Supreme Court of Ohio Clerk of Court - Filed June 12, 2015 - Case No. 2015-0873

IN THE SUPREME COURT OF OHIO

Lindsay Walsh	)	Case No.: 2015-0873
	)	
Appellee,	)	On Appeal from the Hamilton County
	)	Court of Appeals,
vs.	)	First Appellate District
	)	
Abubakar Atiq Durrani, M.D., et al.	)	Court of Appeals
	)	Case No. C 1500143
Appellants.	)	

JOINT MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS ON BEHALF OF APPELLANTS ABUBAKAR ATIQ DURRANI, M.D., CINCINNATI CHILDREN'S HOSPITAL MEDICAL CENTER, AND CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.

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MEMORANDUM IN OPPOSITION

Now come Appellants, Abubakar Atiq Durrani, M.D., Cincinnati Children's Hospital Medical Center, and Center for Advanced Spine Technologies, Inc. (hereinafter "Appellants"), by and through counsel, and respectfully submit the following Memorandum in Opposition to Appellee's Motion to Dismiss for Lack of Subject Matter Jurisdiction and request that this Honorable Court issue an order denying Appellee's Motion to Dismiss.[1]

The First District Court of Appeals Order dismissing the appeal filed on behalf of Appellants is a final, appealable order that this Honorable Court has jurisdiction to review. Further, Appellants submit that this case is one of great importance such that this Court has jurisdiction to determine whether the grant of a motion to consolidate is a final, appealable order. Accordingly, this Court may exercise jurisdiction over the First District Court of Appeals Order filed on April 15, 2015. As this Court has subject matter jurisdiction over this appeal, sanctions are not appropriate under either S.Ct.Prac.R. 4.03 or other applicable Ohio law.

1. A Motion to Dismiss is not the proper procedural mechanism to challenge this Honorable Court's jurisdiction to review the First District's dismissal of the appeal from the Consolidation Order.

The proper procedure to argue that this Honorable Court does not have jurisdiction to review the First District's determination is a memorandum in response to Appellants' Memorandum in Support of Jurisdiction. S.Ct.Prac.R. 7.03. This Honorable Court has appellate jurisdiction to review and affirm, modify, or reverse the judgment of the court of appeals in cases of public or great general interest. *See* Ohio Constitution, Article IV, Section 2(B)(2)(e). Pursuant to S.Ct.Prac.R. 7.03(B), a memorandum in response "shall contain both of the following: (1) [a] statement of appellee's position as to * * * whether the case is of public or

[1] In that Appellee's Motion to Dismiss argues that this Court lacks jurisdiction to hear the appeal, Appellants request that this Honorable Court treat this Motion as Appellee's Memorandum in Opposition to Jurisdiction.

great general interest; (2) [a] brief and concise argument in support of the appellee's position regarding each proposition of law raised in the memorandum in support of jurisdiction."

In the instant case, Appellee's Motion to Dismiss Appellants' appeal for lack of subject matter jurisdiction is inappropriate and fails to meet the procedural requirements of S.Ct.Prac.R. 7.03. Appellee appears to argue that because the trial court's order is not a final, appealable order, this Court does not have jurisdiction to hear the instant appeal. However, Appellants are seeking review of the Court of Appeals order dismissing the appeal submitted by Appellants which is a final, appealable order that can be reviewed by this Court. *See* Ohio Constitution, Article IV, Section 2(B)(2)(e).[2] Whether the trial court order is a final, appealable order has no bearing on this Court's jurisdiction to review the Order of the First District Court of Appeals.

Therefore, this Court may review the First District's Order dismissing the appeal should it find that this case is one of public or great general interest. *Id.*

2. The Consolidation Order denied Appellants' procedural due process rights by failing to comply with the Civil and Local Rules governing consolidation.

In the Motion to Dismiss, Appellee incorrectly asserts that Article IV, Section 3(B)(2) of the Ohio Constitution does not apply as noted above. This provision will ultimately decide whether the First District Court of Appeals should review the Consolidation Order (hereinafter "Consolidation Order") as a final, appealable order. Appellee further argues that (1) the Order does not "truly impact the substantial rights of the parties"; and (2) "[t]here is no fundamental constitutional due process right not to have cases consolidated." Each of these arguments is also legally and factually deficient.

[2] Interestingly, Appellee cites to this provision of the Ohio Constitution yet argues that this Court lacks jurisdiction because the trial court order is not a final, appealable order under R.C. 2505.02.

Appellants respectfully disagree with Appellee's self-serving conclusion that the Consolidation Order does not truly impact the substantial rights of the parties. As previously indicated in Appellants' Memorandum in Support of Jurisdiction, the Consolidation Order impacts the substantial rights of the parties because Judge Ruehlman entered the Order without complying with the Ohio Rules of Civil Procedure and the Hamilton County Local Rules governing consolidation. Specifically, Judge Ruehlman's Order deprived Appellants of a reasonable opportunity to defend against the disposition of the cases by denying Appellants the mandatory consolidation hearing in front of the trial court judge with the lowest numbered active case. Accordingly, Appellants' rights have been substantially impacted by being both (1) deprived of the reasonable opportunity to defend against the consolidation and (2) forced to litigate the consolidated cases in front of Appellee's handpicked judge.

