directed verdict in Altercare's favor was therefore rendered harmless, as the error, if any, was corrected by the jury's verdict. *See Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 642 N.E.2d 615 (1994); *Thomas v. Nationwide Mut. Ins. Co.*, 177 Ohio App.3d 502, 2008-Ohio-3662, 895 N.E.2d 217 (8th Dist.); *see also Gracetech Inc. v. Perez*, 8th Dist. Cuyahoga No. 96913, 2012-Ohio-700, ¶ 9 (the standards applicable to motions for summary judgment and a directed verdict are the same).

{¶38} Appellants' second assignment of error is overruled.

Attorney Fees

{¶39} In its cross-appeal, Altercare contends, in two cross-assignments of error, that the trial court erred in denying its motions for attorney fees. We address the cross-assignments of error together.

{¶40} Altercare filed two motions for attorney fees. In its first motion, Altercare requested an order for attorney fees against Berner and Miller under Civ.R. 37(C) and R.C. 2323.51 for expenses associated with the appellants' claims of Medicare billing fraud and lack of staffing. Altercare's second motion requested attorney fees for its expenses relating to its claim of a breach of the guarantee. Altercare contends that the

appellants' claims and their defenses to Altercare's claim were frivolous. In its order denying Altercare's first motion, the trial court determined that Altercare never propounded requests for admissions to Miller and it failed to present competent and credible evidence of the appellants' frivolous conduct. In denying the second motion, the trial court found that Berner's denial of requests for admission were made in good faith and with sufficient basis and Altercare failed to present competent and credible evidence of frivolous conduct associated with Berner's asserted defenses.

{¶41} Both Civ.R. 37(C) and R.C. 2323.51 allow an award of attorney fees as a form of sanctions. *Desai v. Franklin*, 177 Ohio App.3d 679, 2008-Ohio-3957, 895 N.E.2d 875, ¶ 51 (9th Dist.); *Mills v. Westlake*, 8th Dist. Cuyahoga No. 103643, 2016-Ohio-5836, ¶ 49.

{¶42} Civ.R. 37(C) provides:

> If a party, after being served with a request for admission under Rule 36, fails to admit * * * the truth of any matter as requested, and if the party requesting the admissions thereafter proves * * * the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making the proof, including reasonable attorney's fees. Unless the request has been held objectionable under Rule 36(A) or the court finds that there was good reason for the failure to admit or that the admission sought was of no substantial importance, the order shall be made.

{¶43} Thus, where a party has denied a request for admission, but the proof at trial contradicts the denial, the court must award sanctions unless (1) the request was held objectionable; (2) there was good reason for the denial; or (3) the issue was not of substantial importance. *Tanio v. Ultimate Wash*, 8th Dist. Cuyahoga No. 98826, 2013-Ohio-939, ¶ 26, citing *Salem Med. Arts & Dev. Corp. v. Columbiana Cty. Bd. of Revision*, 82 Ohio St.3d 193, 195-196, 694 N.E.2d 1324 (1998). The responding party bears the burden of proving that a good reason existed for failing to admit to the matter requested. *Itskin v. Restaurant Food Supply Co.*, 7 Ohio App.3d 127, 130, 454 N.E.2d 583, 587 (10th Dist.1982). The determination of whether a good reason for failing to admit exists is within the discretion of the trial court. *Id.*

{¶44} Additionally, this court noted:

> "When the responding party justifiably believes that the matter requested to be admitted is a disputable issue, the responding party's only option is to deny the matter on that basis. Even if the requesting party is then able to prove the matter requested to be admitted, the responding party should not be charged for the cost of proving that issue under Civ.R. 37(C) since his denial based on a belief that the matter was disputable was a good reason for not admitting the matter."

Davis v. D&T Limousine Serv., 8th Dist. Cuyahoga Nos. 65683, 66027, 1994 Ohio App. LEXIS 2615, 12-13 (June 16, 1994), quoting *Youssef v. Jones* , 77 Ohio App.3d 500, 509, 602 N.E.2d 1176 (6th Dist.1991).

{¶45} In accordance with R.C. 2323.51, a party adversely affected by frivolous conduct in a civil action may file a motion for an award of attorney fees. R.C. 2323.51(A)(2)(a) defines "frivolous conduct," as any of the following:

> (I) It obviously serves merely to harass or maliciously injure another party to the civil action * * * 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.

{¶46} What constitutes frivolous conduct is a factual determination where the moving party alleges, for example, that a party engaged in conduct to harass or maliciously injure the moving party; however, where the moving party alleges, for example, that the claim is not warranted under existing law, it is a legal determination. *Orbit Elecs., Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91, ¶ 47 (8th Dist.).

{¶47} In determining whether the claim itself is frivolous, the test is whether no reasonable lawyer would have brought the action in light of the existing law. *The James Lumber Co. v. Nottrodt*, 8th Dist. Cuyahoga No. 97288, 2012-Ohio-1746, ¶ 25, citing *Orbit* at ¶ 49. Conduct is not frivolous "merely because a claim is not well-grounded in fact or lacks evidentiary support." *Cleveland v. Abrams*, 8th Dist. Cuyahoga No. 97814, 2012-Ohio-3957, ¶ 19. Additionally, the fact that a legal claim (or defense) was

unsuccessful does not, in and of itself, warrant sanctions. *Halliwell v. Bruner*, 8th Dist. Cuyahoga Nos. 76933 and 77487, 2000 Ohio App. LEXIS 5896, 24 (Dec. 14, 2000); *Miller v. Miller*, 5th Dist. Holmes No. 11CA020, 2012-Ohio-2905, ¶ 18 ("R.C. 2323.51 does not purport to punish a party for raising an unsuccessful claim").

