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Court of Appeals

FILING OTHER THAN MOTION Electronically Filed:
May 13, 2016 14:14

By: ELIZABETH BONHAM 0093733

Confirmation Nbr. 751540

CHRISTINA CRUZ, ET AL.

CA 15 103714

vs.

Judge:

ENGLISH NANNY & GOVERNESS SCHOOL INC., ET AL.

Pages Filed: 20

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

CHRISTINA CRUZ, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	**Case No. CA-15-103714**
ENGLISH NANNY AND GOVERNESS SCHOOL, INC., et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Civil Liberties Union of Ohio Foundation ("ACLU"), is the Ohio affiliate of the national American Civil Liberties Union, one of the oldest and largest organizations in the country dedicated to the preservation of the Bill of Rights and the defense of the freedoms set forth therein. With some 500,000 members in all 50 states, and nearly 30,000 members and supporters in Ohio, the ACLU appears routinely in state and federal courts, both as amicus and as direct counsel, without bias or political partisanship, to protect the freedoms of speech and press. This case involves the interpretation of an Ohio statute in a manner that could restrict the ability of lawyers to communicate with the press about non-confidential information in pending cases—and at the same time restrict the public's ability to receive information about court proceedings. The resolution of this case, therefore, is a matter of substantial interest to the ACLU and to its members and supporters.

STATEMENT OF THE ISSUES PRESENTED

The issues presented for review relate to the trial court's imposition of sanctions on counsel for Plaintiffs-Appellants for "frivolous conduct" under an Ohio statute penalizing attorney conduct that "obviously serves merely to harass or maliciously injure another party to a civil action … or is for another improper purpose." The conduct consisted of providing the press with non-confidential information about a pending trial. This brief addresses the free-speech implications of the trial court's interpretation of the statute in a manner that could restrict the ability of lawyers to communicate with the press about non-confidential information in pending cases and also restrict the public's ability to receive information about court proceedings.

BACKGROUND

Peter Pattakos, an attorney at the Chandra Law Firm in Cleveland, represented Plaintiffs-Appellants, two former employees of a nanny training school, in a wrongful termination lawsuit against the school. The school had terminated the employees after they reported child abuse committed by a client of the school. During the representation, Mr. Pattakos communicated with the editor of *Scene Magazine* about his clients' claims and provided the magazine with public court records related to the lawsuit, including the complaint, the briefs opposing a summary judgment motion, and the affidavits supporting the motion. None of the records was confidential or under seal, and neither the parties nor their counsel was bound by a gag order. Mr. Pattakos encouraged *Scene's* editor to report on the case when it was set for trial.

Ultimately, the magazine published a news story that mostly reflected the former employees' version of events, and upon learning of the story, the trial court questioned the jurors individually about it. Two said they had seen the story but had read only the headline and nothing more. They said they would not be influenced by it as jurors. Soon thereafter, the court declared a mistrial for unrelated reasons, and a new jury was selected and the trial proceeded, with verdicts for the former employees and awards of both compensatory and punitive damages. Defendants-Appellees then moved, under R.C. 2323.51, for sanctions against Mr. Pattakos, citing his "involvement in the publication of an inflammatory article related to this case."

R.C. 2323.51 covers "the taking of any … action in connection with a civil action" and states:

> ... any party affected by frivolous conduct may file a motion for award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with a civil action … The court may assess and make an award to any party to the civil action … who was adversely affected by the frivolous conduct.

Under R.C. 2323.51(A)(1)(a), "Frivolous conduct" is defined to include "[that which] obviously serves merely to harass or maliciously injure another party to a civil action … or is for another improper purpose, including, but not limited to, causing unnecessary delay or a heedless increase in the cost of litigation."

The trial court found that Mr. Pattakos's "involvement in publication of the *Scene* article was a malicious attempt to injure and was intended to harass each of the defendants." The court said Mr. Pattakos "had a purpose to defame defendants" when he encouraged the editor to report on the case and notified him that the case was set for trial. Acknowledging that Mr. Pattakos "did not write the article," the court said nonetheless that "he knew … the thrust of any reporting was likely to be to discredit the defendants and that, if believed by members of the public, the reporting would injure them." Therefore, the court held, "[u]rging *Scene* to begin coverage constituted initiating harassment."

