

THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
STEVEN A. BOZSIK

Case No. 08-0022

Relator

vs

HONORABLE LYN SLABY, et al.

Respondents

MOTION FOR LEAVE TO AMEND
COMPLAINT FOR PEREMPTORY
OR ALTERNATIVE WRIT OF
MANDAMUS

For the Relator:

STEVEN A. BOZSIK 389-250
RiCI
1001 Olivesburg Rd.
P.O. Box 8107
Mansfield, Ohio 44901-8107

For the Respondents:

SHERRI BEVAN WALSH
Summit County Prosecuting Attorney
CORINA STAEBLE GAFFNEY(56180)
Assistant Prosecuting Attorney
53 University Avenue, 6th Floor
Akron, Ohio 44308-1689
(330)643-2800 (tel.)
(330) 643-2137 (fax)

FILED
FEB 28 2008
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
FEB 26 2008
CLERK OF COURT
SUPREME COURT OF OHIO

THE SUPREME COURT OF OHIO

| | | |
|-----------------------------|---|----------------------------------|
| STATE OF OHIO EX REL. | : | Case No. 08-0022 |
| STEVEN A. BOZSIK | : | |
| | : | |
| Relator | : | |
| | : | |
| vs | : | |
| | : | |
| HONORABLE LYN SLABY, et al. | : | <u>MOTION FOR LEAVE TO AMEND</u> |
| | : | <u>COMPLAINT FOR PEREMPTORY</u> |
| | : | <u>OR ALTERNATIVE WRIT OF</u> |
| Respondents | : | <u>MANDAMUS</u> |

The Parties & Jurisdiction

1. The averments in this complaint are verified by the affidavit of Steven A. Bozsik, which are submitted with this complaint as Exhibits 1 and 2, and incorporated by reference herein. Also incorporated is relator's memorandum in support of his complaint previously filed on January 3, 2008 with this Court.

2. The Honorable Lynn Slaby is named as a repondent in this Complaint in his official capacity. Respondent Slaby is an Elected Judge of the Ninth District Court of Appeals, presiding over various appeals and original actions from the counties of Summit, Medina, Wayne and Lorain, Ohio.

3. The Honorable Clair Dickinson is named as a repondent in this Complaint in her official capacity. Respondent Dickinson is an Elected Judge of the Ninth District Court of Appeals, presiding over various appeals and original actions from the counties of Summit, Medina, Wayne and Lorain, Ohio.

4. Relator Steven A. Bozsik, a labeled vexatious litigator and Ohio citizen is being denied his substantial right to a direct appeal from a final order issued by the Wayne County Court of Common Pleas after leave was granted by the screening judge pursuant to O.R.C. § 2323.52(F)(1).

5. This Court has original jurisdiction over this action pursuant to Article IV, Section 2(B)(1) of the Constitution of the State of Ohio (mandamus).

Background

6. On March 17, 2005, the Relator an Ohio citizen and labeled vexatious litigator pursuant to O.R.C. § 2323.52(A)(3) by the Honorable James L. Kimbler, Judge of the Medina County Court of Common Pleas, issued an order against Relator to seek leave with his court before commencing or continuing any civil action in Ohio's trial courts pursuant to O.R.C. § 2323.52(F)(1). A copy of Judge Kimbler's judgment entry is attached with this complaint as Exhibit 3 and incorporated by reference herein.

7. In May of 2005 the Ninth District Court of Appeals sua sponte dismissed Relator's timely appeal, informing Relator leave is required or mandated pursuant to O.R.C. § 2323.52(F)(2); in addition to, the Respondents ordered the clerk of the court to refuse any additional filings from Relator unless leave is required since Respondents allege Judge Kimbler's order restricts the Relator under O.R.C. § 2323.52(D)(1). A copy of Respondent's judgment orders are attached with this complaint as Exhibits 4 and 5, incorporated by reference herein.

8. In December of 2006, Relator, obtained an order by Judge Kimbler with permission to commence a civil complaint with the Wayne County Court of Common Pleas commencing a breach of contract complaint against the City of Rittman Cemetery who refuses to provide a certificate of burial rights as agreed with full payment in the purchase contract between the parties. A copy of Judge Kimbler's Order is attached with this complaint as Exhibit 6,

incorporated by reference herein.

9. In December of 2006 Relator filed his complaint as approved by Judge Kimbler which was served upon the Rittman Cemetery in June of 2007. A copy of the complaint and appearance docket is attached with this complaint as Exhibits 7 and 8, incorporated by reference herein.

10. In January of 2007, the Relator, once again was directed by the Respondents, leave pursuant to O.R.C. § 2323.52(F)(2) is mandated regardless of the Order issued by Judge Kimbler; furthermore, the authority in *Mayer v. Bristow* (2000), 91 Ohio St.3d 3, 740 N.E.2d 656 has been abrogated by Senate Bill 168 that added the court of appeals to O.R.C. § 2323.52 on June 28, 2002. A copy of the Respondent's judgment order is attached with this complaint as Exhibit 9, incorporated by reference herein.

11. On September 5, 2007, the Wayne County Court of Common Pleas issued an order granting the Rittman Cemetery summary judgment when genuine issues of material fact remain to be litigated, especially the admissions by the Cemetery the trial court failed to entertain with the complaint. A copy of the final order is attached with this complaint as Exhibit 10, incorporated by reference herein.

12. On September 13, 2007, Relator moved the Respondent's seeking leave of court pursuant to O.R.C. § 2323.52(F)(2) as mandated by Respondents outside of Judge Kimbler's vexatious litigator March 17, 2005 order. A copy of the motion for leave is attached with this complaint as Exhibit 11, incorporated by reference herein.

13. On November 15, 2007 Respondents issued a judgment entry that denied leave pursuant to O.R.C. § 2323.52(F)(2); even though, Relator was not ordered by Judge Kimbler to seek leave pursuant to O.R.C. § 2323.52(F)(2). The Relator also obtained leave of court by Judge Kimbler satisfying the statutory requirements of O.R.C. § 2323.52(F)(1)

incorporating the September 5, 2007 order by the Wayne County trial court as final and appealable. A copy of the Respondents judgment order that denied the Relator's motion for leave and Relator's substantial rights of appeal is attached with this complaint as Exhibit 12, incorporated by reference herein.

**Respondent's Requirements of Relator Seeking Leave Pursuant to
O.R.C. § 2323.52(F)(2)**

14. As the Respondents mandate Relator to file leave pursuant to O.R.C. § 2323.52(F)(2) outside the judgment entry by Judge Kimbler, the Respondents support their decision or requirement of O.R.C. § 2323.52(F)(2) with authority by the Sixth, Tenth and Eleventh District Court of Appeals. See, Exhibit 6.

15. The Respondent's position that leave is mandated or required pursuant to O.R.C. § 2323.52(F)(2) is misplaced with the case authority by the Sixth, Tenth and Eleventh District Court of Appeals. The original vexatious litigator orders from the trial courts in Ottawa, Franklin and Portage County, each require the vexatious litigators to seek leave with the courts of appeal and the requirements pursuant to O.R.C. § 2323.52(F)(2) must be followed. A copy of the final orders against the vexatious litigators from Ottawa (6th Dist.), Franklin (Tenth Dist.) and Portage County (11th Dist.) are attached with this complaint as Exhibit 13, 14, and 15, incorporated by reference herein.

16. The Respondent's position mandating Relator to file leave pursuant to O.R.C. § 2323.52(F)(2) exceeds the maxim of law, a court speaks through its journal entry; in addition, the requirements by Respondents that Relator requires leave with the courts of appeal conflicts with the position of the Fifth (Delaware and Richland County¹), Eight (Cuyahoga

¹ The Relator was not required to seek leave with the Richland County Court of Appeals for the Fifth District and with this Court on direct appeal. *Bozsik v. Hudson* (2006), 110 Ohio St.3d 245, 852 N.E.2d 1200, 2006 -Ohio-4356.

County) and Eleventh (Geauga County) District courts of appeal. A copy of the appearance docket filed with the Fifth, Eight and Eleventh District Court of Appeals, along with the vexatious litigator order and case docket support Relator is not required to seek leave pursuant to O.R.C. § 2323.52(F)(2), are attached with this complaint as Exhibits 16, 17 and 18.

**Count 1: Mandamus To Allow A Direct Appeal of the September 5, 2007
Final Order by the Wayne County Court of Common Pleas**

17. Relator incorporates by reference all of the previous averments in this complaint.

18. By preventing the Relator from his substantial rights to appeal the final order by the Wayne County Court of Common Pleas and mandating Relator to seek leave pursuant to O.R.C. § 2323.52(F)(2) outside the limits imposed by Judge Kimbler's judgment entry, the Respondents are ignoring and depriving Relator of his due process and equal protection of the law in Article I, Section 16 of the Ohio Constitution and the Due Process and Equal Protection Clause of the 14th Amendment to the United States Constitution

19. Because the exclusion of Relator's guaranteed rights to appeal a final order after leave was granted by the original screening court, prevents the Relator access to the courts guaranteed by the federal and state constitution, including the maxim of law a court always speaks through the journal entry being ignored by the Respondents violates Relator's due process rights and the Respondent's duty to protect the federal and state constitution.

20. The Relator has followed the Respondents direction, even though unconstitutional, the Respondents continue to deprive the Relator his substantial rights to a direct appeal a final order of summary judgment which is reviewed by the court of appeals using de novo review analysis from the inferior courts record. A reasonable judgment can not be held

without the complete record from the inferior court.

21. The Respondent's preliminary review of a final order is unconstitutional since de novo review is mandatory from a complete record and cursory review denies Relator's substantial right for review by the higher court.

22. Just as Respondents have a clear legal duty to allow a direct appeal of a final order that is timely filed, Relator has a clear legal right to appeal a final order issued by the inferior court when the process was granted leave by the screening court under the proper application of the appellate statutes and rules.

23. Since the dismissal of an appeal pursuant to O.R.C. § 2323.52(F)(2) is not a final order under O.R.C. § 2323.52(G), Relator has no plain and adequate remedy in the ordinary course of law to address this unconstitutional process with this Court, other than, to seek a writ of mandamus.

Prayer for Relief

WHEREFORE, Relator Steven A. Bozsik prays that this Court immediately issue the following relief:

(a) A peremptory writ of mandamus compelling Respondents to allow Relator to appeal the final order by the Wayne County Court of Common Pleas on September 5, 2007 as described in this complaint.

or

(b) An alternative writ of mandamus setting a schedule for briefing the merits of the complaint, and requiring respondent to show cause why a peremptory writ should not issue.

and,

- (c) Such other and further relief as appears to the Court to be appropriate.

Respectfully submitted,

A handwritten signature in cursive script, reading "Steven A. Bozsik", written over a horizontal line.

Steven A. Bozsik 389-250
1001 Olivesburg Rd.
P.O. Box 8107
Mansfield, Ohio 44901

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed to Corina Staehle Gaffney Assistant Prosecuting Attorney, 53 University Avenue, 6th Floor, Akron, Ohio 44308-1689 on this 26 day of February 2008.

A handwritten signature in cursive script, reading "Steven A. Bozsik", written over a horizontal line.

Steven A. Bozsik

STATE OF OHIO)
)
COUNTY OF RICHLAND)

SS: AFFIDAVIT OF VERITY FOR STEVEN A. BOZSIK

I Steven A. Bozsik, affiant and Relator being duly sworn hereby deposes the facts are based from personal knowledge, setting forth the facts and exhibits affirmatively show affiant (Relator) is competent to testify to all matters stated in the original complaint in mandamus compelling Respondents to allow affiant his direct appeal rights from a final order issued by the Wayne County court of common pleas issued on September 5, 2007.

Steven A. Bozsik

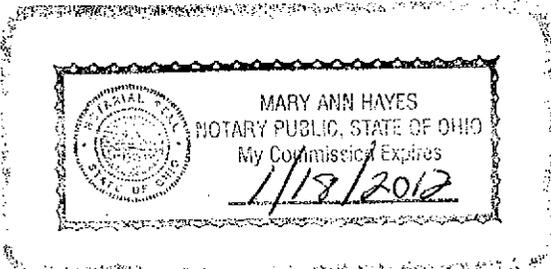
Steven A. Bozsik

NOTARY PUBLIC

The foregoing has been sworn, affirmed and subscribed before me on this 24 day of December, 2007.

Mary Ann Hayes

Notary



7. On June 12, 2007 the City of Rittman Cemetery answered the complaint with one defense "the complaint fails to state a cause for action where relief can be granted and one counter claim seeking Relator declared a vexatious litigator pursuant to O.R.C. § 2323.52(A)(3).
8. On June 19, 2007 Relator moved the City of Rittman Cemetery with his first request for interrogatories, production of documents and request for admissions as part of discovery.
9. On June 22, 2007 Relator moved the Wayne County trial court with a motion to dismiss pursuant to Civil Rule 12(B)(6) the City of Rittman Cemetery counter claim since the original complaint was approved for filing under O.R.C. § 2323.52(F)(1) by Judge Kimbler before commencing the complaint.
10. On July 19, 2007 the City of Rittman Cemetery defaulted the Realtor's first set of admissions filed on June 19, 2007 admitting the City of Rittman Cemetery has breached the contract between the parties.
11. Both parties moved the trial court for summary judgment and the Wayne County trial court set a cut-off date for a non-oral hearing on September 1, 2007.
12. On September 5, 2007 the Wayne County trial court issued a succinct judgment entry that granted the City of Rittman Cemetery motion for summary judgment and denied the Relator's motion for summary judgment. The trial court also granted the Relator's motion to dismiss the City of Rittman Cemetery's counter claim pursuant to Civ.R. 12(B)(6) making the motion for summary judgment filed by the City of Rittman Cemetery moot.