Moreover, Appellee's argument that "[t]here is no fundamental constitutional due process right not to have cases consolidated" misconstrues Appellants' argument. Appellants assert that Judge Ruehlman's failure to adhere to the Civil and Local Rules violated Appellants' procedural due process rights when the cases were consolidated in the absence of the mandatory oral hearing with the judge with the lowest numbered case as requested by both parties and consolidation with that judge as required by Loc.R. 7(G). <u>Simply put, there is a violation of a fundamental constitutional due process right to have cases litigated according to Ohio Rules of Civil Procedure and Local Rules of Court when failure to comply with the applicable Rules results in the denial of a reasonable opportunity to defend the case in favor of the other party</u>. See *Parra v. Continental Tire*, 9th Dist. Summit No. 26315, 2012-Ohio-4138, at ¶7.

Additionally, Appellee's statement that Appellants failed to exhaust their remedies at the trial court level by not allowing the trial court to address the Motion to Vacate is disingenuous.

Appellants were required to file the Notice of Appeal within thirty (30) days of the entry, pursuant to App.R. 4(A)(1) or waive their appeal to the First District. The motion practice regarding the Motion to Vacate concluded on February 9, 2015. No entry was filed, nor was any hearing held, before Appellants were required to file the Notice of Appeal on or before March 2, 2015.[3]

Further, as noted above, Appellants' procedural due process rights were violated by the effectuation of the Consolidation Order, **and not with respect to the Motion to Vacate**. Therefore, Appellee's statement that Appellants' procedural due process rights were violated through their own actions is unfounded and contradicted by the procedural facts of this case. Finally, although Appellee states that Appellants had further remedies available at the trial court, Appellee fails to provide any examples or otherwise state the remedies which Appellants should have pursued to illustrate their argument.

Notwithstanding Judge Ruehlman's willingness to consolidate and preside over all of the cases involving Dr. Durrani, his Consolidation Order was not in conformity with the Civil and Local Rules. A judge's willingness to preside over the cases has no bearing on whether consolidation in front of that judge is procedurally proper unless all of the judges involved agree. *See* Loc.R. 7(G).[4] Furthermore, although counsel for Appellee seeks to have all of the cases to be transferred to Judge Ruehlman, Appellants prefer consolidation to be done in accordance with the applicable Civil and Local Rules.

Appellee's assert that the cases consolidated in Butler County under Judge Guckenberger are far more judicially efficient that the Hamilton County cases. While Judge Guckenberger has

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[3] Although the parties were attempting to schedule a hearing regarding the Motion to Vacate, Appellants were required to file the Notice of Appeal under App.R. 4(A)(1) by March 2, 2015.

[4] There is no evidence that all of the judges presiding over the consolidated cases agreed to consolidation with Judge Ruehlman.

done an outstanding job in handling the huge volume of cases, under the Butler County Case Management Order cases are scheduled for trial through May of 2025; no Hamilton County cases had been scheduled beyond the early part of 2017 due to the cases being spread across the Hamilton County Common Pleas bench. In response to Appellee's assertion that the individual filing of the appeals undermines Appellants' position that deciding the issue now would be more cost-effective, the threat of having to adjudicate the consolidated cases and then repeat the process if the Order is reversed could potentially result in an even greater burden on the taxpayers and the trial courts' dockets.[5] Accordingly, there has been no evidence that the Order permits for a more judicially effective management of the cases involving Dr. Durrani.

For each of the reasons asserted above, Appellants request that this Honorable Court issue an Order denying Appellee's Motion to Dismiss and accept jurisdiction of this appeal.

2. Sanctions are not proper under Ohio law because the appeals of the Consolidation Order were not filed to harass Appellee, cause unnecessary delay, or needlessly increase the cost of litigation and the basis of the instant appeal is supported by a good faith argument for modification or reversal of existing law.

Sanctions are not appropriate in this case as the appeal is not frivolous nor is it sought to delay the proceedings or harass Appellee. A motion for sanctions under R.C. 2323.51 requires a court to determine (1) whether challenged conduct constitutes frivolous conduct, as defined by statute, and if so, (2) whether any party has been adversely affected by the frivolous conduct. *Riston v. Butler*, 149 Ohio App.3d 390, 396, 2002-Ohio-2308, 777 N.E.2d 857, at ¶17. "Frivolous conduct" is defined by R.C. 2323.51(A)(2)(a), in relevant part, as conduct by a party which satisfies 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

[5] Appellants were required to appeal in each of the cases individually as the Order was entered in each case and Appellants did not want to take procedural shortcuts in requesting review of this important issue.

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.

The appeal in this case does not satisfy the criteria set forth in either R.C. 2323.51(A)(2)(a)(i) or (ii). As stated above, Appellants oppose the consolidation in the Hamilton County cases because the manner in which the consolidation occurred infringed upon Appellants' procedural due process rights. Appellee's assertion that this appeal is frivolous, for the purpose to delay the proceedings and to harass Appellee is merely opinion and not grounded in any actual facts. Without more, Appellee's opinion in this regard is insufficient for supporting an award for sanctions.