The court went on to say that R.C. 2323.51 required it to consider whether Pattakos's actions were taken "merely" to harass or maliciously injure. Noting that a "lawsuit may have multiple purposes," the court said that "the purpose of litigation is the orderly and fair resolution of disputes"—and that the word "merely" required the court to evaluate whether the actions at issue "advance[d] the interests of a fair and orderly trial or resolution of the dispute." Mr. Pattakos argued that he had a "valid public purpose" in encouraging the editor to write about the case—to generate coverage underscoring the

need to report child abuse—but the court did not agree.

Specifically, the court said it did not "doubt that the *Scene* article served that purpose and that Mr. Pattakos had that purpose," but it concluded that "public education about reporting child abuse was a quite secondary purpose of Mr. Pattakos and that news coverage of the trial was not necessary to producing a fair and orderly resolution of the court case." For those reasons, the court found that Mr. Pattakos's "sole purpose" in encouraging *Scene* to cover the case "was to harass or maliciously injury [sic] the defendants outside of the litigation process" and that "soliciting news … coverage once trial began served no purpose of achieving an orderly or fair adjudicative process or settlement."

Moreover, the court found that Mr. Pattakos, as an officer of the court, "had a primary obligation … to avoid taking actions which raised a substantial risk of prejudicing a jury or requiring the [c]ourt to take special actions to prevent prejudice because of matters occurring outside of the court room." The court said that encouraging *Scene* to report on the case "raised [such] a substantial likelihood." The court also noted that counsel for Defendants-Appellees brought the story to its attention and that "Mr. Pattakos … did not … give the [c]ourt advance notice that he had engaged in conversations with *Scene* that might produce an article which could prejudice the jury." For those reasons, the court ruled that Mr. Pattakos's actions constituted "frivolous conduct" under R.C. 2323.51.

It is worth mentioning that the court dismissed the relevance of Rule 3.6 of the Code of Professional Conduct, which governs the making of extrajudicial statements by lawyers participating in litigation. The Rule expressly permits lawyers to share or state

any information "contained in a public record" or related to "the scheduling or result of any step in litigation." Mr. Pattakos argued that all of the information he provided to *Scene* appeared in a public record or involved scheduling. The court said that this "may be correct," and "passe[d] no judgment on whether Mr. Pattakos … violated Rule 3.6." Nevertheless, the court held that it was possible on the same facts to be protected by Rule 3.6 and to be in violation of R.C. 2323.51.

ARGUMENT

Against that background, the purpose of this amicus brief is to address the free-speech implications of the trial court's interpretation of R.C. 2323.51 in a manner that could restrict the ability of lawyers to communicate with the press about non-confidential information in pending cases—as well as restrict the public's ability to receive information about court proceedings. The brief begins by discussing, as a general matter, the value of extrajudicial attorney speech to the functioning of the legal system. Then, the brief analyzes R.C. 2323.51 and urges this court to make clear that imposition of the statute's sanctions must be limited to cases in which the trial court has made an explicit finding of attorney conduct that "obviously serves merely to harass or maliciously injure" the opposing party. R.C. 2323.51(A)(1)(a).

A. Extrajudicial attorney speech has value to the legal system.

It must be pointed out, as a preliminary matter, that it is common for an attorney to advocate regarding an ongoing case in the court of public opinion. *See* James F. Haggerty, *In the Court of Public Opinion: Winning Your Case with Public Relations,* xxiii (2003) (nearly 50 percent of top-200 U.S. corporate law departments regularly engage in public relations in connection with litigation, and another 22.9 percent do so

"often" or "always"). Courts have recognized such advocacy to be a necessary and valuable component of a lawyer's representation of a client—even to the point of specifically compensating for such activity in the calculation of fee awards. *See In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 327 (S.D.N.Y. 2003) (observing that "many courts have compensated lawyers, in making fee awards…, for public relations efforts in recognition of the importance of such work in the clients' interests"). Today's lawyers are emphatically expected—by the press, the public, and their clients—to communicate with the news media. *See* Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 860 (1998) ("As the media … increasingly follow high profile cases, there is ever greater pressure on lawyers to talk with the press"); Beth A. Wilkinson and Steven H. Schulman, *When Talk is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203 (2002) ("Some clients view media relations as an essential element of … zealous" representation).

