

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

MATHIAS H. HECK JR,

CASE NO.: 2023 CV 03636

Plaintiff,

JUDGE RICHARD S. SKELTON

-vs-

PETER J. ATAKPU,

Defendant.

**DECISION, ENTRY AND ORDER
GRANTING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
DECLARING DEFENDANT TO BE A
VEXATIOUS LITIGATOR**

This matter is before the Court on Plaintiff's *Motion for Summary Judgment* filed on August 31, 2023. On September 20, 2023, the Court granted Defendant an extension until October 30, 2023 to file a Response pursuant to Defendant's Motion for an Extension filed on September 19, 2023. Instead of filing a Response, Defendant, filing *Pro Se*, filed:

- November 3, 2023 Motion for Instanter;
- November 3, 2023 Motion for 30 day Extension of Time to File [Response to Summary Judgment];
- November 8, 2023 Motion to Respond to Plaintiff's Response to Defendant's Motion to Stay and Hold Motion for Summary Judgment in Abeyance;¹
- November 8, 2023 Motion for Instanter;
- November 29, 2023 Motion to Correct the Record;²

¹ On October 26, 2023, the Court Overruled Defendant's Motion to Stay and Hold Plaintiff's Motion for Summary Judgment in Abeyance. Defendant filed his Motion on September 28, 2023.

² To "correct" twelve (12) Pro Se filings of Defendant which were filed on a criminal case number which was dismissed.

- November 30, 2023 Motion for Emergency Stay of Plaintiff's August 31, 2023 Motion for Summary Judgment.³

The matter is properly before the Court for Decision despite Defendant's failure to file a response.

I. Summary Judgment

Pursuant to Civ.R. 56(C), a trial court may grant a moving party summary judgment when (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds, after construing the evidence most strongly in favor of the nonmoving party, can only conclude adversely to that party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201 (1998).

The moving party carries the initial burden of affirmatively demonstrating that no genuine issue of material fact remains to be litigated. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988); *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107, 662 N.E.2d 264 (1996). To that end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. *Dresher* at 292-293. Once the moving party satisfies its burden, the burden then shifts to the nonmoving party to respond, with affidavits or as otherwise permitted by Civ.R. 56, setting forth specific facts that show that there is a genuine issue of material fact for trial. *Id.*; Civ.R. 56(E).

II. Vexatious Litigator

Pursuant to R.C. 2323.52(A)(3), a "vexatious litigator" is:

[A]ny person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions.

The term "vexatious conduct" means:

[C]onduct of a party in a civil action that satisfies any of the following:

- (a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action.
- (b) The 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.
- (c) The conduct is imposed solely for delay.

³ Based on the pending Motion to Correct Record.

R.C. 2323.52(A)(2).

Conduct in a criminal action can also result in a vexatious litigator designation when said conduct is “civil in nature.” *State v. West*, 2nd Dist. Greene No. 2021-CA-17, 2022-Ohio-2060, ¶18, citing *Ferrero v. Staats*, 5th Dist. Stark No. 2018 CA 16, 2018-Ohio-3235, ¶ 11-13 (“pleadings of a civil nature, although filed in a criminal case, may for[m] the predicate for a vexatious litigator finding”); *Watkins v. Pough*, 11th Dist. Trumbull No. 2016-T-100, 2017-Ohio-7026, ¶ 41; *Watkins v. Perry*, 11th Dist. Trumbull No. 2017-T-31, 2017-Ohio-9347, ¶ 18-25, 107 N.E.3d 574.

Under R.C. 2323.52(B), a prosecuting attorney “who has defended against habitual and persistent vexatious conduct in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court may commence a civil action in a court of common pleas with jurisdiction over the person who allegedly engaged in the habitual and persistent vexatious conduct to have that person declared a vexatious litigator.” All elements of R.C. 2323.52(A)(3) must be established by clear and convincing evidence in order to have the person declared a vexatious litigator. *Lasson v. Coleman*, 2d Dist. Montgomery No. 21983, 2008-Ohio-4140, ¶ 33. Accord *Madeira v. Oppenheimer*, 1st Dist. Hamilton No. C-200458, 2021-Ohio-2958, ¶ 8.