13. On September 13, 2007 Relator filed a motion for leave with the court of appeals pursuant to O.R.C. § 2323.52(F)(2) since the court of appeals will not accept any proceedings or filings by Relator without leave of the court.

14. On November 15, 2007 Respondents issued a judgment entry that denied Relator his guaranteed right to an appeal after the screening court pursuant to O.R.C. § 2323.52(F)(1) granted leave. A colorful claim existed for the complaint and the City of Rittman Cemetery created genuine issue of material fact from the admissions during the discovery of the original complaint.

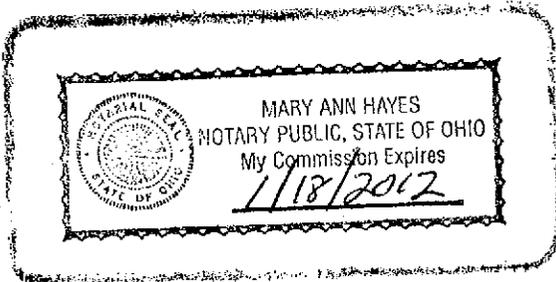
AFFIANT FURTHER SAYETH NAUGHT.



Steven A. Bozsik

NOTARY PUBLIC

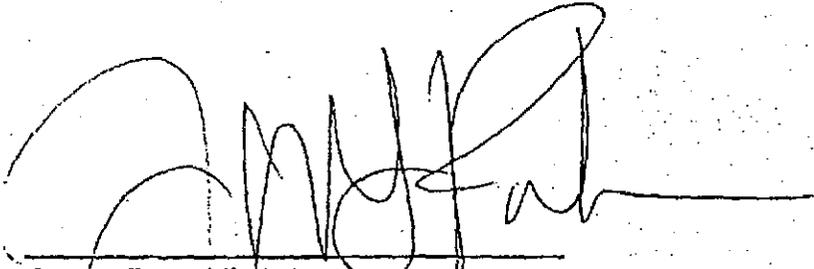
The foregoing has been sworn, affirmed, and subscribed before me by Steven A. Bozsik on this 24 day of December 2007.


Notary

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Defendant's Motion for Summary Judgment is denied.
2. Plaintiff's Motion for Summary Judgment is granted.
3. Defendant is a vexatious litigator as defined in R.C. §2323.52(A)(3).
4. Unless Defendant first obtains leave of court, Defendant is prohibited from:
 - a) Instituting any legal proceedings in the court of claims, or in a court of common pleas, municipal court, or county court;
 - b) Continuing any legal proceedings that he has instituted in any of the aforesaid courts prior to the entry of this Order; and
 - c) Making any application, other than an application for leave to proceed under R.C.2323.52(F)(1), in any legal proceeding instituted by the Defendant or another person in the court of claims, or in a court of common pleas, municipal court, or county court

Costs to Defendant.



Judge James L. Kimbler

INSTRUCTIONS TO THE CLERK

Pursuant to Civil Rule 58, the Clerk is hereby directed to serve upon the

STATE OF OHIO
COUNTY OF MEDINA

COURT OF APPEALS
MAY -2 AM 11:22

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DEAN HOLMAN

FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURTS

C.A. No. 05CA0034-M

Appellee

v.

STEVEN A. BOZSIK

Appellant

JOURNAL ENTRY

Appellant filed a notice of appeal on April 18, 2005 from the trial court's decision adjudicating him a vexatious litigator under R.C. 2323.52(D)(1). Pursuant to R.C. 2323.52(F)(2), appellant's appeal is dismissed. Costs taxed to appellant.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to App.R. 30.



Judge



Judge

A copy of this journal entry is being mailed to the following:

William Thorne, Attorney at Law, 72 Public Square, Medina, OH 44256.

Steven A. Bozsik, #389-250, 1150 N. Main St., P.O. Box 788, Mansfield, OH.

MEDINA COUNTY COURT OF COMMON PLEAS - STATE OF OHIO, MEDINA COUNTY, S.S.
I hereby certify that this is a true copy of the original on file in said court.
Witness my hand and the seal of said court at Medina, Ohio this 18th
day of September, 2005 Kathy Fortney, Clerk of Court
By Kathy Fortney Deputy

STATE OF OHIO)
COUNTY OF MEDINA)

COURT OF APPEALS

THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

05 MAY 19 AM 11:10

DEAN HOLMAN

Appellee

v.

STEVEN A. BOZSIK

Appellant

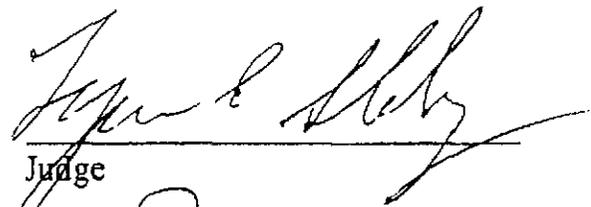
FILED
KATHY FURNEY
MEDINA COUNTY
CLERK OF COURTS

C.A. No. 05CA0034-M

JOURNAL ENTRY

Appellant has moved this Court to reconsider its order, journalized on May 2, 2005, which dismissed his appeal for failure to comply with R.C. 2323.52(F)(2). Pursuant to R.C. 2323.52(F)(2), appellant is required to apply for leave to proceed before submitting any filings for consideration by this Court. The motion for reconsideration is stricken.

Pursuant to R.C. 2323.52(H), the clerk of the appellate court is ordered to refuse any further papers submitted by appellant for filing if leave to proceed has not been granted.



Judge


Judge

A copy of this journal entry is being mailed to the following:

William Thorne, Attorney at Law, 72 Public Square, Medina, OH 44256.

Steven A. Bozsik, #389-250, 1150 N. Main St., P.O. Box 788, Mansfield, OH.

COMMON PLEAS COURT

06 DEC 13 AM 9:12

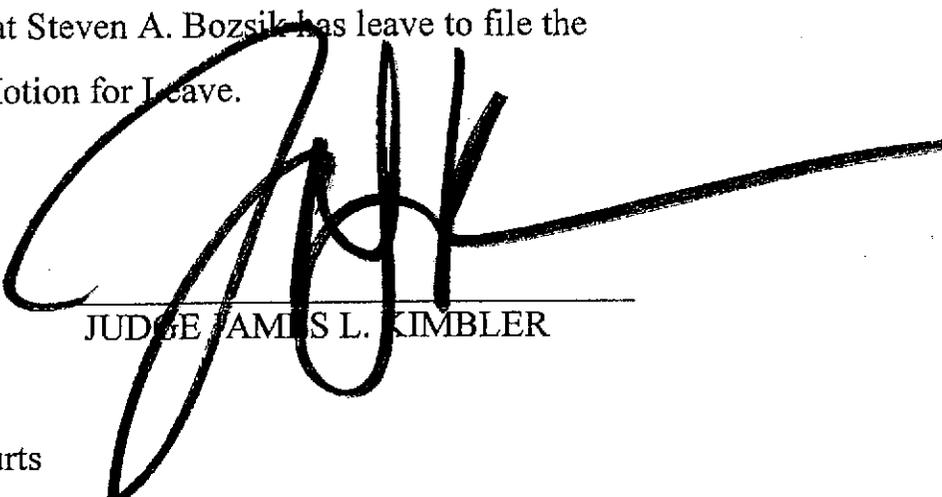
FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO**

In Re: STEVEN A. BOZSIK

On December 12, 2006, Steven A. Bozsik filed a Motion for Leave of the Court Pursuant to R.C. 2323.52(F)(1) to commence a civil action in the Common Pleas Court of Wayne County, Ohio on December 13, 2006. Said Motion is granted.

IT IS ORDERED that Steven A. Bozsik has leave to file the Complaint attached to the Motion for Leave.



JUDGE JAMES L. KIMBLER

Copy:
Wayne County Clerk of Courts
107 West Liberty Street
Wooster, OH 44691

Steven Bozsik 389-250
Richland Correctional Institution
P.O. Box 8107
Mansfield, OH 44901

CRTR5925

Summary

| <u>Case Number</u> | <u>Status</u> | <u>Judge</u> |
|---|------------------|------------------|
| 06-CV-0849 | OPEN | Wiest, Mark K |
| <u>In The Matter Of</u> | <u>Action</u> | |
| BOZSIK, STEVEN A vs. CITY OF RITTMAN CEMETERY | OTHER CIVIL | |
| <u>Party</u> | <u>Attorneys</u> | |
| BOZSIK, STEVEN A | PLNTF | |
| CITY OF RITTMAN CEMETERY | DFNDT | |
| <u>Opened</u> | <u>Disposed</u> | <u>Case Type</u> |
| 12/19/2006 | UNDISPOSED | CIVIL(C) |

Comments:

| <u>No.</u> | <u>Date of Pleadings Filed, Orders and Decrees</u> <u>Journal Book-Page-Nbr</u> | <u>Ref Nbr</u> | <u>Amount Owed/ Amount Dismissed</u> | <u>Balance Due</u> |
|------------|--|----------------|--|--------------------|
| 1 | 09/18/07 TRACK CASE OUT TO JUDGE WIEST | | 0.00 | 0.00 |
| 2 | 09/18/07 FILED MOTION TO STAY THE EXECUTION OF THE JUDGMENT ENTRY (FILED BY PLFT/ STEVEN BOZSIK) | | 0.00 | 0.00 |
| 3 | 09/11/07 COURTESY LETTER WAS ISSUED: (N) NOTICE 1 FOR A/R Sent on: 09/11/2007 12:55:12 | | 0.00 | 0.00 |
| 4 | 09/05/07 JOURNAL ENTRY THIS IS RULING ON CROSS MOTIONS FOR SJ, PLNTF MOTION IS DENIED & DFDNT MOTION GRANTED, PLNTF AMENDED COMPLAINT IS DISMISSED W/PREJ; PLNTF MOTION TO DIMISS DFDNTS COUNTERCLAIM IS GRANTED; PLNTF HAS ALREADY BEED DECLARED A VEXATIOUS LITIGATOR IN MEDINA CNTY & HAD JUDICIAL APPROVAL TO FILES THIS SUIT, COSTS TO PLNTF COPY BOZSIK; CITY RITTMAN 89-214-89 | | 2.00 | 2.00 |
| 5 | 09/05/07 TRACK-CASE IN CLERK'S OFFICE | | 0.00 | 0.00 |
| 6 | 08/31/07 TRACK CASE OUT TO JUDGE WIEST | | 0.00 | 0.00 |
| 7 | 08/30/07 FILED REPLY TO PLNTF MSJ W/NOTICE OF SERVICE | | 0.00 | 0.00 |
| 8 | 08/24/07 JOURNAL ENTRY ON PLNTF MOTION TO AMEND AND SUPPLEMENT MSJ, COURT GRANTS MOTION COPY CITY OF RITTMAN; BOZSIK 89-44-89 | | 2.00 | 2.00 |
| 9 | 08/24/07 TRACK-CASE IN CLERK'S OFFICE | | 0.00 | 0.00 |
| 10 | 08/08/07 MOTION FILED FOR LEAVE TO AMEND AND SUPPLEMENT MSJ OUT TO JUDGE WIEST | | 0.00 | 0.00 |