Traditionally, attorneys have been seen as members of a self-regulating profession that restricts their speech in certain ways—e.g., via rules of professional conduct—with attorneys accepting such restrictions as conditions of their bar admissions. *See* Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 30-31 (2011). However, that does not mean attorneys relinquish their First Amendment rights upon entering the profession. The U.S. Supreme Court has ruled that attorneys *do* have free-speech rights, even in pending cases. *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1054, 111 S. Ct. 2720, 2734, 115 L. Ed. 2d 888 (1991).

With the emergence of new communication technologies and the modern mass-

media environment, not to mention the public's appetite for legal conflicts and its democratic interest in the proper functioning of the courts, it is increasingly unrealistic to expect that legal advocacy would be confined entirely to the courtroom. *See* Meghan Levine, *The Competing Roles of an Attorney in a High-Profile Case: Trying a Case Inside and Outside of the Courtroom*, 28 GEO. J. LEGAL ETHICS 683, 690 (2015); Mark Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOY. L.A. L. REV. 1167, 1171 (2006) (discussing how the advent of outlets like Court TV and competition among cable television stations has resulted in saturation coverage of all manner of legal issues).

Moreover, to the extent that attorneys make accurate, pertinent, and responsible public comments regarding their pending cases, those comments can help to ensure the perception and reality of fair legal proceedings. *See* Lonnie T. Brown, Jr., *"May It Please the Camera, ... I mean Court" – An Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83, 126 (2004). Those comments can also compensate for any errors or shortcomings in news coverage of the proceedings.

Attorneys' extrajudicial speech thus plays a key role in the proper functioning of the legal system. *See* Margaret Tarkington, *Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*, 66 FLA. L. REV. 1873, 1888 (2014). This idea is grounded not only in First Amendment theories and democratic philosophy but also in the reality that in the U.S. system the press is the main link between the courts and the public, and attorneys are the main link between the courts and the press. *See* Eliot E. Slotnick and Jennifer Segal, *Television News and the Supreme Court: All the News That's Fit to Air* 1 (1998). It is critical for the public to be able to receive information

about trials and other legal proceedings, because their attention to them—and understanding of them—has been said "to enhance the integrity and quality of what takes place." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578, 100 S. Ct. 2814, 2828, 65 L. Ed. 2d 973 (1980).

Historically, in England and the United States, attending court proceedings was a common way of "passing the time." *See* J. Wigmore, *Evidence* Section 1834, at 6 (J. Chadbourn rev.1976). Today, court attendance is no longer widespread, and the news media supply "the representations or reality of the … drama once available only in the courtroom." *Richmond Newspapers, supra,* at 572. Media reports can "afford[] citizens a form of legal education and hopefully promote[] confidence in the fair administration" of legal claims. *Richmond Newspapers, supra,* at 572, quoting *State v. Schmit*, 273 Minn. 78, 87-88 (1966). In other words, instead of receiving information about court proceedings through "firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the … media," validating "the media claim of functioning as surrogates for the public." *Richmond Newspapers, supra,* at 573. Thus, media reports and their sources, including attorneys, can "contribute to public understanding of the rule of law and to comprehension of the functioning of the entire" legal system. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587, 96 S. Ct. 2791, 2816, 49 L. Ed. 2d 683 (1976) (Brennan, J., concurring).

These principles stem from the Bill of Rights, enacted "against the backdrop of the long history of trials being … open" and the general idea that public inclusion in legal proceedings was "an important aspect of the process itself." *Richmond Newspapers, supra,* at 575. The First Amendment protects the right to attend trials in order to give

meaning to the freedoms of speech and press. Accordingly, the First Amendment goes "beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S. Ct. 1407, 1419, 55 L. Ed. 2d 707 (1978). Free speech, then, carries with it the "freedom to listen." *Richmond Newspapers, supra,* at 576. And, thus, free speech carries with it the right to "receive information and ideas." *Kleindienst v. Mandel,* 408 U.S. 753, 762, 92 S. Ct. 2576, 2581, 33 L. Ed. 2d 683 (1972).

