

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

MAURIE NUNN :
 :
 Plaintiff-Appellee, :
 : No. 113718
 v. :
 :
 DONNELL MITCHELL, ET AL., :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 19, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-892125

Appearances:

Samuel R. Smith II, *for appellee.*

Donnell Mitchell, *pro se.*

KATHLEEN ANN KEOUGH, A.J.:

{¶ 1} Defendant-appellant, Donnell Mitchell (“Mitchell”), appeals the trial court’s denial of his Civ.R. 60(B) motion for relief from judgment. For the following reasons, we affirm.

Factual and Procedural History

{¶ 2} On January 26, 2018, plaintiff-appellee Maurie Nunn (“Nunn”) filed a complaint in the Cuyahoga County Court of Common Pleas against Mitchell; The Personal Injury Network, LLC; My Spaceship, LLC; MMT Fund, LLC; and King of Hip Hop, LLC (collectively, “Defendants”) for intentional interference with business activity, defamation, false light, use of personal image without compensation, and deceptive trade practices. Specifically, Nunn alleged that Defendants caused damage to his reputation, as well as to his bail bond enforcement, photography, videography, real estate, and marketing businesses. Nunn alleged that Mitchell used the defendant entities to post a series of negative, harmful, and defamatory comments on Facebook and other social media platforms about Nunn personally and Nunn’s businesses, which resulted in damage to his reputation and the loss of future earnings. Nunn further alleged that Defendants used his personal image without compensation.

{¶ 3} Nunn’s complaint in the underlying action ultimately sought damages in excess of \$25,000 and requested a jury trial.

{¶ 4} On June 26, 2018, Defendants filed a motion for leave to file an answer and counterclaim. The trial court granted this motion. On July 10, 2018, Defendants filed an answer and counterclaim.

{¶ 5} The parties engaged in discovery and motion practice, and ultimately, the court held a jury trial on August 22, 2022. Pursuant to a journal entry issued the

same day, the court dismissed, under Civ.R. 12(F), the two claims for breach of contract raised in Defendants' counterclaim.

{¶ 6} On August 24, 2022, the court granted Nunn's directed verdict motion as to Defendants' deceptive business practices counterclaim. The court also dismissed MMT Fund, My Spaceship, and King of Hip Hop as defendants.

{¶ 7} On August 30, 2022, the court issued the following journal entry:

Friday 8/26/22: Closing arguments had. Jury instructed and jury deliberates. Jury returns verdict as follows: \$240,000 for plaintiff and against defendant Mitchell and Personal Injury Network LLC on Count 1; \$340,000 for plaintiff and against defendant Mitchell on Count 2; \$100,000 for plaintiff and against defendant Mitchell on Count 3; and \$240,000 for plaintiff and against defendant Mitchell and Personal Injury Network LLC on Count 4. Verdicts in favor of Personal Injury Network LLC and against plaintiff were returned upon Count 2 and Count 3. The parties agree that the \$340,000 verdict against defendant Donnell Mitchell on Count 2 represented \$240,000 plus \$100,000 with the former amount duplicating the verdict on Counts 1 and 4 and with the latter amount duplicating the verdict on Count 3. The parties agreed to the following reduction of the verdicts to judgment; Judgment is hereby entered upon which execution may issue in the amount of \$240,000 in favor of plaintiff Maurie Nunn and against defendants Donnell Mitchell and Personal Injury Network LLC jointly and severally on Counts 1, 2, and 4 and an additional separate judgment is entered upon which execution may issue in the amount of \$100,000 in favor of plaintiff Maurie Nunn and against defendant Donnell Mitchell on Count 3. Costs to defendant Mitchell and Personal Injury Network LLC. Remaining defendants dismissed during trial. This is a final judgment under R.C. 2505.02.

{¶ 8} On September 15, 2022, defendants Mitchell and Personal Injury Network LLC filed a notice of appeal.

{¶ 9} On May 15, 2023, Mitchell filed a Civ.R. 60(B) motion to vacate.

{¶ 10} On July 20, 2023, this court affirmed the trial court’s judgment. *Nunn v. Mitchell*, 2023-Ohio-2484 (8th Dist.). Mitchell appealed to the Ohio Supreme Court, and on January 24, 2024, the Ohio Supreme Court declined jurisdiction.

{¶ 11} Between the Ohio Supreme Court’s decision to decline jurisdiction in the initial appeal and the notice of appeal in the instant case, the following journal entries appear in the docket:

February 16, 2024. The motion filed February 12, 2024 is hereby stricken from the record. The case is closed. There are no pending matters. The clerk is ordered to strike the February 12, 2024, filing from the docket. Notice issued.

February 16, 2024. Docket has been stricken by order of the court.

February 20, 2024. Deposit amount paid Donnell Mitchell.

March 6, 2024. The motion for relief from judgment, filed February 20, 2024, is stricken from the record. The case is closed. There are no pending matters. The clerk is ordered to strike the February 20, 2024 motion from the docket. Notice issued.

March 6, 2024. Docket has been stricken by order of the court.