Ex
7

CRTR5925

Summary

06-CV-0849 BOZSIK, STEVEN A vs. CITY OF RITTMAN CEMETERY

| No. | Date of | Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr | Ref Nbr | Amount Owed/ Amount Dismissed | Balance Due |
|-----|----------|--|---------|----------------------------------|-------------|
| 11 | 08/03/07 | MOTION FOR SUMMARY JUDGMENT | | 0.00 | 0.00 |
| 12 | 08/02/07 | JOURNAL ENTRY MOTION FOR LEAVE TO FILE SJ IS GRANTED; MOTION TO ADMIT DENIED; DFDNT SHALL RESPOND TO MSJ ON/BEF 9/1/07 COPY CITY RITTMAN; BOZSIK 88-216-88 | | 2.00 | 2.00 |
| 13 | 08/02/07 | TRACK-CASE IN CLERK'S OFFICE | | 0.00 | 0.00 |
| 14 | 07/27/07 | MOTION FILED FOR LEAVE TO MOVE FOR JS | | 0.00 | 0.00 |
| 15 | 07/25/07 | TRACK CASE OUT TO JUDGE WIEST | | 0.00 | 0.00 |
| 16 | 07/25/07 | MOTION TO ADMIT ADMISSIONS BY DEFAULT, RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT | | 0.00 | 0.00 |
| 17 | 07/19/07 | JOURNAL ENTRY 9/1/07 CUTOFF FOR FILING BRIEFS ETC COPY BOZSIK; CITY OF RITTMAN 87-489-87 | | 2.00 | 2.00 |
| 18 | 06/22/07 | MOTION FILED TO DISMISS COUNTERCLAIM | | 0.00 | 0.00 |
| 19 | 06/19/07 | TRACK CASE OUT TO JUDGE WIEST | | 0.00 | 0.00 |
| 20 | 06/19/07 | MOTION FILED BY PLNTF TO WAIVE ELECTRONIC FILING AND SERVICE; REQ FOR 1ST SET ADMISSIONS OF RITTMAN CEMENTARY; NOTICE OF SERVICE | | 0.00 | 0.00 |
| 21 | 06/13/07 | ANSWER FILED BY DEFENDANT CITY OF RITTMAN TO COMPL & COUNTERCLAIM & MOTION | | 0.00 | 0.00 |
| 22 | 06/11/07 | CERTIFIED MAIL RETURNED FOR: CITY OF RITTMAN CEMETARY 06/07/07 SIGNED FOR BY: KRIS FETTER | | 0.00 | 0.00 |
| 23 | 06/05/07 | CERT MAIL SENT TO: CITY OF RITTMAN (CHANGED ADDRESS)-AMENDED COMPLAINT | | 5.38 | 5.38 |
| 24 | 06/05/07 | TRACK-CASE IN CLERK'S OFFICE | | 0.00 | 0.00 |
| 25 | 03/27/07 | TRACK CASE OUT TO JUDGE WIEST | | 0.00 | 0.00 |
| 26 | 03/14/07 | JOURNAL ENTRY ON PNLTF MOTION TO AMEND COMPLAINT GRANTED; AMENDED COMPL FILED COPY BOZSIK; CITY OF RITTMAN 84-292-84 | | 2.00 | 2.00 |
| 27 | 03/14/07 | TRACK-CASE IN CLERK'S OFFICE | | 0.00 | 0.00 |

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RTR5925

Summary

6-CV-0849 BOZSIK, STEVEN A vs. CITY OF RITTMAN CEMETERY

| No. | Date of | Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr | Ref Nbr | Amount Owed/ Amount Dismissed | Balance Due |
|-----------------------|----------|--|---------|----------------------------------|-------------|
| 8 | 02/28/07 | TRACK CASE OUT TO JUDGE WIEST | | 0.00 | 0.00 |
| 9 | 02/28/07 | MOTION FILED TO AMEND COMPLAINT | | 0.00 | 0.00 |
| 0 | 02/27/07 | CERTIFIED MAIL FAILED ATTEMPTED NOT KNOWN | | 2.00 | 2.00 |
| 1 | 02/21/07 | CERTIFIED MAIL FAILED ATTEMPTED - NOT KNOWN ON CITY OF RITTMAN CEMETERY C/O DIRECTOR OF PUBLIC SERVICE | | 2.00 | 2.00 |
| 2 | 02/20/07 | CERT MAIL SENT | | 4.88 | 4.88 |
| 3 | 02/20/07 | SUMMONS ISSUED BY CERTIFIED MAIL (N) SUMMONS FOR CIVIL Sent on: 02/20/2007 08:21:18 | | 2.00 | 2.00 |
| 4 | 02/16/07 | TRACK-CASE IN CLERK'S OFFICE | | 0.00 | 0.00 |
| 5 | 02/15/07 | TRACK CASE OUT TO JUDGE WIEST | | 0.00 | 0.00 |
| 6 | 02/15/07 | MOTION FILED FOR TRO W/AFFIDAVIT NOTE: RETURNED COMPLAINT W/SIGNATURE AS REQ, HOWEVER, FILED SEVERAL OTHER PLEADINGS ALL W/NO SIGNATURE, SENT BACK TO BE SIGNED. | | 0.00 | 0.00 |
| 7 | 12/22/06 | TRACK-CASE IN CLERK'S OFFICE | | 0.00 | 0.00 |
| 8 | 12/20/06 | TRACK CASE OUT TO JUDGE WIEST | | 0.00 | 0.00 |
| 9 | 12/19/06 | MOTION FILED FOR LEAVE TO FILE IN WYN CNTY COURT-THROUGH MEDINA COURT MOTION GRANTED PER JUDGE KIMBLER | | 0.00 | 0.00 |
| 0 | 12/18/06 | CIVIL COMPLAINT FILED | | 114.00 | 114.00 |
| 1 | 03/27/06 | MOTION TO SERVE DEFENDANT | | 0.00 | 0.00 |
| Totals By: COST | | | | 140.26 | 140.26 |
| INFORMATION | | | | 0.00 | 0.00 |
| *** End of Report *** | | | | | |

**IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO**

In Re: STEVEN A. BOZSIK

Judge JAMES L. KIMBLER

**MOTION FOR LEAVE OF THE
COURT PURSUANT TO R.C.
2323.52(F)(1)**

Now comes Steven A. Bozsik, (“movant”), hereby seeks leave of the Court pursuant to RC 2323.52(F)(1) to commence a civil action with the Common Pleas Court of Wayne County, Ohio. The movant is required by law, through an Order from this Court, issued on March 17, 2005, to seek leave under R.C. § 2323.52(F)(1) before commencing a civil action in an Ohio trial court..

The civil action attached hereto, incorporated herein is required against the City of Rittman Cemetery, c/o The Director of Public Service who has statutory responsibility of the city owned property under RC 759.01 et seq. The Director of Public Service fails to comply with the purchase contract, providing the Plaintiff his rightfully owned “Certificate of Burial Rights;” even after, the movant made proper payment under the conditions to the purchase contract.

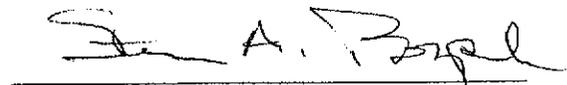
The Court of Common Pleas for Wayne County, Ohio has jurisdiction and is the proper venue, since the City of Rittman Cemetery is located within the boundaries of the County of Wayne, in the State of Ohio. Unless this Court grants leave, the Plaintiff will be denied his due process under Article I, Section 16 to the Ohio Constitution; moreover, the Plaintiff will have no

remedy to correct the injury being caused by the Defendant breaching a purchase contract which Plaintiff satisfied.

This Court is required under law to deny the motion, unless the movant can show the Court, the proposed civil action is not abuse of judicial process and the movant is entitled to probable relief. Attached to the proposed complaint, are copies of the purchase contract and payment receipt, that purports the movant satisfying his contractual responsibility mandating the Defendant through the Director of Public Service for the City of Rittman, Ohio satisfy his contractual and statutory responsibility to the purchase contract of the parties.

Wherefore, movant prays the Court will grant leave under RC 2323.52(F)(1) allowing the movant permission to commence the civil action with the Common Pleas Court of Wayne County, Ohio.

Respectfully submitted,



Steven A. Bozsik 389-250
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901-8107

**IN THE COURT OF COMMON PLEAS
WAYNE COUNTY, OHIO**

STEVEN A. BOZSIK 389-250

No. _____
1001 Olivesburg Rd.
P.O. Box 8107
Mansfield, Ohio 44901-8107

Plaintiff

-vs-

CITY OF RITTMAN CEMETERY

C/o Director of Public Service
City of Rittman, Ohio
12 N. Main Street
Rittman, Ohio 44270

Defendant

Case

Judge _____

COMPLAINT

Type: Breach of Contract

INJUNCTION RELIEF REQUESTED

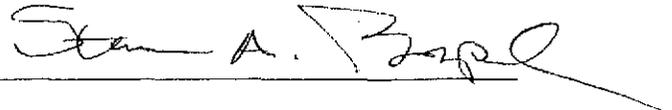
1. Plaintiff, STEVEN A. BOZSIK entered into a purchase contract for two- (2) burial plats on December 3, 1999 with the City of Rittman Cemetery, attached hereto, incorporated herein as Exhibit "A".
2. Defendant, CITY OF RITTMAN CEMETERY is a city owned Cemetery by the City of Rittman, Ohio, statutorily supervised by the Director of Public Service for the City of Rittman under Ohio Revised Code 759.01 et seq.
3. On or about December 5, 1999, Carol Bozsik was interned in one of the two burial plats after the purchase contract was agreed with between the parties.
4. Plaintiff satisfied payment of the purchase agreement identified in Exhibit "A" in February of 2000, attached hereto, incorporated herein, as Exhibit "B".
5. The Defendant, CITY OF RITTMAN CEMETERY, through the Director of Public Service has failed to provide the ownership "Certificate of Burial Rights"

to the Plaintiff for both burial plats after full payment was rendered and the Plaintiff has made demand for the Certificate of Burial Rights.

WHEREFORE, Plaintiff demand's Judgment against the Defendant for the following:

- a. Defendant issue to the Plaintiff his Certificate of Burial Rights as stated and agreed in the purchase contract between the parties..
- b. Defendant is restrained from any internment in the purchase contract-burial plat that was purchased by the Plaintiff on December 3, 1999 unless approved by the Plaintiff or his executrix.
- c. Defendant pays the Plaintiff the appropriate amount of punitive damages as deemed proper by the Court, resulting from the breach of the purchase contract.
- d. Any additional relief required.

Respectfully submitted,



Steven A. Bozsik 389-250
P.O. Box 8107
Mansfield, Ohio 44901

Pro se

THE RITTMAN CEMETERY

Rittman, Ohio

Wayne Co.

Interment Record Interment No. _____

Name.. Carol E. Bozsik Age.. 33 Sex...F Permit # 2295

Date of Death.. 11/30/99 Birthplace.... Wadsworth, OH

Date Interred.. 12/04/99 Place of Death.. Wadsworth, Ohio

Cause of Death .. _____

Last Residence.. 7965 Beach Rd., Wadsworth OH 44281

Father.. John F. Burkhart Mother.. Bernadine Crum

Funeral Director.. Gillman Funeral Home, Rittman, Ohio

Lot No.. 56 Sec... G Grave... 3

Casket Container.... Clark 12 Ga. Galv. Steel

Vault Company... Baumgardner Vault Co.

Lot & Burial Fee \$1,300.00 Cash \$ -0- Balance Due \$1,300.00

Grave Ordered By.. Steven A. Bozsik

Address.. 7965 Beach Rd., Wadsworth OH 44281

\$ 1,300.00 December 3, 1999

30 Days after date for value received I promise to pay to the order of The City of Rittman \$1,300.00 with interest at the rate of 6 per cent per annum at City Hall and I hereby authorize any Attorney-at-law to appear in any Court of Record in the United States, after the above obligation becomes due, and waive the issuing and service of process and confess a judgement against Me in favor of the holder hereof for the amount then appearing due, together with costs of suit, and thereupon to release all errors and waive all rights of appeal.

Signature Steven A. Bozsik

Address... 7965 Beach Rd., Wadsworth, OH 44281

RITTMAN CEMETERIES

RITTMAN, OHIO

No 1410

Certificate of Burial Rights

The **COPY** Rittman, a municipal corporation of the State of Ohio, in consideration of the sum of Nine hundred (\$ 900.00) Dollars, in hand paid, one fifth of which amount shall be placed with the permanent Cemetery endowment fund and four-fifths with the general funds of the City, hereby certifies that

Carol Bozsik family c/o Karen Jordan 344 Nautilus Lane, Rittman, OH 44770

is vested with burial rights in Graves Nos. 3 & 4, Lot No. 56, Section No. 9 as shown on the plat of grounds of The Rittman Cemetery and The Pioneer Memorial Cemetery, in the Township of Milton, County of Wayne, State of Ohio, subject however, to the following terms, conditions and limitations, to-wit:

1. By virtue of this certificate, the holder has only the right and privilege to use the burial area involved, for the interment of dead bodies or parts thereof, in accordance with the rules and regulations of the Cemetery, as now in effect or hereafter to be adopted, all of which are hereby made a part of this certificate, by reference, with the same force and effect as if herein set forth in their entirety.

2. The Burial Rights, evidenced by this certificate, include the privilege of the holder or those entitled to act after his or her death, to authorize interment therein and to erect memorials, **COPY** in accordance with the rules and regulations of the Cemetery.

3. By virtue of this Certificate permanent care shall be provided for the burial area.

4. The Burial Rights of the holder do not include the privilege of doing or having done any work whatsoever in the Cemetery. The Cemetery authorities shall retain exclusive control of all facilities and features within the Cemetery grounds, both as to maintenance, replacement, continuation, alteration and/or removal.

5. The Cemetery authorities shall have exclusive control of the planting, care and maintenance of all grass, shrubbery and trees. They shall retain the right of ingress and egress over the burial area involved, and the right to use such area, temporarily, for any activity necessary for the proper functioning of the Cemetery, as such.

6. In case of a breach by the holder or assigns of any of the terms, limitations or conditions hereinabove set forth, or of the rules and regulations of the Cemetery, now in force or which may be hereafter operative, the burial rights hereby evidenced shall revert to The Rittman Cemetery who may immediately reenter and repossess said premises, and hold the same as if this certificate has never been issued. No waiver of the right to reenter and repossess shall revoke or impair such right of reentry and repossession for any subsequent breach of any of the terms, conditions and limitations of this certificate, nor operate as a waiver other than such specific breach.

