

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Michael D. Sopp, :  
 :  
 Plaintiff-Appellant, :  
 :  
 v. : No. 10AP-25  
 : (C.P.C. No. 08CVH07-10248)  
 Joseph Turner et al., : (REGULAR CALENDAR)  
 :  
 Defendants-Appellees. :

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D E C I S I O N

Rendered on August 26, 2010

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*Michael D. Sopp, pro se.*

*Hill, Allison & DeWeese, LLC, and Christian D. Donovan, for appellees.*

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APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiff-appellant, Michael D. Sopp ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Joseph Turner, Mike Williamson, and Ravenstone Games, Inc. ("appellees"). For the following reasons, we affirm.

{¶2} The following facts are germane to this appeal. On July 17, 2008, appellant filed his complaint in the underlying action, alleging causes of action for breach of

contract, contract implied at law, fraud, and unjust enrichment. On August 18, 2008, appellees filed their answer to appellant's complaint, which included a counterclaim asserting that the lawsuit was frivolous.

{¶3} On August 7, 2009, appellees moved for summary judgment on the claims asserted by appellant in his complaint, as well as their claim for frivolous conduct. Appellant responsively filed a motion pursuant to Civ.R. 56(F), seeking an extension of time to respond to appellees' summary judgment motion. The trial court granted appellant's motion on August 25, 2009, and gave appellant an additional 21 days to respond. Appellant complied with the trial court's order and filed his memorandum contra on September 16, 2009.

{¶4} On October 26, 2009, appellant voluntarily dismissed his complaint. The action was terminated, but because appellees' counterclaim was still pending, the trial court issued an entry on October 27, 2009, reactivating the case. In that entry, the trial court apprised the parties that the matter would proceed to a bench trial on November 10, 2009, which was the date set by the trial court in an entry journalized on October 15, 2009.

{¶5} On November 10, 2009, the day of trial, the trial court granted summary judgment in favor of appellees and referred the matter to a magistrate for a damages hearing on appellees' counterclaim. The trial court's order of reference to the magistrate states that the hearing would take place at 1:30 p.m. that afternoon. The trial court's entry granting summary judgment to appellees, as well as its order of reference to the

magistrate, both bear a time stamp of 1:15 p.m. Within minutes of those entries, appellant moved for a continuance. The trial court denied appellant's motion.<sup>1</sup>

{¶6} A damages hearing was held before the magistrate as scheduled, and, on December 9, 2009, the magistrate issued his decision. Therein, the magistrate found that appellees produced evidence that they incurred attorney fees in the amount of \$19,140 as a result of appellant's frivolous conduct, and further found those fees to be reasonable. The magistrate noted in his decision that appellant "addressed the underlying claims in the litigation, but not the reasonableness of [appellees'] attorney's fees." (Magistrate's Decision at 4.) Following the issuance of the magistrate's decision, none of the parties filed any objections. The trial court adopted the magistrate's decision on January 5, 2010.

{¶7} Appellant appeals, and asserts the following two assignments of error:

[1.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR JOSEPH TURNER.

[2.] THE TRIAL COURT ERRED IN GRANTING A DAMAGES HEARING AND IN GRANTING ATTORNEY'S FEES FOR JOSEPH TURNER, et al.

{¶8} We will address appellant's assignments of error together as they are interrelated. The gravamen of appellant's arguments on appeal is that the trial court could not lawfully impose sanctions upon him under R.C. 2323.51 because it failed to: set a hearing date, notify him of the hearing date, and conduct a hearing.

{¶9} Appellate review of a trial court's award of attorney fees for frivolous conduct pursuant to R.C. 2323.51 is under the abuse-of-discretion standard, but the trial court's factual findings will not be disturbed if they are supported by competent, credible

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<sup>1</sup> The record discloses that the trial court did not expressly rule on appellant's motion. In a situation where the record is silent on the court's ruling on a motion, such as here, we generally assume that the trial court denied the same. *Takacs v. Baldwin* (1995), 106 Ohio App.3d 196, 209.

evidence. *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 51-52. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} At this juncture, we note that appellant failed to file objections to the magistrate's decision. Civ.R. 53 imposes an affirmative duty on parties to make timely, specific objections in writing to the trial court, identifying any error of fact or law in the magistrate's decision. *Howard v. Norman's Auto Sales*, 10th Dist. No. 02AP-1001, 2003-Ohio-2834, ¶21. Pursuant to Civ.R. 53(D)(3)(b), a party may not raise on appeal any error pertaining to a trial court's adoption of any finding of fact or conclusion of law by a magistrate unless that party timely objected to that finding or conclusion as required under the rule. *State ex rel. Booher v. Honda of Am. Mfg., Inc.*, 88 Ohio St.3d 52, 53-54, 2000-Ohio-269.

{¶11} In this case, appellant failed to file objections to the magistrate's decision. As such, appellant has waived any alleged errors except those constituting plain error. See Civ.R. 53(D)(3)(b)(iv). With respect to plain error, appellate courts must proceed with caution and find plain error only in " 'extremely rare circumstances' where the error seriously affects the basic fairness, integrity, or public reputation of the judicial process itself." *Unifund CCR Partners v. Hall*, 10th Dist. No. 09AP-37, 2009-Ohio-4215, ¶22, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401. Indeed, the plain error doctrine implicates errors in the judicial process where the error is clearly apparent on the face of the record and is prejudicial to the appellant. *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 223; see also *Allegro Realty Advisors, Ltd. v. Orion Assoc.*, 8th Dist.