{¶48} The decision to impose sanctions under Civ.R. 37 is within the discretion of the trial court. *In re I.A.G.*, 8th Dist. Cuyahoga No. 103656, 2016-Ohio-3326, ¶ 38. We will therefore not reverse the trial court's decision absent an abuse of discretion. *Id.* So, too, the ultimate decision whether to impose sanctions under R.C. 2323.51, including an award of reasonable attorney fees, rests in the sound discretion of the trial court. *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶ 10, citing R.C. 2323.51(B)(1). We will therefore not reverse the trial court's decision denying sanctions under R.C. 2323.51 absent an abuse of discretion. *Id.* The trial court is in the best position to appraise the conduct of the parties, and we must defer to the trial court's ruling on a motion for sanctions. *First Place Bank v. Stamper*, 8th Dist. Cuyahoga No. 80259, 2002-Ohio-3109, ¶ 17. An abuse of discretion occurs when a trial court's decision is unreasonable, arbitrary, or unconscionable and is more than an error in law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶49} Ordinarily, a trial court is not required to hold a hearing before denying a motion for sanctions "'when the court determines, upon consideration of the motion and in its discretion, that [the motion] lacks merit.'" *Lakeview Holding (OH), L.L.C. v.*

Haddad, 8th Dist. Cuyahoga No. 98744, 2013-Ohio-1796, ¶ 14, quoting *Pisani v. Pisani*, 101 Ohio App.3d 83, 88, 654 N.E.2d 1355 (8th Dist.1995); *CM Newspapers, Inc. v. Dawson*, 10th Dist. Franklin No. 91AP-1067, 1992 Ohio App. LEXIS 344, 7 (Jan. 28, 1992) ("the specific language of R.C. 2323.51 does not require the trial court to conduct a hearing before denying a motion for sanctions thereunder"). "[W]here the court has sufficient knowledge of the circumstances for the denial of the requested relief and the hearing would be perfunctory, meaningless, or redundant," a hearing is unnecessary. *Pisani*. Courts, however, have found that a trial court abuses its discretion when it arbitrarily denies a motion for sanctions. *Bikkani v. Lee*, 8th Dist. Cuyahoga No. 89312, 2008-Ohio-3130, ¶ 31. This court has held that an arbitrary denial occurs when "the record clearly evidences frivolous conduct" and "the trial court nonetheless denies a motion for attorney fees without holding a hearing." *Id.*

{¶50} We note, initially, that the record in this case reflects that the trial court had sufficient knowledge of the circumstances in this case, the matter was fully briefed by the parties, and the court thoroughly considered the issues presented prior to denying Altercare's motions. Furthermore, the trial court found the record lacked competent and credible evidence of frivolous conduct. Accordingly, a hearing was not required on Altercare's motions for attorney fees.

{¶51} Secondly, the trial court found that Altercare never propounded a request for admission upon Miller, as executor of the estate. Therefore, sanctions pursuant to Civ.R. 37(C) were properly denied as the motion relates to Miller.

{¶52} Altercare contends that Berner and Miller asserted frivolous claims for billing fraud and lack of staffing. Specifically, Altercare argues that the appellants' claims were not supported by any factual evidence, as evidenced by the trial court's granting of Altercare's motion in limine regarding these claims. Altercare also contends that Berner asserted frivolous defenses to Altercare's claim of breach of guarantee and she submitted improper responses to Altercare's request for admission. Altercare claims that Berner presented no evidence to support her defenses of lack of meeting of the minds, Altercare's deceptive trade practices, and Altercare's breach of contract.

{¶53} The appellants argue that their claims and defenses were asserted in good faith and were supported by legal and factual bases at the time they were presented at trial. Toward that end, they argue that throughout the proceedings, Altercare placed issues concerning the personal guarantee and its nonperformance under the terms of the underlying residency agreement in dispute. According to appellants, these issues included whether Altercare provided all of the services it claimed to have provided and whether Altercare violated Ohio's Nursing Home Residents' Bill of Rights. Appellants also point out that their claims were supported by an affidavit of merit required under Civ.R. 10(D) and expert testimony at trial. Additionally, they assert that when it became apparent that their deceptive trade practices claim lacked evidentiary support, they voluntarily withdrew it.

{¶54} We are mindful of the chilling effect applying the sanction remedy can have upon zealous advocacy. *Carr v. Riddle*, 136 Ohio App.3d 700, 706, 737 N.E.2d 976

(8th Dist.2000). As the trial judge presided over this matter throughout the extensive litigation, we defer to the trial judge for the determination that attorney fees are not warranted in this case.

{¶55} Given that appellants' claims were supported by expert testimony, and given the trial court's conclusion that there was no competent or credible evidence establishing that the appellants' claims were frivolous, we cannot conclude that the trial court's decision was unreasonable, arbitrary, or unconscionable. Thus, the trial court did not abuse its discretion in denying Altercare's request for sanctions.

{¶56} Altercare's cross-assignments of error in its cross-appeal are overruled.

{¶57} Judgment affirmed.

It is ordered that each party pay their respective costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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TIM McCORMACK, PRESIDING JUDGE

MELODY J. STEWART, J., and
ANITA LASTER MAYS, J., CONCUR