In witness whereof, the City of Rittman, by its said Officers, has caused its name to be signed and its corporate seal affixed this First day of March A.D. 2000

THE CITY OF RITTMAN

Signed, and acknowledged in presence of

Tandy S. Spald
Mary Jane Gertman

State of Ohio
County of Wayne [ss.

By Robert Kellogg

City Manager

Attest: Mollie Watson

Clerk of Council

Before me, a Notary Public in and for said County, personally came Mollie Watson,

Clerk of Council, and Robert Kellogg, City Manager, who severally acknowledged they are the respective Officers above designed, of the City of Rittman; the execution of the foregoing Certificate of Burial Rights to be their voluntary act on behalf of the City and the corporate act and deed of said City.

In testimony whereof, I hereunto set my hand and seal this 1 day of March A.D. 19 00

Carol
Notary Public 8-5-2000

STATE OF OHIO)
COURT OF APPEALS
COUNTY OF MEDINA)

67 JAN 24 AM 11:44

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURTS

IN RE: STEVEN A. BOZSIK

C.A. No. 06CA0026-M

JOURNAL ENTRY

Steven A. Bozsik ("Applicant") has filed with this Court an application for leave to proceed pursuant to R.C. 2323.52(F)(2). Bozsik seeks permission to file a petition for writ of mandamus to order Judge James Kimbler to vacate three orders filed pursuant to R.C. 2323.52(F)(1).

Before considering the merits of the application, we first address three preliminary issues Bozsik raises. First, Bozsik asserts that he should not need to seek leave from this Court because Judge Kimbler's order did not require that Bozsik seek leave from a court of appeals prior to filing in the court of appeals. The plain language of R.C. 2323.52(F)(2) requires Bozsik to seek leave to proceed in this Court: "A person who is subject to an order entered pursuant to division (D)(1) of this section [Bozsik concedes he is such a person] and who seeks to institute or continue any legal proceedings in a court of appeals [Bozsik concedes this is his goal] * * * in any legal proceedings in a court of appeals shall file an application for leave to proceed in the court of appeals in which the legal proceedings would be instituted * * *." R.C. 2323.52 does not require the trial court to include in its order finding a person to be a

I hereby certify that this is a true copy of the original on file in said Court. Witness my hand and the seal of said Court at Medina, Ohio this 24th day of January, 2007. Kathy Fortney, Clerk of Courts, Deputy.

Tax 1
copy

vexatious litigator a limitation on the vexatious litigator's ability to file in the court of appeals. The statute, by its plain language, requires a person found to be a vexatious litigator to seek permission from a court of appeals before filing in the court of appeals.

Second, Bozsik asserts that this Court's requirement that he seek leave from this Court prior to filing conflicts with the decision of the Fifth District Court of Appeals in *Castrataro v. Urban* (2003), 155 Ohio App.3d 597. After reviewing *Castrataro*, we cannot find that the Fifth District Court of Appeals ever mentioned or considered the requirement that the vexatious litigator seek leave in order to file anything in the court of appeals. We cannot conclude that the absence of this discussion leads logically to the conclusion that the Fifth District Court of Appeals does not require an applicant to comply with R.C. 2323.52(F)(2).

A number of recent decisions further support this Court's conclusion that an applicant must seek leave from this Court. For example, in *State ex rel. Howard v. Member of Bench*, 10th Dist. No. 05AP-808, 2006-Ohio-3265, the Tenth District Court of Appeals held that the applicant must seek leave in the Court of Appeals before filing a petition for writ of mandamus because a trial court declared he was a vexatious litigator. See, also, *State v. Baumgartner*, 6th Dist.No. E-06-045, 2006-Ohio-3792; *Grundstein v. Carroll*, 8th Dist.No. 86604, 2006-Ohio-2215; *Huntington Natl. Bank v. Lomaz*, 11th Dist.No. 2005-P-0075, 2006-Ohio-3880.

Third, Bozsik asserts that the Supreme Court of Ohio "virtually authorized the movant to commence this mandamus action" in *Mayer v. Bristow* (2000), 91 Ohio St.3d 3. The *Mayer* Court found that R.C. 2323.52, the vexatious litigator statute, was constitutional. *Id.*, paragraph one of the syllabus. When considering R.C. 2323.52(G),

the provision limiting the ability of a vexatious litigator to appeal the trial court's denial of leave, the Supreme Court held that "in this specific situation, under this particular statute, an original action in mandamus is an appropriate means by which the vexatious litigator could effectively challenge arbitrary denials of leave." *Mayer*, 91 Ohio St.3d at 15. However, the statute the *Mayer* Court reviewed changed after the Supreme Court's decision. The new version of the statute, specifically R.C. 2323.52(F)(2), requires a vexatious litigator to seek leave from the Court of Appeals. Thus, the version of the statute the Supreme Court considered is not the statute this Court must apply. Under the current version of the statute, Bozsik must seek leave to proceed from this Court, just as the applicants in *Baumgartner*, *Grundstein*, and *Lomaz*, supra, were required to seek leave to proceed in the courts of appeal.

With those preliminary matters resolved, we turn to Bozsik's application. R.C. 2323.52(F)(2) provides:

"The court of appeals shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of appeals unless the court of appeals is satisfied that the proceedings or application are not an abuse of process of the court and that there are reasonable grounds for the proceedings or application."

To grant Bozsik's application for leave to proceed, this Court must find both that the proceeding is not an abuse of process and that reasonable grounds for the proceeding exist.

Upon consideration of Bozsik's application, this Court concludes that reasonable grounds do not exist for the underlying action. Bozsik seeks to file a petition for writ of mandamus to order Judge Kimbler to vacate three orders denying Bozsik's applications he filed seeking permission to file three motions. Because R.C. 2323.52(G) prohibits an

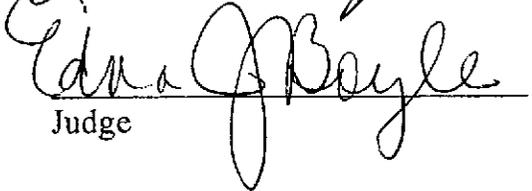
appeal from these decisions, Bozsik asserts that he must be permitted to petition for a writ of mandamus to challenge Judge Kimbler's decisions.

Bozsik did not meet his burden under R.C. 2323.52(F)(2). He failed to demonstrate that there are reasonable grounds for this action. Bozsik argued that he should not have to comply with the vexatious litigator statute, as discussed above. But Bozsik did not articulate reasonable grounds to pursue this action. Bozsik failed to meet his obligation to demonstrate reasonable grounds to file a petition and, therefore, this Court denies his application.

There are no reasonable grounds for this proceeding. Accordingly, the application for leave to proceed is denied and the matter is dismissed. Costs taxed to Applicant.



Judge



Judge

FILED
IN THE COURT OF COMMON PLEAS, WAYNE COUNTY, OHIO
WAYNE COUNTY, OHIO

STEVEN A. BOZSIK 2007 SEP 5 AM 9 07

Plaintiff

TIM NEAL
CLERK OF COURTS

CASE NO. 06-CV-0849

vs.

CITY OF RITTMAN CEMETERY

FINAL JUDGMENT ENTRY

Defendant

This is a ruling on cross motions for summary judgment. Plaintiff's motion is denied and defendant's motion granted. Plaintiff's amended complaint is dismissed with prejudice. Plaintiff's 12(B)(6) motion to dismiss defendant's counterclaim is granted.

Plaintiff has already been declared a vexatious litigator in Medina County and had judicial approval to file this suit.

Costs to plaintiff.

IT IS SO ORDERED.



Mark K. Wiest, Judge

Dated: _____

9/5/07

JOURNALIZED

SEP - 5 2007

TIM NEAL
CLERK, WAYNE COUNTY, OHIO

**STAMP "FILED"
AND RETURN**

**IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT OF OHIO
WAYNE COUNTY**

IN RE: STEVEN A. BOZSIK

Case No.

07 CA 0069

Movant

STEVEN A. BOZSIK

Plaintiff-Appellant

vs

On appeal from the Wayne County Court
of Common Pleas

CITY OF RITTMAN CEMETERY

Case No. 06-CV-0849

Defendant-Appellee

**MOTION FOR LEAVE PURSUANT TO
O.R.C. § 2323.52(F)(2)**

For the Movant

STEVEN A. BOZSIK 389-250
1001 Olivesburg Rd.
P.O. Box 8107
Mansfield, Ohio 44901-8107

FILED
9TH DISTRICT
COURT OF APPEALS
2007 SEP 18 AM 8 28
TIM NEAL
CLERK OF COURTS

11
1-21

Now comes Steven A. Bozsik, ("movant"), hereby moves this Honorable Court pursuant to O.R.C. § 2323.52(F)(2), seeking leave of this Court to commence a civil appeal from a final appealable order issued by the Wayne County Court of Common Pleas. This Court has previously mandated the movant to seek leave since he was labeled a vexatious litigator on March 17, 2005 from the Medina County Court of Common Pleas, even though, the vexatious litigator journal entry does not mandate this review.

This Court is required to deny the motion, unless the movant can justify the proposed appeal is not an abuse of process and the movant has a reasonable claim for this Court's review. See, O.R.C. § 2323.52(F)(2). This appeal brings forth claims for relief that needs the interpretation of law, including the facts since the trial court addressed the case merits and the screening court granted leave pursuant to O.R.C. § 2323.52(F)(1).

This Court is urged not to surmise what occurred during the litigation of the case since the record is not before this Court. The Ohio Constitution mandates a moving party an appeal of right if the inferior court issues a final appealable order; otherwise, this Court would lack jurisdiction to entertain the appeal if the order is not final by the inferior court.

Both the screening court and the trial court agreed the face of the complaint warrants probable relief. The record will purport the trial court setting a deadline for each motion for summary judgment, which is a review of the case merits and not a frivolous complaint trying to harass the party. In fact the final order grants the movant's motion to dismiss the counter claim so obvious merits in the case exist. With this being said the face of the final journal entry should muster the screening process in O.R.C. § 2323.52(F)(2) and leave should be granted.

The succinct journal entry by the trial court is vague as to how the court reviewed the merits of the case since no finding of facts and conclusion of law was journalized with the

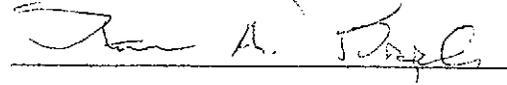
judgment order. Assuming arguendo the trial court was not required to issue finding of facts and conclusion of law¹ with the summary judgment decision, this Court is required by law to review a court's order for summary judgment de novo. See, *McGee v. Goodyear Atomic* (4th Cir 1995), 103 Ohio App.3d 236, 659 N.E.2d 317 (citing, *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio St.3d 103, 107, 614 N.E.2d 765, 767-68). The *McGee* Court also opined: "That is not to say that we afford no deference whatsoever to the trial courts decision." (citing *Shepherd v. United Parcel Service* (1992), 84 Ohio App. 634, 641, 617 N.E.2d 1152, 1156-57.) In other words, this Court should conduct it's own review to determine if summary judgment was proper. See, *Schartz v. Bank One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809, 619 N.E.2d 10, 11-12. Therefore, it is imperative for this Court to grant leave since the case merits where reviewed by the trial court and the screening court granted leave. Furthermore a final appealable order has been issued mandating an appeal of right.

Accordingly, this Court is urged to grant leave pursuant to O.R.C. § 2323.52(F)(2) permitting this Court to entertain the complaint since the trial court and reviewing court both authorized the complaint to continue. The appeal is not an abuse of process and clearly satisfied Ohio law and not just an attempt to harass the opposing party since leave was granted by trial court issuing the vexatious litigator order.

¹ Findings of fact and conclusion of law were unnecessary in disposition of summary judgment motion. *Stanton v. Miller* (1ST Dist. 1990), 66 Ohio App.3d 201, 583 NE2d 1080.

It is so prayed this Court will grant leave pursuant to O.R.C. § 2323.52(F)(2) and permit the movant to file his notice of appeal and docketing statement with the time it takes this Court to issue its order not computed in the limitation time of App.R. 3.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Steven A. Bozsik", is written over a horizontal line.

Steven A. Bozsik 389-250
P.O. Box 8107
Mansfield, Ohio 44901

STATE OF OHIO)
COUNTY OF WAYNE)

FILED
STW DISTRICT IN THE COURT OF APPEALS
)ss: COURT OF APPEALS NINTH JUDICIAL DISTRICT

2007 NOV 15 AM 7 51

STEVEN A. BOZSIK

TIM HEAL
CLERK OF COURTS C.A. No. 07CA0069

Appellant

v.

CITY OF RITTMAN CEMETERY

Appellee

JOURNAL ENTRY

Steven Bozsik ("Applicant") has filed with this Court an application for leave to proceed pursuant to R.C. 2323.52(F)(2). The application seeks permission to appeal from the trial court's September 5, 2007, order, which granted summary judgment in favor of Defendant and dismissed Applicant's complaint.

R.C. 2323.52(F)(2) provides:

"The court of appeals shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of appeals unless the court of appeals is satisfied that the proceedings or application are not an abuse of process of the court and that there are reasonable grounds for the proceedings or application."