R.C. 2323.52, Ohio’s vexatious litigator statute, was enacted to “prevent abuse of the system by those persons who persistently and habitually file lawsuits without reasonable grounds and/or otherwise engage in frivolous conduct in the trial courts of this state.” *Mayer v. Bristow*, 91 Ohio St.3d 3, 13, 740 N.E.2d 656 (2000), quoting *Cent. Ohio Transit Auth. v. Timson*, 132 Ohio App.3d 41, 50, 724 N.E.2d 458 (10th Dist.1998). If a person is declared a vexatious litigator under R.C. 2323.52, he or she cannot institute or continue legal proceedings unless he or she first obtains leave from that specific court to move forward. R.C. 2323.52(D).

As stated by the Second District Court of Appeals “[i]t is the nature of the conduct, [and] not the number of actions, that determines whether a person is a vexatious litigator.” *West* ¶29, citing *Prime Equip. Group, Inc. v. Schmidt*, 2016-Ohio-3472, 66 N.E.3d 305, ¶ 40 (10th Dist.), quoting *Borger v. McErlane*, 1st Dist. Hamilton No. C-010262, 2001-Ohio-4030, 2001 WL 1591338, *3 (Dec. 14, 2001). “Given the purpose and design of the vexatious-litigator statute, it makes sense that the consistent repetition of arguments and legal theories that have been rejected by the trial court numerous times can constitute vexatious litigation.” *Id*, citing *Easterling v. Union Sav. Bank*, 2d Dist. Greene No. 2012-CA-52, 2013-Ohio-1068, ¶ 16, quoting *Lasson v. Coleman*, 2d Dist. Montgomery No. 21983, 2008-Ohio-4140, ¶ 36, citing *Farley v. Farley*, 10th Dist. Franklin

No. 02AP-1046, 2003-Ohio-3185, ¶ 46. See also *State v. Jordan*, 8th Dist. Cuyahoga No. 100686, 2014-Ohio-2408, ¶ 7, fn. 1.

In this case, Plaintiff outlines all of Defendant's Pro Se filings accurately as follows regarding his criminal case in 1999CR2375:

- Notice of Appeal and Motion for Delayed Appeal, filed on March 8, 2002, in Montgomery County Appellate Case No. CA 19240. Dismissed by court of appeals on March 26, 2002. Application for Reconsideration filed April 15, 2002. Reconsideration denied on June 24, 2002.
- Motion Seeking Leave to Withdraw Guilty Plea After Sentencing, filed on January 7, 2003. Overruled on October 31, 2003, because nothing in the record indicated that Atakpu did not voluntarily enter his plea.
- Request for Records filed on October 12, 2004.
- Motion of Defendant for Preparation of Complete Transcript, filed on October 18, 2004.
- Petition for Relief After Judgment, filed on July 29, 2005. Overruled on February 23, 2006, because Defendant did not present new evidence that he was unavoidably prevented from discovering at the time of trial, nor did he assert a newly recognized constitutional right as the basis for his post-conviction petition.
- Motion for Reconsideration of Sentence, filed on July 29, 2005. Overruled on February 23, 2006, because Defendant's conviction became final on May 11, 2000, when Atakpu exhausted his direct-appeal rights.
- Motion of Defendant for an Evidentiary Hearing, filed on July 29, 2005. Overruled on February 23, 2006.
- Request for Documents, filed on September 19, 2005. Overruled on February 23, 2006, because Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim.
- Request for Records, filed on December 23, 2005. Overruled on February 28, 2006, because Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim.
- Motion for Leave to Withdraw Guilty Plea, filed on August 12, 2009. Overruled on September 22, 2010, because Defendant failed to meet his burden of showing that a manifest injustice needed to be corrected.
- Notice of Appeal, filed on October 25, 2010, in Montgomery County Appellate Case No. CA 24312. Dismissed by court of appeals on January 20, 2011.
- Request for Records, filed on November 19, 2009. Overruled on April 30, 2010, because Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim.
- Motion to Order Production of Evidence, filed on December 2, 2009. Overruled on April 30, 2010, because Defendant has the information that he was requesting.
- Motion of Defendant to Order Production of Evidence, filed on January 7, 2010. Overruled April 30, 2010, because Defendant already has the information that he was requesting.
- Motion for Statement of Facts and Conclusions of Law for each Motion Submitted by Defendant, filed on July 29, 2010. Overruled as moot on September 22, 2010, because the Court conveyed its findings of fact and conclusions of law with respect to Defendant's motions.
- Motion to Order Production of Evidence, filed on September 29, 2010. Overruled on July 18, 2011, because Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim.