No. 87004, 2006-Ohio-4588, ¶56, citing *Goldfuss* (referring to errors "challenging the legitimacy of the underlying judicial process itself").

{¶12} Upon review, we do not conclude that this case involves exceptional circumstances requiring plain error review. However, in the interest of justice, we will review the merits of appellant's arguments.

{¶13} R.C. 2323.51 provides, in pertinent part:

(B) (1) Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in division (E)(2)(b) of section 101.15 or division (I)(2)(b) of section 121.22 of the Revised Code, at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section.

(2) An award may be made pursuant to division (B)(1) of this section upon the motion of a party to a civil action or an appeal of the type described in that division or on the court's own initiative, but only after the court does all of the following:

(a) Sets a date for a hearing to be conducted in accordance with division (B)(2)(c) of this section, to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;

(b) Gives notice of the date of the hearing described in division (B)(2)(a) of this section to each party or counsel of record who allegedly engaged in frivolous conduct and to each party who allegedly was adversely affected by frivolous conduct;

(c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division, allows the parties and counsel of record involved to present any relevant evidence at

the hearing, including evidence of the type described in division (B)(5) of this section, determines that the conduct involved was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made. If any party or counsel of record who allegedly engaged in or allegedly was adversely affected by frivolous conduct is confined in a state correctional institution or in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, the court, if practicable, may hold the hearing by telephone or, in the alternative, at the institution, jail, or workhouse in which the party or counsel is confined.

(3) The amount of an award made pursuant to division (B)(1) of this section that represents reasonable attorney's fees shall not exceed, and may be equal to or less than, whichever of the following is applicable:

(a) If the party is being represented on a contingent fee basis, an amount that corresponds to reasonable fees that would have been charged for legal services had the party been represented on an hourly fee basis or another basis other than a contingent fee basis;

(b) In all situations other than that described in division (B)(3)(a) of this section, the attorney's fees that were reasonably incurred by a party.

(4) An award made pursuant to division (B)(1) of this section may be made against a party, the party's counsel of record, or both.

{¶14} Thus, pursuant to R.C. 2323.51(B), before a court may award sanctions, it must hold a hearing to determine: (1) whether the conduct was frivolous; (2) whether any party was adversely affected by the frivolous conduct; and (3) the amount of the award, if any. "The hearing may be conducted on written materials or it may be an oral hearing." *Foland v. City of Englewood*, 2d Dist. No. 22940, 2010-Ohio-1905, ¶31, citing *Shields v. Englewood*, 172 Ohio App.3d 620, 2007-Ohio-3165, ¶48. At the hearing, the parties must be allowed to present relevant evidence in support of, or in opposition to, an award of

sanctions. R.C. 2323.51(B)(2)(c); *Siemientkowski v. Moreland Homes, Inc.*, 8th Dist. No. 84758, 2005-Ohio-515, ¶13.

{¶15} In this case, we find that the trial court complied with R.C. 2323.51(B)(2). Appellees moved for summary judgment on the basis that appellant engaged in frivolous conduct, which caused delay and increased their litigation costs. Appellant was afforded a meaningful opportunity to respond to appellees' motion, which he did after having received a 21-day extension of time from the trial court in which to do so. Based on the written materials submitted by the parties, the trial court determined that appellant had engaged in frivolous conduct and referred the matter to a magistrate for a damages hearing. The magistrate held a hearing and determined that appellant was liable to appellees in the amount of \$19,140.

{¶16} Both the trial court's determination regarding appellant's liability, as well as the subsequent damages hearing conducted by the magistrate, occurred on the date the trial court scheduled appellees' counterclaims for trial (November 10, 2009); the trial court had set the trial date on October 15, 2009. Thus, when the parties appeared before the trial court on November 10, 2009, they had already submitted written materials with respect to appellees' counterclaim for fees under R.C. 2323.51. In addition, the parties knew as of October 15, 2009, that the matter would proceed to trial and, as such, they were given several weeks notice that they should be prepared for trial on the matter. There does not appear to be any prohibition that prevents a trial court from determining a party's liability under R.C. 2323.51 based on written materials, and, upon a finding of liability, referral of the matter to a magistrate for a damages hearing.

{¶17} Based on the record before us, we conclude that the sequence of events, which culminated in the trial court's adoption of the magistrate's decision that recommended appellees recover reasonable attorney fees in the amount of \$19,140 from appellant, did not run afoul of the requirements of R.C. 2323.51 nor raise any due process concerns.

{¶18} As a final matter, we note that appellant did not file a transcript of the trial court proceedings. Therefore, we have no transcript of the hearing before the magistrate. Without it, to the extent appellant's argument encompasses factual issues, we have no basis for reviewing the same. See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199 ("When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm.").

{¶19} For all these reasons, we overrule both of appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

TYACK, P.J., and CONNOR, J., concur.

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