Thus, a court of appeals is precluded from granting an application for leave to proceed unless it determines both that the proceeding is not an abuse of process and that reasonable grounds for the proceeding exist.

Upon consideration of Applicant's proposed filing and the relief requested therein, this Court concludes that reasonable grounds for this action do not exist.

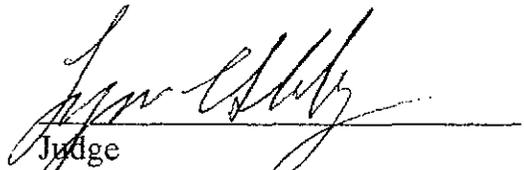
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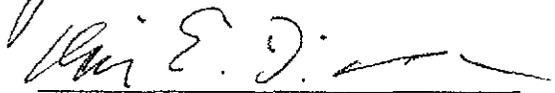
Accordingly, the application for leave to proceed is denied and the matter is dismissed.

Costs taxed to Applicant.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to App.R. 30, and to provide a certified copy of the order to the clerk of the trial court. The clerk of the trial court is ordered to provide a copy of this order to the judge who presided over the trial court action.



Judge



Judge

FILED
COURT OF COMMON PLEAS

MAY 03 2005

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

05VL1

| | | |
|---|---|------------------------------|
| Lawrence De Leon Lomaz, |) | <u>CASE NO. 5:03 CV 2609</u> |
| |) | |
| Plaintiff, |) | JUDGE PATRICIA A. GAUGHAN |
| |) | |
| vs. |) | |
| |) | |
| Ohio Department of Commerce, |) | <u>Order</u> |
| Division of State Fire Marshal, et al., |) | |
| |) | |
| Defendants. |) | |

IT IS HEREBY ORDERED that:

1. Lawrence De Leon Lomaz aka Larry Lomaz ("Lomaz") is hereby declared a "vexatious litigator" as defined in Ohio Revised Code § 2323.52(A)(3) and under federal law.
2. Unless Lomaz first obtains leave of this Court to institute a legal proceeding or an application based upon reasonable grounds and which is not an abuse of process, he is prohibited, both individually and through any of his affiliates or related companies or business entities (including without limitation Pacific Financial Services of America, Inc. and Midwest Fireworks Manufacturing Co., Inc. II) (collectively "Lomaz Entities"), either *pro se* or through legal counsel, from:

- (a) Instituting legal proceedings (including counterclaims, crossclaims or third-party complaints) in (i) any Ohio court, including the court of claims or in a court of common pleas, municipal court, county court, court of appeals, or The Supreme Court of Ohio or (ii) any federal court; or
- (b) Continuing any legal proceedings (including counterclaims, crossclaims or third-party complaints) that he has instituted prior to the entry of this order in (i) any Ohio court, including the court of claims or in a court of common pleas, municipal court, county court, court of appeals, or The Supreme Court of Ohio or (ii) any federal court; or
- (c) Making or filing any motion or application in any legal proceedings, whether instituted by either one of the Lomaz Entities or any other entity in (i) any Ohio court, including the court of claims or in a court of common pleas, municipal court, county court, court of appeals, or The Supreme Court of Ohio or (ii) any federal court, except for an application to this Court for leave to take one of the actions prohibited above, or
- (d) Issuing any subpoenas or causing any court to issue a subpoena; or
- (e) Sending any threatening letter or other threatening communication to any person if it is related in any way to litigation; or
- (f) Causing any company or other entity which he controls or owns, to do any of the foregoing.

3. During the period of time that this Order is in force, no appeal by Lomaz (or a Lomaz Entity) shall lie from a decision of this Court that denies him leave, pursuant to O.R.C. § 2323.52(F) or pursuant to federal law, for taking any of the actions listed in paragraph 2 above.

4. Any request for leave pursuant to paragraph 2(c) above shall (a) be filed with the Clerk of Courts for the United States District Court for the Northern District of Ohio, (b) demonstrate that the proceedings or application are not an abuse of process and that there are reasonable grounds for the proceeding or application, (c) be served on any party which would be adversely affected by Lomaz's proposed action, which party shall have an opportunity to respond.

5. The Clerk of Courts shall send a certified copy of this Order to the Supreme Court of Ohio for publication in a manner that the Supreme Court of Ohio determines is appropriate and that will facilitate the clerk of the court of claims and a clerk of a court of common pleas, municipal court, county court, court of appeals, The Ohio Supreme Court and all federal courts in refusing to accept pleadings or other papers submitted for filing by Lomaz or a Lomaz Entity who has been found to be a Vexatious Litigator, if he has failed to obtain leave as required by this Order.

6. Whenever it appears by suggestion of any person or entity that Lomaz or a Lomaz Entity has instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from this Court, the court in which the legal proceedings are pending shall dismiss the proceedings or application of Lomaz or the Lomaz Entity.

7. This Order shall remain in force indefinitely unless and until modified by this Court.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

Dated: 4/20/05

IN THE COURT OF COMMON PLEAS
OTTAWA COUNTY, OHIO

Mark E. Mulligan as
Ottawa County Prosecutor,

Plaintiff,

vs.

Elsebeth M. Baumgartner,

Defendant.

Case No. 02-CVH-025

JUDGE RICHARD M. MARKUS

JUDGMENT ENTRY

OFFICE OF THE CLERK OF COURT
OTTAWA COUNTY, OHIO
JUL 1 5 11 10 AM '02
COMMON PLEAS COURT

This case came for trial before the Honorable Richard M. Markus, Retired Judge recalled to service pursuant to Ohio Constitution Art. IV Section 6(C) and Ohio R.C. 141.16, and assigned by the Chief Justice to the Ottawa County Common Pleas Court for this matter. Present in Court were Plaintiff Mark Mulligan, Ottawa County Prosecuting Attorney, and Plaintiff's attorney Teresa Grigsby.

Though she received adequate notice of the duly scheduled trial, Defendant Elsebeth Baumgartner did not appear for trial. Immediately before the trial commenced the Court contacted the Defendant by telephone, and the Defendant expressly advised the Court that she would not participate in the proceedings. The case proceeded to trial, and the Court received documentary and testimonial evidence from the Plaintiff.

Based upon clear and convincing evidence, the Court finds that Defendant Elsebeth Baumgartner is, and is declared to be, a vexatious litigator as that term is defined in R.C. §2323.52(A)(3).

It is therefore ORDERED that Elsebeth Baumgartner is prohibited, without first obtaining leave of this Court, from:

- 1) instituting new legal proceedings in the court of claims, in a court of common pleas, a municipal court or a county court;
- 2) continuing any legal proceedings which she has instituted in any of the courts specified in item (1) above; and
- 3) making any application [other than an application for leave to proceed under R.C. §2323.52(F)(1)] in any legal proceeding instituted by Defendant or another person in any of the courts specified in item (1) above.

Within 30 days after the filing of this Judgment Entry, Defendant shall file her request, if any, for leave to continue the assertion of any pending claim she has in an Ohio court of common pleas, municipal court, or county court in which she is a party, which cases include (but are not limited to):

- a) Baumgartner v. Smith Case No. 01-CVC-136 (Ottawa County Common Pleas Court);
- b) Baumgartner v. Druckenmiller Case No. 01-CV-223 (Ottawa County Common Pleas Court)
- c) National Bank of Oak Harbor v. Baumgartner Case No. 01-CVE-003 (Ottawa County Common Pleas Court)
- d) National Bank of Oak Harbor v. Baumgartner Case No. CJ26-016 (Ottawa County Common Pleas Court)
- e) National Bank of Oak Harbor v. Baumgartner Case No. 01-EX-010 (Ottawa County Common Pleas Court)
- f) Baumgartner v. Smith Case No. 02-CVC-048 (Ottawa County Common Pleas Court)

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The request for leave shall be filed with the Clerk of the Ottawa County Common Pleas Court which shall forward it to the undersigned Judge assigned to this matter for ruling. Any application to continue the assertion of any claim in any Ohio common pleas, municipal, or county court must demonstrate that the proceedings or application are not an abuse of process and that there are reasonable grounds for the proceeding or application. If the Defendant fails to file such an application for any claim in any of the previously designated trial court cases within 30 days after the filing of this Judgment Entry, or if the application fails to satisfy this court that the proceedings or application are not an abuse of process and that there are reasonable grounds for the proceeding or application, this Court will dismiss any or all of the Defendant's pending claims in those cases with prejudice.

If the Defendant seeks to institute or continue any legal proceeding in a court of appeals or to make an application in any court of appeals, other than an application for leave to proceed under R.C. 2323.52(F)(2), she shall file an application for leave to proceed in the court of appeals in which the legal proceedings would be instituted or are pending, which cases include (but are not limited to):

- a) Baumgartner v. Smith Case No. OT-03-050 (Sixth District Court of Appeals)
- b) In Re Incarceration of Baumgartner v. Sheriff Emahiser Case No. OT-03-023 (Ottawa County Court of Appeals, Sixth Appellate District)
- c) State ex. rel. Baumgartner v. Judge Adkins, et. al. Case No. OT-03-033 (Ottawa County Court of Appeals, Sixth Appellate District);
- d) Albrechta and Coble v. Baumgartner Case No. S-03-006 (Sandusky County Court of Appeals, Sixth Appellate District)

Pursuant to R.C. 2323.52(F)(2), the court of appeals shall not grant that application unless it is satisfied that it complies with R.C. 2323.52(F)(2).

It is further ORDERED that the clerk of the Ottawa County Common Pleas Court shall send a certified copy of this Judgment Entry to the Supreme Court of Ohio for publication in a manner that the Supreme Court determines to be appropriate and that will facilitate the clerk of the court of claims, and a clerk of a court of appeals, common pleas court, municipal court or county court in refusing to accept pleadings or other papers submitted by Defendant for filing without having obtained leave to proceed.

The clerk of the Ottawa County Common Pleas Court shall also send a certified copy of this Judgement Entry to the Ohio Court of Appeals for the Sixth Appellate District for its consideration in relation to the cases pending there in which the Defendant asserts any claim.

April 1, 2004
Date

Richard M. Markus
Judge Richard M. Markus
Retired Judge recalled to service pursuant to Ohio Constitution Art. IV Section 6(C) and Ohio R.C. 141.16, and assigned by the Chief Justice to the Ottawa County Common Pleas Court for this matter

THE CLERK SHALL MAIL TIME STAMPED COPIES OF THIS ORDER
TO PLAINTIFF'S COUNSEL AND THE PRO SE DEFENDANT
AND TO THE VISITING JUDGE

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

Gregory T. Howard,

Plaintiff,

v.

Ohio State Supreme Court,

Defendant.

Case No. 05CVH-01-398

FILED
CLERK OF COURTS
2006 JAN 11 AM 10:05

**NUNC PRO TUNC
FINAL JUDGMENT ENTRY AND ORDER**

This cause came before the court for consideration of Defendant Supreme Court of Ohio's Motion to Dismiss Plaintiff's Complaint and corresponding Counterclaim, seeking only to have Plaintiff declared a "vexatious litigator." The court, being fully advised, in a Decision rendered April 28, 2005, finds that the Supreme Court of Ohio's Motion to Dismiss and Counterclaim is **WELL-TAKEN** and is therefore **GRANTED** in its entirety.

Furthermore, pursuant to R.C. §2323.52, the State of Ohio has defended against the habitual and persistent vexatious conduct of Plaintiff Gregory T. Howard in various courts across the state. Thus, this Court hereby specifically finds that Howard is a "vexatious litigator" within the meaning of the statute, and intends that the prohibitions contained in R.C. §2323.52 shall operate to the fullest extent. Pursuant to R.C. §2323.52, Howard has repeatedly engaged in vexatious conduct in various civil actions he has brought, including but not limited to those against the Supreme Court of Ohio, as a pro se plaintiff. This Court finds that Howard's conduct has overwhelmingly not been warranted under existing law and has not been supported by a good-faith argument for an extension, modification, or reversal of existing law.

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MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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Therefore, it is hereby **ORDERED** that Howard is prohibited from doing any of the following without first obtaining leave of this Court to Proceed:

1. Howard shall not institute any legal proceeding, nor make any application, other than an application to this Court for leave to proceed under division (F) of R.C. §2323.52, in the Ohio Court of Claims, or in any county court of common pleas, municipal court, or other county court of Ohio.
2. Howard shall not continue in any legal proceeding that he has instituted in the Ohio Court of Claims, or in any court of common pleas, municipal court, or other county court of Ohio prior to the date of the Entry of this Order.
3. Howard shall not institute a legal proceeding in any court of appeals, or continue any legal proceeding already instituted in a court of appeals prior to entry of this order, other than an application for leave to proceed under division (F) of R.C. §2323.52.

Pursuant to R.C. §2323.52(E), this Order shall remain in force indefinitely.

Pursuant to R.C. §2323.52(F), only this Court may grant Howard leave for institution or continuance of, or making an application in, legal proceedings in the Ohio Court of Claims, or in any court of common pleas, municipal court, or any county court in Ohio. This court will only grant such leave if it is satisfied that the proceedings or application are not an abuse of process of the court in question, and that there are reasonable grounds for the proceeding or application. If leave is granted, it will be in the form of a written order by this Court. Pursuant to R.C. §2323.52(D)(3), only the relevant court of appeals may grant Howard leave to institute or continue an action in the relevant court of appeals.