- Notice of Appeal, filed on August 31, 2011, in Montgomery County Appellate Case No. CA 24798. Dismissed by court of appeals, at Atakpu's request, on December 20, 2011.
- Motion for Preparation of Complete Transcript, filed on November 3, 2011. Overruled on May 9, 2012, because the Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim.
- Motion for Reconsideration of Motion to Withdraw Guilty Plea, filed on December 9, 2011.
- Motion to be Resentenced, filed on December 9, 2011. Motion to Withdraw Motion to be Resentenced, filed May 9, 2012. Motion to Strike Motion to Withdraw Motion to be Resentenced, filed on June 5, 2012. 5
- Motion to Add Information to the Record and Request to the Clerk to Receive Documents, filed on February 28, 2012. Overruled on May 9, 2012, because the Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim.
- Notice of Appeal, filed on June 4, 2012, in Montgomery County Appellate Case No. CA 25232. Trial court's decision affirmed on September 30, 2013.
- Motion to Review and Correct Unlawful Sentence, filed on June 27, 2012.
- Motion to Compel the prosecutor to enter into evidence a transcript of his plea and sentencing hearings, filed on July 18, 2012.
- Motion to Strike his December 9, 2011 Motion to be Resentenced, to Strike his December 9, 2011 Motion for Reconsideration of his Motion to Withdraw Plea, and to Strike his June 27, 2012 Motion to Review and Correct Unlawful Sentence, filed on August 1, 2012, and again (in a different form) on August 13, 2012. Sustained on February 7, 2013, thus dismissing all pending motions.
- Pre-Sentence Motion to Withdraw Guilty Plea, filed on September 6, 2016. Motion to Supplement Motion to Withdraw Guilty Plea, filed on October 7, 2016. Overruled on June 26, 2017, because Defendant failed to demonstrate a manifest injustice, or to show deficient performance and resulting prejudice. Furthermore, Defendant knowingly and voluntarily entered his plea.
- Notice of Appeal, filed on July 17, 2017, in Montgomery County Appellate Case No. CA 27656. Dismissed by court of appeals on October 23, 2017.
- Notice of Appeal, filed on November 28, 2017, in Montgomery County Appellate Case No. 27817. Dismissed by court of appeals on January 10, 2018.
- Motion for Preparation of Complete Transcript, filed on August 28, 2017. Overruled on February 8, 2019, because Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim.
- Motion for Transcripts, filed on May 16, 2018 and again on January 17, 2019. Overruled on February 8, 2019, because Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim. The trial court nevertheless sent Defendant a copy of the transcript of the March 23, 2000 Plea Hearing in Case No. 99-CR-382, but reiterated that a transcript of Defendant's April 6, 2000 Plea and Sentencing Hearing in Case No. 99-CR-2375 was never prepared. The trial court advised Defendant, however, that it would make the stenographer's notes from the April 6, 2000 Hearing available to Mike Mobley Reporting and that, if Defendant wished to have the hearing transcribed, he should contact Mike Mobley Reporting and make his own payment arrangements for the transcription.
- Motion for Records and transcripts, filed on August 27, 2019.
- Motion for Records, filed on October 28, 2019. Overruled on January 17, 2020, because Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim.