Here, that means the constitutional guarantees of speech and press contemplate the importance of the public's meaningful inclusion in court proceedings and the right to receive information about those proceedings, generally with the effect of enhancing the integrity and quality of the adjudication process—all in a modern media environment in which journalists and their sources, including attorneys, typically supply the information as surrogates of the public. These are important principles and realities because the "First Amendment does not speak equivocally … [and] must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (Footnote omitted.) *Bridges v. State of Cal.*, 314 U.S. 252, 263, 62 S. Ct. 190, 194, 86 L. Ed. 192 (1941). In such a society, it is important, generally, for lawyers to communicate with the news media about non-confidential information in their cases and for the public to receive information about legal proceedings.

While some restrictions on attorney speech are necessary to preserve the adjudication process and the system in which attorneys work, generally attorneys enjoy the First Amendment right to speak truthfully and extrajudicially about their pending

cases as long as their speech does not create a substantial likelihood of materially prejudicing an adjudicative proceeding in which they are involved.

B. Sanctions against an attorney under R.C. 2323.51 are limited to cases in which the trial court has made an explicit finding of attorney conduct that "obviously serves merely to harass or maliciously injure" the opposing party.

As discussed above, Defendants-Appellees moved under R.C. 2323.51 for sanctions against Mr. Pattakos, because of his "involvement in the publication of an inflammatory article related to this case." R.C. 2323.51 covers "the taking of any … action in connection with a civil action" and states:

> ... any party affected by frivolous conduct may file a motion for award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with a civil action … The court may assess and make an award to any party to the civil action … who was adversely affected by the frivolous conduct.

Under R.C. 2323.51(A)(1)(a), "Frivolous conduct" is defined, as applied in this case, to include "[that which] obviously serves merely to harass or maliciously injure another party to a civil action." After a hearing, the trial court found that Mr. Pattakos's "involvement in publication of the *Scene* article was a malicious attempt to injure and was intended to harass each of the defendants." The statute contains no language related to an attorney's communication with the press, and we are not aware of any other case in which a court has imposed sanctions under the statute for communicating with the press. Instead, the statute has been invoked to sanction attorneys and parties solely for their dilatory or frivolous litigation practices. The "frivolous conduct" referenced in the statute has been construed to include the following types of litigation practices:

1. Filing claims that are unwarranted or precluded by law. *See, e.g., Newman v.*

Weinman, 2012-Ohio-3464, 985 N.E.2d 161 (8th Dist.) (plaintiff's claims precluded by law, and "cursory review, prior to the filing of the complaint, would have uncovered the current state of case law").

2. Pursuing claims lacking evidentiary support. *See, e.g., Norris v. Philander Chase Co.*, Knox 5th Dist. No. 10-CA-04, 2010-Ohio-5297 (at the time of filing complaint, plaintiff lacked evidence to prove claim's elements).

3. Failing to dismiss claims after learning they lacked merit. *See, e.g., Sigmon v. Sw. Gen. Health Ctr.,* Cuyahoga 8th Dist. No. 88276, 2007-Ohio-2117 (baseless punitive damages claim appeared in re-filed complaint).

4. Perpetuating an action to cause delay and expense for the opposing party. *See, e.g., Drywall v. Axe*, Union 3rd Dist. No. 14-09-31, 2010-Ohio-986 (counsel "engaged in a strategy of deliberate delay" by failing to respond to correspondence to set depositions and conduct discovery).

5. Repeatedly attempting to remove judges from a case due to dissatisfaction with their decisions. *See, e.g., First Fed. Bank of Ohio v. Angelini*, Crawford 3rd Dist. No. 3-11-16, 2012-Ohio-2136 (appellant "engaged in a tactic of seeking the removal of every judge in this case").

6. Failing to dismiss a defendant after learning the defendant was not implicated in the case. *See, e.g., Barbato v. Mercy Med. Ctr.*, Stark 5th Dist. No. 2005 CA 00044, 2005-Ohio-5219 (attorney refused to dismiss doctor-defendant after learning that doctor was not responsible for patient-plaintiff's complications).