Additionally, if Howard requests this Court to grant him leave to proceed as described in R.C. §2323.52(F), the period of time commencing with the filing with this Court of an application for the issuance of an order granting leave to proceed and ending with the issuance of

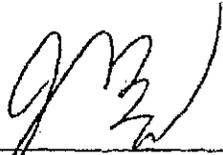
an order of that nature shall not be computed as part of an applicable period of limitations within which the legal proceedings or application involved generally must be instituted or made.

Pursuant to R.C. §2323.52(G), no appeal by Howard shall lie from a decision of this Court if this Court denies Howard, under R.C. §2323.52(F), leave for the institution or continuance of, or the making of an application in, legal proceedings in the Ohio Court of Claims or in any court of common pleas, municipal court, or county court in Ohio.

Pursuant to R.C. §2323.52(H), the Franklin County Common Pleas Clerk of Courts shall immediately send a certified copy of this order to the Ohio Supreme Court for publication in a manner that the Supreme Court determines is appropriate and that will facilitate the clerk of the Court of Claims and clerks of all courts of common pleas, municipal courts, or any county courts in Ohio in refusing to accept pleadings or other papers submitted for filing by Howard if he has failed to obtain leave under R.C. §2323.52(F) to proceed.

Pursuant to R.C. §2323.52(I), whenever it appears by suggestion of the parties or otherwise that Howard has instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from this court, the court in which legal proceedings are pending shall immediately dismiss the proceeding or application of Howard.

IT IS SO ORDERED.



Judge John F. Bender

Submitted by:

/s/

Rene L. Rimelspach (0073972)
Counsel for Defendant, Supreme Court of Ohio

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

LINDA CASTRATARO :
Plaintiff, ⁸⁶ :
-vs- 188-199: :
KENNETH URBAN :
Defendant :

Case No. 02CV-A-11-677

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
03 MAY -9 AM 11:17
JAN ANTONOPLOS
CLERK

JUDGMENT ENTRY

This case is presently pending before this Court on the Motion Of Defendant Dr. Kenneth Urban For Summary Judgment, Defendant Dr. Kenneth Urban having filed said Motion on January 27, 2003; Plaintiff's Memorandum Contra Motion For Summary Judgment; Oral Hearing Requested; Motion Contra Counterclaim Of Vexatious Litigator/Motion For Oral Hearing On Civil Rule 60 Motion, Plaintiff having filed said Motions and Memorandum Contra on February 21, 2003; the Reply of Defendant Dr. Kenneth Urban To Plaintiff Linda Castrataro's Memorandum Contra To Motion Filed On January 27, 2003, Defendant having filed said Reply on February 27, 2003; and the Memorandum Contra Of Defendant Dr. Kenneth Urban To Plaintiff Linda Castrataro's Rule 60(B) Motion Filed On February 21, 2003, Defendant having filed said Memorandum Contra on March 6, 2003.

This Court must make disposition of the instant Motion for Summary Judgment within the confines of Rule 56(C) of the Ohio Rules of Civil Procedure, as well as the interpretation of that rule by the Supreme Court of Ohio. Civ.R. 56; See State ex rel. Zimmerman v. Tompkins (1996), 75 Ohio St.3d 447, 663 N.E.2d 639; Dresher v. Burt

**Common Pleas Court
Delaware Co., Ohio**

**I hereby certify the within be a true
copy of the original on file in this office.
Jan Antonoplos, Clerk of Courts**

By Jan Libera Deputy

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(1996), 75 Ohio St.3d 280, 662 N.E.2d 264. Pursuant to Civil Rule 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of dispute as to a material fact. Dresher, at 293. However, the moving party cannot discharge its burden with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must be able to point to evidence of a type listed in Civil Rule 56(C), affirmatively demonstrating that the nonmoving party has no evidence to support the claims. Id.; Vahila v. Hall (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164. Moreover, Summary Judgment is appropriate if the nonmoving party does not respond with, or fails to set forth, by affidavit or as otherwise provided in Civil Rule 56, specific facts showing that there is a genuine issue for trial. Dresher, at 293; Civ.R. 56(E).

Inevitably, a Motion for Summary Judgment may not be granted unless the court determines that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the Motion for Summary Judgment is made. Tompkins, at 448.

The instant case arose as result of a Complaint Plaintiff filed on November 18, 2002. Plaintiff's Complaint alleges a single cause of action, nominally for breach of contract, against Defendant Dr. Kenneth Urban. Plaintiff alleges that she "was a patient of Doctor Urban in Franklin County about May thru [sic] September, 1995." Plaintiff also alleges "Defendant orally agreed with Plaintiff to treat Plaintiff for medical problems in which he was qualified to prescribe medication and treatment. Defendant was given reimbursement for his services and subsequently failed to fulfill his legal obligations as to

disclosing medical information, misleading his patient, and giving his patient false information.” Plaintiff further alleges that Defendant “did not in good faith fulfill his obligations to Plaintiff as a patient or client.” Plaintiff seeks damages as compensation for Defendant’s alleged wrongful conduct.

In response to Plaintiff’s Complaint, Defendant filed an Answer in which he denied the material allegations contained in Plaintiff’s Complaint and raised various defenses to Plaintiff’s cause of action. Additionally, Defendant brought a counterclaim seeking a declaration from this Court stating that Plaintiff qualifies as a vexatious litigator under the provisions of Section 2323.52 of the Revised Code. Defendant now seeks summary judgment against the Plaintiff not only on the claim raised in her Complaint but on his counterclaim as well.

The instant case is not the first case Plaintiff has filed against Defendant in this Court. See Castrataro v. Urban, Case No. 01CV-A-05-243. Plaintiff’s complaint in Case No. 01CV-A-05-243 contained allegations materially identical and, indeed, verbatim to those contained in the instant Complaint. Defendant eventually filed a motion for summary judgment in that case. Plaintiff failed to respond to the motion and, in fact, upon filing her complaint made no further appearance whatsoever. This Court sustained Defendant’s motion and dismissed the case. This Court subsequently found that Plaintiff’s failure to pursue her case against Dr. Urban constituted “frivolous conduct” and, as a consequence, pursuant to the provisions of Section 2323.51 of the Revised Code, charged Defendant’s attorneys’ fees against her. On appeal, the Fifth District Court of Appeals affirmed this Court’s disposition of Case No. 01CV-A-05-243. See Castrataro v. Urban (Ohio App. 5th Dist. June 27, 2002), Case No. 01CAE12064, 2002 – Ohio – 3472.

In addition to the cases Plaintiff filed against Defendant in this Court, Plaintiff

previously filed similar cases against Defendant in the Franklin County Court of Common Pleas. In April, 1997, Plaintiff filed the first of her cases against Defendant. See Castrataro v. Urban (Franklin Cty. C.C.P.), Case No. 97CVA04-4393. Plaintiff alleged in her complaint in Case No. 97CVA04-4393 that she sought medical care from Defendant on May 12, 1995. Plaintiff alleged that, although Dr. Urban conducted a battery of tests and examinations, he "failed to properly diagnose and treat Plaintiff for Epstein-Barr virus on or about June 9th, 1995." Defendant moved for summary judgment on the basis that Plaintiff could produce no evidence creating a genuine issue of material fact on the issue of whether or not Defendant deviated from the applicable standard of care governing his treatment of the Plaintiff. The trial court sustained Defendant's motion. On appeal, the Tenth District Court of Appeals reversed on the grounds that Defendant failed to attach an affidavit demonstrating that he treated Plaintiff within the applicable standard of care and that Plaintiff could produce no evidence to rebut the same. Castrataro v. Urban (Ohio App. 10th Dist. 2000), 2000 WL 254315 *1. In reversing, however, the Court noted the trial court's observation that Plaintiff's failure to disclose an expert witness who might testify on her behalf rendered her malpractice claim against Dr. Urban essentially unsupported. Id. Following remand, Plaintiff voluntarily dismissed Case No. 97CVA04-4393.

On March 13, 2001, Plaintiff re-filed her case against Defendant in Franklin County. See Castrataro v. Urban (Franklin Cty. C.C.P.), Case No. 01CVA03-2391. Again Defendant moved for summary judgment. In support, Defendant relied upon affidavit and deposition testimony establishing that he examined and treated Plaintiff within the accepted standard of care. In reviewing Defendant's motion, the trial court found the testimony of the expert Plaintiff presented in opposition to the motion provided little, if

any, support for her case and generally supported Defendant's position. The trial court ultimately sustained Defendant's motion for summary judgment and dismissed the action. There is no evidence in the instant record indicating whether or not Plaintiff has taken an appeal from that decision.

Now, in support of the present Motion for Summary Judgment, Defendant contends Plaintiff split a malpractice action into claims for negligence and breach of contract. Defendant also draws attention to the fact that Plaintiff filed separate actions on these respective claims in courts sharing concurrent jurisdiction. Accordingly, Defendant contends that this Court lacks jurisdiction to proceed further given the fact the Franklin County Court of Common Pleas obtained jurisdiction prior to this Court obtaining such jurisdiction. On that basis, Defendant seeks summary judgment on Plaintiff's Complaint.

A claim arising out of alleged misconduct of a medical professional constitutes a cause of action for malpractice regardless of whether the claim is brought as either a tort or a contract action. Prysock v. Ohio State University Medical Center (Ohio App. 10th Dist. 2002), 2002 WL 1164098, 2002-Ohio-2811, ¶10. Moreover, under the "jurisdictional priority rule," among courts sharing concurrent jurisdiction, the court whose power is first invoked acquires exclusive jurisdiction to adjudicate the claims and issues existing between the parties. State ex rel. Dannaher v. Crawford (1997), 78 Ohio St.3d 391, 393, 678 N.E.2d 549. An examination of the pleadings both here and in Franklin County quite clearly reveals that Plaintiff has pursued and is presently pursuing a malpractice action against Dr. Urban arising out of the same operative and material facts, though her Franklin County actions sound in tort while the actions before this Court sound in contract. It is equally clear the Franklin County Court of Common Pleas obtained jurisdiction to adjudicate Plaintiff's malpractice claim prior in time to this Court

obtaining jurisdiction. Therefore, this Court is, once again, without jurisdiction to consider Plaintiff's claim, leaving it with no choice but to sustain Defendant's Motion for Summary Judgment.

Nevertheless, in opposition to Defendant's Motion, Plaintiff argues the procedural issues Defendant raises "[are] not correct and [are] not directly relevant at this time to this lawsuit." Interestingly, Plaintiff attempts in her Memorandum Contra to frame her cause of action as one of fraud. Granted, a party may pursue a cause of action for fraud independent of an action based on alleged malpractice. See e.g. Gaines v. PreTerm – Cleveland Inc. (1987), 33 Ohio St.3d 54, 514 N.E.2d 709. However, a party must plead an action for fraud with particularity. Civ.R. 9(B). A party seeking to establish fraud must demonstrate a representation or, where there is a duty to disclose, concealment of a fact; which is material to the transaction at hand; made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; with the intent of misleading another into relying upon it; justifiable reliance upon the representation or concealment; and a resulting injury proximately caused by the reliance. Burr v. Stark County Board of Commissioners (1986), 23 Ohio St.3d 69, 73, 491 N.E.2d 1101. Here, Plaintiff failed to plead the elements of fraud, let alone plead those elements with any semblance of particularity. Thus, Plaintiff cannot seriously expect this Court to entertain the notion that her claim against Defendant constitutes a cause of action for fraud.

Additionally, Plaintiff claims that summary judgment is not appropriate at this time in light of the fact that discovery remains ongoing. Whether Plaintiff realizes it or not, Civil Rule 56(B) provides that a "party against whom a claim is asserted *** may at any time, move with or without supporting affidavits for summary judgment in his favor

as to all or any part thereof.” Civ.R. 56(B) (emphasis added). Consequently, contrary to Plaintiff’s belief, the instant case is eminently ripe for a motion for summary judgment.

Lastly, Plaintiff insists on this Court scheduling an oral hearing on Defendant’s Motion. A court is not required to hold an oral hearing on a motion for summary judgment, Huntington National Bank v. Ross (10th Dist. 1998), 130 Ohio App.3d 687, 697, 720 N.E.2d 1000, and the decision to do so lies in the discretion of the trial court. Doe v. Beach House Development Co. (8th Dist. 2000), 136 Ohio App.3d 573, 583, 737 N.E.2d 141. It is not entirely clear why Plaintiff believes an oral hearing on Defendant’s Motion is necessary. Plaintiff’s overall argument in opposition to Defendant’s Motion suggests that she wishes to present, at the oral hearing, evidence to support her allegations against the Defendant. A court, however, in deciding a motion for summary judgment, may not consider evidence adduced at oral hearings. See Carrabine Construction Co. v. Chrysler Realty Corp. (1986), 25 Ohio St.3d 222, 495 N.E.2d 952. Furthermore, it has been this Court’s experience that parties tend to set forth their arguments, either in opposition to or in support of such motions, clearly and more concisely in textual form, rather than by oration. As a result, this Court believes that oral hearings on motions for summary judgment are largely useless exercises. Therefore, this Court finds an oral hearing on Defendant’s Motion unnecessary.

