

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

KEVIN JONES,	:	
Plaintiff-Appellant,	:	CASE NO. CA2012-02-009
- vs -	:	<u>OPINION</u>
	:	9/24/2012
TRACY NICHOLS,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11CV79551

Kevin Jones, 5808 Running Fox Lane, Mason, Ohio 45040, plaintiff-appellant, pro se

Batsche & Batsche Attorneys at Law, D. Andrew Batsche, 300 West Main Street, P.O. Box 75, Mason, Ohio 45040, for defendant-appellee

YOUNG, J.

{¶ 1} Appellant, Kevin Jones, appeals a decision of the Warren County Court of Common Pleas dismissing his malicious prosecution claim and granting sanctions against him. For the reasons stated below, we affirm the decision of the trial court.

{¶ 2} In 2009, appellant and appellee, Tracy Nichols, divorced and were granted shared parenting for their two children. Approximately one year later, appellee filed a civil protection order ("CPO") on behalf of the children against appellant in the Domestic Relations

Division of the Warren County Court of Common Pleas. Appellee alleged that appellant recently punched one of the children in the face and has abused the other child in the past. The trial court issued an ex parte or a temporary CPO and scheduled the matter for a hearing regarding a permanent CPO. On April 21, 2010, appellee filed a motion to terminate shared parenting. One day later, appellee voluntarily dismissed the CPO case. Subsequently, the trial court granted appellee's motion to terminate shared parenting and appellee was deemed the residential parent and legal custodian of the two children.

{¶ 3} On April 12, 2011, appellant filed a *pro se* complaint in the General Division of the Warren County Court of Common Pleas. Appellant did not list the cause of action he was pursuing in the complaint but alleged that appellee frivolously filed for the CPO against him and that this has caused appellant financial and emotional damages. The complaint went on to state that the CPO case and charges were denied by the city of Mason and Warren County Children's Services and that appellee dismissed the CPO action. Appellant requested that the court award damages in excess of \$100,000 and "make-up" parenting time. Appellee filed a motion to dismiss the complaint and a motion for sanctions. On September 1, 2011, the trial court granted appellee's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The trial court then scheduled a hearing regarding the imposition of Civ.R. 11 and R.C. 2323.51 sanctions against appellant.

{¶ 4} At the sanctions hearing, appellant testified that he filed the complaint to recover the monetary damages he suffered and to recover "make-up" parenting as a result of the "frivolous" filing of the CPO. Appellant testified that he did not seek counsel in filing the action and does not remember what particular law he researched prior to filing his complaint. Appellant explained that he instituted this action due to appellee's filing for a CPO, even though she dismissed the case before the children received a permanent CPO. He also stated that since the dismissal of the CPO case, appellee has been deemed the residential

parent and legal custodian of the children. After the hearing, the trial court imposed sanctions upon appellant reasoning that he sought a remedy in which the General Division of the Warren County Court of Common Pleas was not authorized to give and that he filed the action primarily to harass appellee.

{¶ 5} Appellant now appeals, raising two assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE COURT ERRED BY GRANTING * * * [APPELLEE'S] MOTION TO DISMISS.¹

{¶ 8} In appellant's first assignment of error, he argues that the trial court erred in dismissing his malicious civil prosecution claim.

{¶ 9} "A motion to dismiss for failure to state a claim upon which relief can be granted * * * tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). A motion made pursuant to Civ.R. 12(B)(6) only determines whether the pleader's allegations set forth an actionable claim. *Ward v. Graue*, 12th Dist. No. CA2011-04-032, 2012-Ohio-760, ¶ 9. "A court may not use the motion to summarily review the merits of the cause of action." *Home Builders Assn. of Dayton & Miami Valley v. Lebanon*, 12th Dist. No. CA2003-12-115, 2004-Ohio-4526, ¶ 8.

{¶ 10} "In order for a complaint to be dismissed under Civ.R. 12(B)(6) * * * it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief ." *Cincinnati v. Berretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 5. "In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable

1. We note that appellant's first and second assignments of error indicate that appellant filed the motion to dismiss and motion for sanctions. We will assume appellant meant appellee, as she is the party that filed the motions.

inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). The court may look only to the complaint to determine whether the allegations are legally sufficient to state a claim. *Home Builders* at ¶ 8. A complaint that fails to allege factual allegations taken together with all reasonable inferences that support an element of a cause of action fails to state a claim upon which relief can be granted. *Springer v. Fitton Ctr. for Creative Arts*, 12th Dist. No. CA2004-06-128, 2005-Ohio-3624, ¶ 66. A trial court does not err in dismissing a malicious prosecution action where the complaint did not allege one of the essential elements of the claim. *Vagas v. City of Hudson*, 9th Dist. No. 24713, 2009-Ohio-6794, ¶ 11.

{¶ 11} A trial court's order granting a motion to dismiss pursuant to Civ.R. 12(B)(6) is subject to de novo review on appeal. *Home Builders* at ¶ 8. An appellate court must independently review the complaint to determine whether dismissal was appropriate. *Id.*

{¶ 12} To prevail on a claim for malicious prosecution of a civil action, a plaintiff must prove the following: (1) the defendant maliciously instituted the prior proceedings against the plaintiff, (2) the lack of probable cause for filing the prior lawsuit, (3) the prior proceedings terminated in the plaintiff's favor, and (4) the plaintiff's person or property was seized during the course of the prior proceedings. *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264 (1996), syllabus. Voluntary dismissal of a complaint is not a termination of the proceedings in plaintiff's favor for purposes of a malicious prosecution claim. *Miller v. Unger*, 192 Ohio App.3d 707, 2011-Ohio-990 (12th Dist.), ¶ 16.