{¶ 12} On March 9, 2024, Mitchell filed a notice of appeal. He raises four assignments of error for our review:

I. The trial court abused its discretion when it denied appellant’s Civ.R. 60(B) motion to vacate the judgment in this matter because the Appellee committed perjury.

II. The trial court abused its discretion when it did not rule on Appellant’s motion to vacate judgment filed May 15, 2023.

III. The trial court abused its discretion when it [struck] from the record Appellant’s February 20, 2024 Civ.R. 60(B)(5) motion without scheduling a hearing on the merits.

IV. The trial court abused its discretion when the trial [struck] from the record Appellant's February 12, 2024 motion requesting an order for the Appellant to own the "AI" (artificial intelligence) videos used at trial to generate revenue to pay judgment.

Legal Analysis

{¶ 13} For ease of discussion, we will address Mitchell's assignments of error out of order.

{¶ 14} In his first assignment of error, Mitchell argues that the trial court abused its discretion when it denied his Civ.R. 60(B) motion. As an initial matter, we note that the record does not reflect that the trial court denied a Civ.R. 60(B) motion filed by Mitchell. Further, App.R. 12(A)(2) provides that this court "may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based." While Mitchell does not specify which Civ.R. 60(B) motion this assignment of error refers to, we presume that his argument pertains to his February 2024 motion that the trial court struck from the record.

{¶ 15} In reviewing an appellant's claims of error, an appellate court is limited to the facts and evidence set forth in the record of appeal and cannot consider facts outside that record. *In re Q.S.*, 2023-Ohio-712, ¶ 105 (8th Dist.), citing App.R. 9; App.R. 12(A)(1)(b); *In re K.K.*, 2021-Ohio-3338, ¶ 16, fn. 3 (4th Dist.) ("It is simply not permissible on direct appeal to consider matters outside of the record."); *Morgan v. Eads*, 2004-Ohio-6110, ¶ 13 ("[A] bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings."); *Herron*

v. Herron, 2021-Ohio-2223, ¶ 19 (9th Dist.) (“Matters outside the record cannot be used to demonstrate error.”), quoting *In re J.C.*, 2010-Ohio-637, ¶ 15 (9th Dist.). Accordingly, this court’s review is limited to the record before us. With respect to Mitchell’s February 20, 2024 Civ.R. 60(B) motion, our review of the record reflects that the trial court struck this motion from the record. Because the record does not contain the Civ.R. 60(B) motion to vacate, the denial of which Mitchell attempts to challenge in this appeal, we are unable to consider Mitchell’s first assignment of error.

{¶ 16} In Mitchell’s third assignment of error, he argues that the trial court abused its discretion when it struck his Civ.R. 60(B) motion from the record without scheduling a hearing on the merits. Civ.R. 12(F), governing motions to strike, provides that “upon the court’s own initiative at any time, the court may order stricken from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter.” The determination of a motion to strike is within the court’s broad discretion, and a court’s ruling on a motion to strike will not be reversed on appeal absent an abuse of discretion. *State ex rel. Ebbing v. Ricketts*, 2012-Ohio-4699, ¶ 13, citing *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 2011-Ohio-6009, ¶ 23; *State ex rel. Mora v. Wilkinson*, 2005-Ohio-1509, ¶ 10. An abuse of discretion occurs when a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35.

{¶ 17} We reiterate that, because the motion was struck from the record, we are unable to consider any arguments related to the substantive merits of the motion. Therefore, we cannot conclude that the trial court abused its discretion in denying Mitchell's motion without an evidentiary hearing. Mitchell's third assignment of error is overruled.

{¶ 18} In Mitchell's second assignment of error, he argues that the trial court abused its discretion when it did not rule on his May 15, 2023 Civ.R. 60(B) motion to vacate.

{¶ 19} With respect to Mitchell's May 15, 2023 Civ.R. 60(B) motion, this motion was filed while the trial court was divested of jurisdiction following Mitchell's 2022 notice of appeal to this court. A trial court loses the ability to rule upon a Civ.R. 60(B) motion because the granting of such relief would conflict with the appellate court's jurisdiction to fully review the final order. *Nemeth v. Nemeth*, 2008-Ohio-4673, ¶ 3 (11th Dist.). Therefore, the trial court did not have jurisdiction to rule on Mitchell's Civ.R. 60(B) motion while his first appeal was pending. *Id.* Accordingly, the trial court did not abuse its discretion by not ruling on this motion. Mitchell's second assignment of error is overruled.

{¶ 20} In Mitchell's fourth assignment of error, he argues that the trial court abused its discretion when it struck his February 12, 2024 motion from the record. According to Mitchell, this was a motion requesting an order for Mitchell to "own" the artificial intelligence videos used at trial to generate revenue to pay the judgment. Mitchell does not provide any support for his assertion that the trial

court's decision to strike his February 12, 2024 motion constituted an abuse of discretion. His fourth assignment of error is overruled.

{¶ 21} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., and
MICHAEL JOHN RYAN, J., CONCUR