On the basis of the foregoing, this Court sees no reason to not now proceed with summary judgment and, indeed, enter summary judgment in Defendant’s favor.

Defendant also seeks summary judgment on the issue of whether or not Plaintiff qualifies as a “vexatious litigator” pursuant to the provisions of Section 2323.52 of Revised Code. Section 2323.52 provides, in relevant part:

“[a] person *** who has defended against habitual and persistent vexatious

conduct in the court of claims or in a 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.”

R.C. § 2323.52(B). Section 2323.52 defines “vexatious conduct” as 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.”

R.C. § 2323.52(A)(2). Furthermore, Section 2323.52 defines a “vexatious litigator” as:

“any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claim or in a 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.”

R.C. § 2323.52(A)(3).

In support of the instant Motion as it relates to his counterclaim, Defendant directs attention to the actions against which he has had to defend not only in this Court and in Franklin County, but in federal court as well. Defendant submits the pertinent pleadings from those cases as well as certified copies of judicial decisions from the issuing courts evidencing disposition of the substantive merits therein and the cases in general. Plaintiff offers no evidence calling into question these pleadings and decisions.

In opposition, Plaintiff claims the provisions of Section 2323.52 do not permit Defendant to bring a vexatious litigator action as a counterclaim. Plaintiff believes the provisions of Section 2323.52 require the Defendant to file a civil action separate and apart from any litigation existing between the alleged vexatious litigator and the person subjected to the alleged vexatious conduct. Plaintiff, however, is mistaken in her reading

of Section 2323.52. To reiterate, Section 2323.52 permits a person to “commence a civil action in a court of common pleas ***.” R.C. § 2323.52(B). A counterclaim that seeks affirmative relief, such as the counterclaim Defendant pursues herein, essentially constitutes a separate civil action within the main civil action wherein it is brought. Thus, a party may pursue an action seeking to declare a person a vexatious litigator as a counterclaim brought in the course of an existing civil action. See e.g. Borger v. McErlane (Ohio App. 1st Dist. 2001), 2001 WL 1591338, 2001 – Ohio – 4030. Therefore, this Court finds that, for purposes of Section 2323.52 of the Revised Code, Defendant commenced a civil action in a court of common pleas.

Turning to the merits of Defendant’s counterclaim, this Court at the outset questions whether or not it may consider evidence of litigation Plaintiff pursued in federal court. There is authority holding such evidence relevant in establishing vexatious conduct. See Borger, supra. However, this Court believes the express language of Section 2323.52 limits the determination strictly to conduct occurring in state court. As the language of Section 2323.52 provides, in order to declare a person a “vexatious litigator,” a court must find that a person “engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of common pleas, municipal court, or county court ***.” R.C. § 2323.52(A)(3)(emphasis added). Similarly, in order to bring a vexatious litigator action, a person had to have “defended against habitual and persistent vexatious conduct in the court of claims or in a court of common pleas, municipal court, or county court ***.” R.C. § 2323.52(B)(emphasis added). Obviously, no allowance appears for conduct occurring in the federal court system. Therefore, this Court declines to consider any conduct on the part of the Plaintiff occurring in the federal courts.

Inevitably, Defendant’s counterclaim turns on whether or not Plaintiff’s conduct

both here and in Franklin County qualifies her as a vexatious litigator. Plaintiff, of course, initiated her state court actions against Defendant in Franklin County with Case No. 97CVA04-4393. Ultimately, Plaintiff voluntarily dismissed that case, but not until after both the trial and appellate courts recognized that Plaintiff identified no witness, other than herself, who could testify on her behalf. Nonetheless, given her voluntarily dismissal, she was well within her rights to re-file an action against Defendant. After learning the lesson taught from her first action, Plaintiff produced a witness to testify on her behalf in her second action against Defendant in Franklin County. Unfortunately for the Plaintiff, the testimony of her witness actually bolstered Defendant's defense more than it established her case. Not surprisingly, Plaintiff's action ended with the trial court entering summary judgment in Defendant's favor. In other words, Plaintiff's claim ended in much the same manner as do hundreds, if not thousands, of cases every year: termination by summary judgment.

But the story is hardly at an end. For whatever reason, Plaintiff felt the need to bring an action, Case No. 01CV-A-05-243, against Defendant in this County, while she had an action pending against Defendant in Franklin County. In Case No. 01CV-A-05-243, Plaintiff offered no legitimate reason to this Court explaining why she brought a breach of contract action against Defendant here in Delaware County while simultaneously pursuing a negligence action against Defendant in Franklin County. Simply stated, Plaintiff offered no legal justification for such a tactic, despite the wealth of judicial precedent instructing her to the contrary. Instead, upon filing her complaint, Plaintiff "altogether disappeared" from Case No. 01CV-A-05-243 and her case suffered dismissal by means of Defendant's unopposed motion for summary judgment.

Undeterred by the disposition of Case No. 01CV-A-05-243, Plaintiff proceeded to

bring the instant action against Defendant. As he did in the prior case brought before this Court, Defendant raised the "split-claims" and "jurisdictional priority" issues. And, once again, Plaintiff failed to present this Court with a justification for her pursuit of the same cause of action in two different courts.

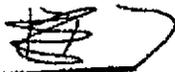
In the end, Plaintiff offered no credible argument and cited no case law suggesting she may split her present or previous malpractice claim into separate actions and pursue those separate actions in courts sharing concurrent jurisdiction. Plaintiff's conduct in pursuing her claims before this Court was not warranted under existing law and certainly not supported by a good faith argument for either a modification or a reversal of existing law. Moreover, Plaintiff's pursuit of her claim before this Court while simultaneously pursuing the same claim before the court that first acquired jurisdiction to consider the claim served to harass the Defendant and cause him considerable expense. Thus, Plaintiff has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in civil actions before this Court against the Defendant. Therefore, based on the foregoing, this Court hereby declares Plaintiff Linda Castrataro a vexatious litigator.

As a final matter, Plaintiff submitted a Motion For Oral Hearing On Civil Rule 60 Motion. After a review of the docket and the record in the instant case, this Court is unable to find any Motion filed pursuant to Civil Rule 60. However, in her Sixth Defense to Defendant's counterclaim, Plaintiff states that "she would like this court to reconsider its decision to award attorney's fees under ORC Section 2323.51, frivolous conduct under Ohio Civil Rule 60, Relief from Judgment or Order." Assuming that defense and Plaintiff's instant Motion somehow constitutes a Civil Rule 60(B) motion, such a motion is procedurally improper. A party seeking relief under the provisions of Civil Rule 60(B) should file a motion in the case within which the final judgment was entered. A party

may not file a Civil Rule 60(B) motion in a subsequent case, even if that subsequent case is a re-filing of an earlier case. This Court entered final judgment in Case No. 01CV-A-05-243. That is the case number under which Plaintiff must attempt to seek relief from the final judgment entered therein. Consequently, this Court declines to schedule a hearing on a procedurally improper motion.

In conclusion, this Court finds no genuine issue exists as to the material facts. This Court further finds that Defendant has established that he is entitled summary judgment as a matter of law on not only the claim stated in Plaintiff's Complaint but on his counterclaim as well. Accordingly, the Motion Of Defendant Dr. Kenneth Urban For Summary Judgment is hereby SUSTAINED. In light of this Court declaring Plaintiff Linda Castrataro a vexatious litigator, Plaintiff is hereby prohibited from instituting, continuing, or making an application in any legal proceeding in this Court without first obtaining leave of this Court pursuant to the provisions of Section 2323.52(F) of the Revised Code. Furthermore, Plaintiff's Motion For Oral Hearing On Civil Rule 60 Motion is hereby OVERRULED. The instant Judgment Entry terminates the instant case. Therefore, this Court finds no just reason for delay and the instant Judgment Entry is hereby made a final appealable order. Costs taxed to Plaintiff.

TERMINATION CODE _____




W. DUNCAN WHITNEY, JUDGE

cc: Linda Castrataro, Plaintiff, P.O. Box 24104, Mayfield Heights, Ohio 44124
Craig R. Carlson, Monique Lampke, and Ryan P. Sherman, Attorneys for
Defendant, 41 South High Street, 29th Floor, Columbus, Ohio 43215
Jan Antonoplos, Clerk of the Delaware County Court of Common Pleas,
91 North Sandusky Street, Delaware, OH 43015

General Inquiry



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Docket Search

03 CAE 06 0030 CASTRATARO, LINDA URBAN, KENNETH

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| 06/22/2004 | COSTS DUE RECORD | 0.00 | |
| 05/17/2004 | CLERK'S CERTIFICATE OF MAILING SENT CTF COPIES OF JUDGMENT ENTRY VOL 15 PAGE 332 FROM THE SUPREME COURT OF OHIO TO FIFTH DISTRICT APPEALS COURT AND COUNSEL HAND DELIVERED COPY TO DELAWARE COUNTY COMMON PLEAS COURT JUDGE | 0.00 | |
| 05/17/2004 | JUDGMENT ENTRY FROM SUPREME COURT OF OHIO UPON CONSIDERATION OF THE JURISDICTIONAL MEMORANDA FILED IN THIS CASE THE COURT DECLINES JURISDICTION TO HEAR THE CASE SEE ENTRY VOL 15 PAGE 332 | 0.00 | |
| 02/02/2004 | NOTICE OF FILING APPEAL OF APPELLANT LINDA CASTRATARO TO SUPREME COURT OF OHIO *** SUPREME COURT OF OHIO CASE NO. 04 - 0192 *** SEE ENTRY VOL 15 | 0.00 | |

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PAGES 196 & 197 (COURT OF
APPEALS JOURNAL)

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| 02/02/2004 | JUDGMENT ENTRY FROM SUPREME COURT OF OHIO SENT CTF COPIES OF NOTICE OF APPEAL TO SUPREME COURT OF OHIO TO FIFTH DISTRICT APPEALS COURT, PRO SE, COUNSEL AND HAND DELIVERED COPY TO DELAWARE COUNTY COMMON PLEAS COURT JUDGE. | 0.00 |
| 01/09/2004 | CASE FILE RETURNED FROM FIFTH DISTRICT APPEALS COURT | 0.00 |
| 12/19/2003 | CLERK'S CERTIFICATE OF MAILING SENT OPINION AND JUDGMENT ENTRY FROM 5TH DISTRICT APPEALS COURT TO PRO SE - COUNSEL - AND HAND DELIVERED COPY TO DELAWARE COUNTY COMMON PLEAS COURT JUDGE. | 0.00 |
| 12/19/2003 | JUDGMENT ENTRY - FOR THE REASONS STATED IN OUR ACCOMPANYING MEMORANDUM- OPINION ON FILE THE JUDGMENT OF THE DELAWARE COUNTY COURT OF COMMON PLEAS IS **** AFFIRMED **** COSTS ASSESSED TO APPELLANT SEE ENTRY VOL 15 PAGE 121 | 0.00 |
| 12/19/2003 | OPINION / JUDGMENT ENTRY THE JUDGMENT OF THE DELAWARE COUNTY COURT OF COMMON PLEAS IS *** AFFIRMED **** SEE ENTRY VOL 15 PAGES 103 THRU 120 | 0.00 |
| 10/23/2003 | CLERK'S CERTIFICATE OF MAILING SENT JUDGMENT ENTRY VOL 14 PAGE 485 AND JUDGMENT ENTRY VOL 14 PAGES 486/487 TO COUNSEL AND PRO SE | 0.00 |
| 10/23/2003 | JUDGMENT ENTRY - THIS MATTER COMES BEFORE THE COURT ON PLAINTIFF-APPELLANT LINDA CASTRATARO'S MOTION FOR LEAVE TO TAKE DEPOSITION OF DEFENDANT-APELLEE DR KENNETH URBAN PURSUANT TO CIV.R.27(B) CIVIL RULE 27(B) STATES: IF AN APPEAL HAS BEEN TAKEN FROM A JUDGMENT OF ANY COURT A PARTY WHO DESIRES TO PERPETUATE TESTIMONY MAY MAKE A MOTION IN THE COURT WHERE THE ACTION WAS TRIED | 0.00 |