Moreover, Appellants' appeal is supported by a good faith argument for a modification or reversal of existing law. As stated in the Memorandum in Support of Jurisdiction, the only Ohio case providing that the grant of a consolidation order is not a final, appealable order is *Columbus Metro. Comm. Action Org. v. Enyart*, 10th Dist. Franklin No. 94APE12-1802, 1995 WL 422648 (July 13, 1995). [6] However, *Enyart* was decided prior to the 122nd General Assembly amended R.C. 2505.02 to become more inclusive in 1998. Further, the facts surrounding the consolidation

[6] Appellee's citation to and apparent reliance on the Ohio Supreme Court's dismissal of the *Enyart* appeal is somewhat misleading. *See* Mot. to Dismiss at 5. The referenced appeal in *Enyart* was dismissed by the Ohio Supreme Court for want of prosecution when the appellant filed a late brief; not because the Supreme Court agreed that the order granting consolidation was not a final appealable order, or that it lacked jurisdiction over the discretionary appeal. *Columbus Metro. Community Action Org. v. Enyart*, 74 Ohio St. 3d 1528 (Ohio 1996). Further, the trial court in *Enyart* later vacated its consolidation order, as reflected in *Enyart v. Columbus Metro. Area Community Action Org.*, 115 Ohio App. 3d 118, 122 (Ohio Ct. App., Franklin County 1996).

in the instant case require immediate appellate scrutiny that was not present in *Enyart*. Accordingly, Appellants' appeal is supported by a good faith argument for a modification of *Enyart* or alternatively, a reversal of *Enyart* to allow for a grant of a consolidation order to be a final, appealable order. Thus, Appellants have set forth a legitimate argument regarding whether the grant of the Consolidation Order is a final, appealable order and sanctions against Appellants are not warranted pursuant to R.C. 2323.51.

Similarly, sanctions under Civ.R. 11 are not appropriate in the instant case. Civ.R. 11 provides, in pertinent part:

> The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or 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; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. 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.

This Court has held that "Civ.R. 11 employs a subjective bad-faith standard to invoke sanctions by requiring that any violation must be willful." *State ex. rel. Bardwell v. Cuyahoga Cty Bd. of Commrs*., 127 Ohio St.3d 202,203, 2010-Ohio-5073, 937 N.E.2d 1274, at ¶8 quoting *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, at ¶19.

As stated above, the instant appeal was not filed for the purpose of causing needless delay, nor is this appeal baseless. Appellee has failed to direct this Court to specific evidence which demonstrates that Appellants have appealed the Order to willfully delay this litigation. Appellants have a legitimate basis in law and fact to appeal both the Order and the First District's dismissal. Mere inconvenience to Appellee is not a sufficient basis to award sanctions

under Civ.R. 11 as the standard established by this Court requires a willful violation. See *State ex. rel. Bardwell, supra.*

Finally, the Ohio Supreme Court regularly must decide whether a court of appeals has correctly dismissed an appeal for lack of finality/jurisdiction, as the court of appeals did here. When it does that, the Supreme Court does not sanction the appellant for bringing that question before the Court, as the movant asks the Court to do here. Several recent cases bear this out.

In *Supportive Solutions, LLC v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, for example, the Eighth District decided that the trial court's decision denying a defendant leave to assert the defense of political subdivision immunity via an amended answer was not a final, appealable order. ECOT appealed from that decision by the Eighth District so that the Supreme Court could decide if the Eighth District's interpretation of the applicable final appealable order statute (in that case, R.C. 2744.02(C)) was correct. It was certainly not a sanctionable offense for ECOT to bring forward that appeal. In fact, the Ohio Supreme Court ultimately agreed with ECOT, deciding that the order at issue was final and appealable, contrary to what the Eighth District had decided. *Id*. If the Supreme Court lacked jurisdiction to decide the merits of that appeal, or had to sanction ECOT or parties like it merely for *bringing* that appeal, then the Supreme Court would never have the chance to interpret the finality statutes in a manner that would be consistently binding in all appellate districts.

Also recently, in *Riscatti v. Prime Properties Ltd. Partnership*, 137 Ohio St.3d 123, 2013-Ohio-4530, the Eighth District decided that it lacked jurisdiction to hear the county's appeal from a trial court's decision denying the county's MSJ, which had asserted a statute-of-limitations defense. Again, as in *Supportive Solutions*, the Eighth District decided that the order

was not a final appealable order. While the Supreme Court in *Riscatti* agreed with the Eighth District that the order was not a final appealable order, the county did not commit a sanctionable offense by presenting the issue on appeal to the Supreme Court.

Accordingly, Appellants request that this Court issue an Order denying Appellee's request for sanctions.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Honorable Court deny Appellee's Motion to Dismiss for Lack of Subject Matter Jurisdiction and ultimately find that the Court has jurisdiction to hear the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing was served by electronic mail on this 12th day of June, 2015 upon the following:

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