{¶ 13} We find that the trial court did not err in dismissing appellant's cause of action. In granting appellee's motion to dismiss, the court reasoned that the complaint failed to raise a claim upon which relief could be granted because it did not mention whether appellant's person or property was seized. As noted above, one of the elements of malicious prosecution of a civil action is a seizure. The complaint failed to mention any allegations

taken together with all reasonable inferences regarding whether appellant's person or property was seized during the course of the proceedings. Although we must accept as true the allegations contained in the complaint, the complaint must mention some facts regarding the seizure element.

{¶ 14} Moreover, the trial court did not err in dismissing the action as the complaint also did not satisfy the "prior proceedings" element. One of the elements of a malicious prosecution claim is that the prior proceedings were terminated in the plaintiff's favor. As stated above, a voluntary dismissal of an action does not constitute proceedings that are terminated in the plaintiff's favor for malicious prosecution. In this case, after receiving an ex parte protection order, appellee voluntarily dismissed the CPO case against appellant. Appellee never received a permanent CPO because she dismissed the case before it went forward. Appellant's complaint recited this fact. Therefore, the trial court did not err in granting appellee's motion to dismiss because the prior proceeding was not terminated in appellant's favor. Appellant's first assignment of error is overruled.

{¶ 15} Assignment of Error No. 2:

{¶ 16} THE COURT ERRED BY GRANTING * * * [APPELLEE'S] MOTION FOR SANCTIONS.

{¶ 17} In appellant's second assignment of error, he argues that the court erred when it granted appellee's motion for sanctions pursuant to Civ.R. 11 and R.C. 2323.51.

{¶ 18} Civ.R. 11 requires that any attorney or *pro se* party who has signed a pleading, motion, or other document certifies that the party has (1) read the document; (2) to the best of his or her knowledge, harbored good grounds to support the document; and (3) did not file the document for purposes of delay. *Long v. Rhein*, 12th Dist. Nos. CA2002-02-007 and CA2002-02-008, 2003-Ohio-711, ¶ 15. If any of the aforementioned requirements is "willfully" violated, the trial court may impose an "appropriate sanction." *Id.* The sanction

may include an award to the opposing party of its expenses and reasonable attorney fees.

Id. Civ.R. 11 employs a subjective bad faith standard, so it is the party's actual intent or belief that determines whether or not his conduct was willful. *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 127 Ohio St.3d 202, 2010-Ohio-5073, ¶ 8.

{¶ 19} R.C. 2323.51(B)(1) provides that a trial court may award court costs, reasonable attorney fees, and other reasonable expenses to any party in an action who has been adversely affected by "frivolous conduct." Conduct is frivolous if it satisfies any of the following:

(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 costs 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.

Id. at (A)(2)(a)(i)-(iv).

{¶ 20} Willfulness is not required under R.C. 2323.51, so the determination to be made is (1) whether the conduct is frivolous, and (2) the amount, if any, of court costs, reasonable attorney fees, and other reasonable expenses that should be awarded. *Smallwood v. State*, 12th Dist. No. CA2011-02-021, 2011-Ohio-3910, ¶ 20.

{¶ 21} On review, the trial court's determination of the existence of frivolous conduct in violation of R.C. 2323.51 is entitled to substantial deference. *Smallwood* at ¶ 20. "However,

legal questions, such as whether a party's 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 de novo review." *Slye v. London Police Dept.*, 12th Dist. No. CA2009-12-027, 2010-Ohio-2824, ¶ 25.

{¶ 22} In either case, appellate review of a trial court's decision to impose sanctions pursuant to Civ.R. 11 and R.C. 2323.51, and upon whom to impose such sanction, is an abuse of discretion standard. *Rhein*, 12th Dist. Nos. CA2002-02-007, CA2002-02-008, 2003-Ohio-711 at ¶ 20; *Smallwood* at ¶ 20. 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 (1983).

{¶ 23} We note that *pro se* litigants are held to the same standard as litigants who are represented by counsel. *State ex rel. Leon v. Cuyahoga Cty. Court of Common Pleas*, 123 Ohio St.3d 124, 2009-Ohio-4688, ¶ 1. Moreover, it is well established that courts of common pleas "may exercise only such jurisdiction as is expressly granted to them by the legislature." *Seventh Urban, Inc. v. Univ. Circle Property Dev.*, 67 Ohio St.2d 19, 22 (1981). The court of common pleas has jurisdiction "in all civil cases in which the sum or matter in disputes exceeds the exclusive original jurisdiction of county courts and appellate jurisdiction from the decisions of boards of commissioners." R.C. 2305.01. However, when a case concerns the custody of a child born issue of a marriage, the judges of the domestic relations division will have jurisdiction in these matters. R.C. 3105.011 and 2301.03(R).

{¶ 24} We find that the trial court did not err in granting sanctions against appellant. In imposing sanctions upon appellant, the trial court reasoned that sanctions were warranted because appellant requested relief that the general division could not grant and that appellant filed the action primarily to punish appellee. The evidence established that appellant requested relief, "make-up" parenting time with his children, over which the court of common

pleas, general division, does not have jurisdiction and no authority to grant. We agree with the trial court in that "[a]ny basic understanding of the legal system makes clear that the General Division has no authority to grant such relief." Moreover, we find that the evidence established that appellant was using the action to harass appellee as he was angry with the outcome of the domestic relations cases. We find that the trial court did not abuse its discretion in awarding reasonable attorney fees of \$1,920. Appellant's second assignment of error is overruled.

{¶ 25} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.