- Motion for Copies of Record filed on November 13, 2019. Overruled on January 17, 2020, because Defendant failed to demonstrate that the information sought was necessary to support what appears to be a justiciable claim.
- Motion to Preserve the Record Beyond the Court's Records Retention Schedule Period, filed on June 30, 2022. On August 8, 2022, the trial court advised Defendant that the stenographer's notes for his April 6, 2022 Plea and Sentencing Hearing had been misplaced and were not currently available. The court ordered, however, that if the stenographer's notes are found, they shall be retained for ten years after either (1) journalization of the final entry is issued by the court; (2) journalization of the final entry is issued by the court of appeals, Supreme Court of Ohio, or the United States; or (3) completion of Atakpu's sentence.
- Motion for Records, filed on March 6, 2023, and asking that the Judicial Assistant to Judge Solle provide him with certified copies of the stenographer's notes from his March 23, 2000, and April 6, 2000 plea and sentencing hearings. Overruled on April 6, 2023, because Defendant was already informed by the court about the procedure the Defendant should follow in order to obtain a transcription of the stenographer's notes.
- Motion to Appoint Official Shorthand Reporter, filed on March 14, 2023, requesting that the court appoint a stenographer to transcribe for him the stenographer's notes from the April 6, 2000 Plea and Sentencing Hearing.
- Notice of Appeal, filed on May 16, 2023, in Montgomery County Appellate Case No. CA 29792.

Based upon the history of Defendant's filings, and the repetitive and frivolous legal theories contained within that history, the Court concludes that there is no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law. Therefore, on the basis provided in Plaintiff's Complaint to Declare Defendant Peter J. Atakpu a Vexatious Litigator, and Motion for Summary Judgment, pursuant to Civ. R. 56, summary judgment is hereby entered in favor of Plaintiff, Matthias Heck Jr., and against Defendant Peter J. Atakpu.

Accordingly, the Court finds and declares, Defendant Peter J. Atakpu to be a vexatious litigator pursuant to R.C. 2323.52.

"In accordance with R.C. 2323.52(H), the Clerk of Courts is directed to send a certified copy of this Order to the Supreme Court of Ohio for publication in a manner that the Supreme Court determines is appropriate and that will facilitate the clerk of the court of claims and clerk of a court of appeals, court of common pleas, municipal court, or county court in refusing to accept pleadings or other papers submitted for filing by Peter J. Atakpu a vexatious litigator, unless Peter J. Atakpu first obtains leave to proceed from this Court."

Further, the Court Orders that Defendant Peter J. Atakpu is prohibited from instituting legal proceedings in the Montgomery County Court of Common Pleas; from continuing any legal proceedings in

the Montgomery County Court of Common Pleas; and from making any application other than an Application for Leave to File within the Montgomery County Court of Common Pleas. **The Clerk of Courts shall hereby reject and not accept for filing any documents from Peter J. Atakpu, with the exception of any Application for Leave to File.**

As a result of the Court's Decision, Defendant's Pro Se filings up through the date of the Court's decision are rendered **MOOT and are DENIED.**

SO ORDERED:

JUDGE RICHARD S. SKELTON

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST REASON FOR DELAY FOR PURPOSES OF CIV.R. 54. IN ACCORDANCE WITH APP.R. 4, ANY PARTY INTENDING TO APPEAL THIS DECISION SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

To the Clerk of Courts:

Pursuant to Civ.R. 58(B), please serve upon all parties not in default for failure to appear Notice of Judgment and its date of entry upon the journal.

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

ANDREW T FRENCH
(937) 225-5757
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Copies of this document were sent to all parties listed below by ordinary mail:

PETER J. ATAKPU
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General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Number:
2023 CV 03636

Case Title:
MATHIAS H. HECK JR vs PETER J. ATAKPU

Type:

Decision

So Ordered,

A handwritten signature in black ink, appearing to read "M. S. Skelton".

Electronically signed by skelton on 12/12/2023 08:34:03 AM Page 8 of 8

I hereby certify this to be a true and correct copy.

Witness my hand and seal this 20th
day of December 2023.

A handwritten signature in red ink, likely belonging to the Clerk of the Court.

Clerk of Common Pleas
Court of Montgomery County, Ohio

By Erica T. Walker
Deputy