7. Repeatedly relitigating issues after raising them unsuccessfully. *See, e.g., State ex rel. Striker v. Cline,* 130 Ohio St.3d 214, 2011-Ohio-5350, 957 N.E.2d 19 (plaintiff

filed writ of mandamus to compel release of records, and in course of dispute plaintiff "filed no less than eight motions raising the same issue" after raising it unsuccessfully).

As shown, the statute has been invoked to sanction attorneys and parties for their litigation practices and never for communicating extrajudicially with the press about non-confidential information in a pending case. In this case, the trial court found that when Mr. Pattakos shared public records with the media and communicated with the media—actions that did not violate any ethical or court rules—he had acted frivolously and had maliciously harmed his opponent. In so holding, the trial court opined that Mr. Pattakos should have waited until the trial had ended to communicate with the media, even though the court had not issued a gag order, and that Mr. Pattakos should have taken steps to ensure that his communication with the media did not influence the jury.

Although a court has discretion to impose sanctions for frivolous conduct, the trial court's novel use of R.C. 2323.51 creates a troubling new precedent. If the holding below is upheld, we urge this court at least to articulate the proper standard for imposing the type of sanction issued by the trial court. Specifically, we urge that no such sanction should be imposed unless a trial court makes an explicit finding of intentional harassment or malicious injury of the opposing party—and that absent such a finding, R.C. 2323.51 should not apply. If the statute were to be applied more broadly, it would interfere with attorneys' communication about legal proceedings that, by definition, are matters of public concern and generally protected by the First Amendment.

Under R.C. 2323.51(A)(1)(a), "Frivolous conduct" is defined, as applied in this case, to include conduct that "obviously serves merely to harass or maliciously injure another party to a civil action." Employing dictionary definitions, for conduct to serve

"obviously" and "merely to harass or maliciously injure" means that the conduct has no aim other than subjecting a person to unwanted and persistent troubling behavior or injury, for such injury to be motivated by an intention and desire to cause harm, and for all of the above to be easy to recognize. (*See, e.g., Merriam-Webster,* which defines the word "obviously" as "in a way that is easy to see, understand, or recognize"; the word "merely" as "being nothing more than"; the word "harassment" as the act of subjecting a person "persistently and wrongfully to … troubling behavior"; and the word "malicious" as "having or showing a desire to cause harm to another person.")

Here, the trial court did find that Mr. Pattakos's "sole purpose" in encouraging *Scene* to cover the case "was to harass or maliciously injury [sic] the defendants outside of the litigation process" and that "soliciting news … coverage once trial began served no purpose of achieving an orderly or fair adjudicative process or settlement." If this highly unusual holding should be affirmed, we implore this court to state clearly that such sanctions under R.C. 2323.51 are limited to cases in which the trial court has made an explicit finding of conduct that "obviously serves merely to harass or maliciously injure" the opposing party.

CONCLUSION

With the emergence of new communication technologies and the modern mass media, along with the public's appetite for legal conflicts, it is increasingly unrealistic for court proceedings to be confined entirely to the courtroom. Advocating in the court of public opinion is not only common but also critical to the public's receipt of information about trials and other legal proceedings, all to the end of "enhanc[ing] the integrity and quality of what takes place" in the proceedings. Some restrictions on attorney speech are

necessary to preserve the adjudication process, but generally attorneys enjoy the right to speak truthfully and extrajudicially about their pending cases as long as their speech does not create a substantial likelihood of materially prejudicing an adjudicative proceeding in which they are involved.

In this case, the trial court's novel use of R.C. 2323.51 creates a troubling new precedent that could restrict the ability of lawyers to communicate with the press about non-confidential information in pending cases—and at the same time restrict the public's ability to receive information about court proceedings. We urge this court to articulate clearly the proper standard for imposing the type of sanction issued by the trial court. Specifically, we argue that no such sanction should be imposed unless the trial court makes an explicit finding of conduct that "obviously serves merely to harass or maliciously injure" the opposing party —and that absent such a finding, R.C. 2323.51 should not apply.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed and served pursuant to the court's electronic filing system on May 13, 2016 upon the following counsel of record for Appellants and Appellees:

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