FOR LEAVE TO TAKE DEPOSITIONS
UPON THE SAME NOTICE AND
SERVICE THEREOF AS PROVIDED IN
(A)(2) OF THIS RULE. THE FIFTH
DISTRICT COURT OF APPEALS IS
NOT THE COURT WHERE THIS
ACTION WAS TRIED. PLAINTIFF-
APPELLANT'S MOTION IS
THEREFORE DENIED. SEE ENTRY
VOL 14 PAGES 486 & 487

| | | |
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| 10/23/2003 | JUDGMENT ENTRY - PLAINTIFF- APPELLANT'S OCTOBER 9, 2003 MOTION TO RESCHEDULE THE ORAL ARGUMENT SCHEDULED FOR OCTOBER 14, 2003 IS OVERRULED. IN FACT PLAINTIFF-APPELLANT WAS PRESENT ON OCTOBER 14, 2003 AND DID PARTICIPATE IN ORAL ARGUMENT SEE ENTRY VOL 14 PAGE 485 | 0.00 |
| 10/14/2003 | DIRECTORY OF PHYSICIANS IN THE UNITED STATES FILED BY PROSE LINDA CASTRATARO | 0.00 |
| 10/14/2003 | NOTICE OF APPEARANCE - NOW COMES DEFENDANT/APPELLEE DR KENNETH URBAN AND HEREBY NOTIFIES THE COURT AND OPPOSING PARTIES THAT RYAN P SHERMAN OF THE LAW OFFICE OF PORTER WRIGHT MORRIS AND ARTHUR LLP ENTERS HIS APPEARANCE AS CO-COUNSEL OF RECORD FOR THE DEFENDANT/APPELLEE | 0.00 |
| 10/13/2003 | MOTION FOR REVIEW OF APPEALS CASES | 0.00 |
| 10/13/2003 | CLERK'S CERTIFICATE OF MAILING SENT CTF COPIES OF JUDGMENT ENTRY VOL 14 PAGE 480 TO FIFTH DISTRICT APPEALS COURT, PRO SE AND COUNSEL | 0.00 |
| 10/13/2003 | JUDGMENT ENTRY FROM SUPREME COURT OF OHIO THE AFFIDAVIT OF DISQUALIFICATION FILED IN THIS CASE ON SEPTEMBER 29, 2003 WAS FOUND NOT WELL TAKEN AND DENIED BY ENTRY DATED OCTOBER 9, 2003. ON OCTOBER 9, 2003 AFFIANT FILED A MOTION REQUESTING RECONSIDERATION OF THAT DECISION AND A REQUEST FOR THIS MOTION TO BE | 0.00 |

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RULED UPON BY ANOTHER JUSTICE OF THE SUPREME COURT. THERE IS NO STATUTORY PROVISION FOR THE DISQUALIFICATION OF A JUSTICE OF THIS COURT. HEREFOR I HAVE REVIEWED AFFIANT'S MOTION FOR RECONSIDERATION AND CONCLUDE THAT IT DOES NOT CONTAIN ANY INFORMATION OR SUBSTANTIVE ALLEGATIONS THAT WERE NOT PREVIOUSLY CONSIDERED OR THAT REQUIRE RECONSIDERATION OF THE EARLIER RULING. ACCORDINGLY THE MOTION FOR RECONSIDERATION IN OVERRULED. SEE ENTRY VOL 14 PAGE 480

| | | |
|------------|---|------|
| 10/09/2003 | MOTION TO RE-SCHEDULE ORAL ARGUMENT | 0.00 |
| 10/08/2003 | CLERK'S CERTIFICATE OF MAILING SENT SUPREME COURT JUDGMENT ENTRY TO ALL COUNSEL AND FIFTH DISTRICT COURT OF APPEALS | 0.00 |
| 10/08/2003 | SUPREME COURT JUDGMENT ENTRY - FOR THESE REASONS, THE AFFIDAVIT OF DISQUALIFICATION IS FOUND NOT WELL-TAKEN AND IS DENIED. THE MATTER SHALL CONTINUE BEFORE JUDGES HOFFMAN, EDWARDS, AND BOGGINS. SEE ENTRY FOR COMPLETE TERMS VOL. 14 PAGES 477 THRU 478 | 0.00 |
| 10/06/2003 | MEMORANDUM IN OPPOSITION TO APPELLANT'S "LEAVE TO TAKE DEPOSITION" | 0.00 |
| 10/03/2003 | MOTION FOR DISQUALIFICATION OF JUDGES | 0.00 |
| 10/02/2003 | SENT PRO SE NOTICE OF PANEL ASSIGNED TO HEAR ORAL ARGUMENTS FOR OCTOBER 14, 2003. | 0.00 |
| 10/01/2003 | CLERK'S CERTIFICATE OF MAILING SENT COPY OF MOTION FOR DISQUALIFICATION OF JUDGES FROM WITH SUPREME COURT OF OHIO TO FIFTH DISTRICT APPEALS COURT COUNSEL AND PRO SE. | 0.00 |
| 10/01/2003 | NOTICE FROM SUPREME COURT OF OHIO FILING OF MOTION FOR | 0.00 |

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DISQUALIFICATION OF JUDGES.
FILED BY APPELLANT
CASTRATARO *** SUPREME COURT
OF OHIO CASE NO. 03APO88 ***

| | | |
|------------|---|------|
| 09/25/2003 | LEAVE TO TAKE DEPOSITION | 0.00 |
| 09/18/2003 | SENT SUBPOENA TO PRO SE LINDA CASTRATARO PER HER REQUEST | 0.00 |
| 09/16/2003 | SENT BRIEFS TO FIFTH DISTRICT APPEALS COURT | 0.00 |
| 09/16/2003 | CLERK'S CERTIFICATE OF MAILING SENT CTF COPIES OF JUDGMENT ENTRY VOL 14 PAGE 473 TO PRO SE AND COUNSEL | 0.00 |
| 09/16/2003 | JUDGMENT ENTRY - APPELLANT'S PRO SE MOTION FOR RECONSIDERATION IS HEREBY OVERRULED. MOTION DENIED IT IS SO ORDERED SEE ENTRY VOL 14 PAGE 473 | 0.00 |
| 09/15/2003 | MAILED ORAL HEARING SCHEDULE TO COUNSEL AND PRO SE | 0.00 |
| 09/05/2003 | MOTION FOR RECONSIDERATION | 0.00 |
| 08/27/2003 | MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION FOR ORAL ARGUMENT | 0.00 |
| 08/26/2003 | CLERK'S CERTIFICATE OF MAILING SENT CTF COPIES OF JUDGMENT ENTRY VOL 14 PAGE 455 TO PRO SE AND COUNSEL | 0.00 |
| 08/26/2003 | JUDGMENT ENTRY - THE MOTION OF THE PLAINTIFF TO HAVE THREE DIFFERENT JUDGES HEAR THIS APPEAL THAN HEARD A PRIOR APPEAL BECAUSE THEIR ASSIGNMENT TO THE PRIOR CASE CREATES A CONFLICT OF INTEREST FOR THEM TO HEAR THE INSTANT CASE IS HEREBY DENIED AS IT FAILS TO SET FORTH GOOD CAUSE IT IS SO ORDERED SEE ENTRY VOL 14 PAGE 455 | 0.00 |
| 08/18/2003 | MOTION FOR ORAL ARGUMENT | 0.00 |
| 08/01/2003 | NOTICE OF FILING BRIEF OF APPELLEE SENT TO COUNSEL, PRO SE AND FIFTH DISTRICT APPEALS COURT | 0.00 |
| 08/01/2003 | BRIEF OF APPELLEE FILED | 0.00 |
| 07/11/2003 | AFFIDAVIT - HEREBY DECLARE THAT THE BRIEFS PROVIDED IN THIS CASE ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF | 0.00 |

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| | | |
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| 07/10/2003 | NOTICE OF FILING APPELLANT BRIEF SENT TO FIFTH DISTRICT APPEALS COURT, COUNSEL AND PRO SE | 0.00 |
| 07/10/2003 | BRIEF OF APPELLANT FILED | 0.00 |
| 06/19/2003 | CLERK'S CERTIFICATE OF MAILING SENT CTF COPIES OF JUDGMENT ENTRY VOL 14 PAGE 290 TO COUNSEL AND PRO SE | 0.00 |
| 06/19/2003 | JUDGMENT ENTRY - APPELLANT'S REQUEST TO PROCEED IN FORMA PAUPERIS STATUS IS HEREBY GRANTED IT IS SO ORDERED SEE ENTRY VOL 14 PAGE 290 | 0.00 |
| 06/16/2003 | NOTICE TO 5TH DISTRICT COURT OF APPEALS AND COUNSEL | 0.00 |
| 06/16/2003 | RECORD CERTIFIED TO THE 5TH DISTRICT COURT OF APPEALS | 0.00 |
| 06/16/2003 | TRANSCRIPT OF DOCKET & JUDGMENT ENTRIES | 0.00 |
| 06/16/2003 | TRANSCRIPT OF PROCEEDINGS (NO TRANSCRIPT REQUESTED - NO TRANSCRIPT FILED) | 0.00 |
| 06/06/2003 | CLERK'S CERTIFICATE OF MAILING SENT NOTICE OF APPEAL TO FIFTH DISTRICT APPEALS COURT COUNSEL AND PRO SE | 0.00 |
| 06/06/2003 | AFFIDAVIT - TO WAIVE COURT FEES | 0.00 |
| 06/06/2003 | NOTICE OF APPEAL COUNSEL FOR PLAINTIFF/APPELLANT LINDA CASTRATARO PRO SE COUNSEL FOR DEFENDANT/APPELLEE CRAIG R CARLSON MONIQUE LAMPKE AND RYAN P SHERMAN | 0.00 |
| 06/06/2003 | DOCKETING STATEMENT | 0.00 |
| 01/01/1900 | | 0.00 |

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

2006 MAR 15 PM 12:52

LINDA H. FRARY
CLERK

STEVEN A. BOZSIK

Relator

-vs-

STUART HUDSON, WARDEN

Respondent

CASE NO. 06-CA-20

JUDGMENT ENTRY

This matter came before the Court for consideration of Relator's pro se Petition for Writ of Habeas Corpus against Respondent, Stuart Hudson, Warden of the Mansfield Correctional Institution. Relator argues in his petition that the Medina County Court of Common Pleas lacked jurisdiction over his felony case.

Appellant is an inmate at Mansfield Correctional Institution. Appellant is currently serving a sentence of 24 years to life, as imposed by the Medina County Court of Common Pleas after being convicted for committing the crimes of aggravated murder and tampering with evidence. On March 17, 2005, in Medina County Court of Common Pleas, General Division, Case Number 04 CIV 0286, Judge James L. Kimbler found Appellant to be a vexatious litigator as defined in R.C. 2323.52(A)(3).

The purpose of habeas corpus is not to determine whether a person is guilty of an offense, but rather the legality of the restraint under which a person is held. *In re: Lockhart* (1952), 157 Ohio St. 192, 105 N.E.2d 35. Habeas corpus is

only available where a petitioner would be entitled to immediate release if the court found his claim well taken. *Geroski v. Haskins* (1964), 176 Ohio St. 393, 199 N.E.2d 881.

Habeas corpus is not the proper mode of redress where the petitioner has been convicted of a criminal offense and sentenced to imprisonment by virtue of a judgment rendered by a court with jurisdiction over the matter. R.C. 2725.05; *In re: Burson* (1949), 152 Ohio St. 375, 89 N.E.2d 651. In other words, the petitioner, in a habeas corpus action, will be granted the writ only if he can establish that his conviction should be declared void because the trial court lacked jurisdiction. See, *State ex rel. Dothard v. Warden, Trumbull County App. No. 2002-T-0145, 2003-Ohio-325, 2003.*

Furthermore, habeas corpus, like other extraordinary writ actions, is not available where there is an adequate remedy at law. *Bellman v. Jago* (1988), 38 Ohio St.3d 55, 56, 526 N.E.2d 308. Where the petitioner's claims are essentially non-jurisdictional, such as a claim of procedural error, the availability of the post-conviction remedies, such as an appeal as of right, a delayed appeal or post-conviction relief provide adequate remedies at law negating the availability of habeas corpus relief. *Freeman v. Maxwell* (1965), 4 Ohio St.2d 4, 210 N.E.2d 885; *In re: Copley* (1972), 29 Ohio St.2d 35, 278 N.E.2d 358.

Section 2931.03 of the Ohio Revised Code gives the Court of Common Pleas original jurisdiction in felony cases. The felony jurisdiction is invoked by the return of a proper indictment before the Grand Jury of the County. *Click v. Eckle* (1962), 174 Ohio St. 88, 89, 186 N.E.2d 731; See also, Crim.R. 7. Once

jurisdiction is properly invoked by indictment, the court retains jurisdiction until the case is terminated. A petitioner who does not attack the validity of the indictment in accordance with R.C. 2941.29, is properly before the court having jurisdiction over the subject matter. *Click v. Eckle*, supra; See also, R.C. 2941.29.

In this case, it appears that the trial court's jurisdiction was properly invoked by a valid indictment. The existence or non-existence of pre-trial procedures, such as alleged ex parte meetings, perjured testimony, the Relator's or Relator's attorney's presence at "critical stage" hearings and the disclosure of evidence, do not affect the jurisdiction of the common pleas court. Therefore, the Relator's contention that the trial court lacked jurisdiction is without merit.

Even assuming there were defects and/or fraud in the pre-indictment procedures, these claims are not grounds for relief in habeas corpus. The Relator's non-jurisdictional claims, if available at all, could be raised in a direct appeal, or other post-conviction proceedings.

The Relator has failed to establish that the Common Pleas Court lacked jurisdiction over his felony conviction and sentence. Furthermore, Relator has an adequate remedy at law by way of appeal. For these reasons, Relator has failed to state a claim upon which habeas corpus relief may be granted. Relator's Petition for Habeas Corpus is hereby sua sponte denied.

Furthermore, Relator's motion for leave to waive the copy requirements of this action is hereby denied.

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WRIT DENIED.

COSTS TAXED TO RELATOR.

IT IS SO ORDERED.



JUDGE



JUDGE



JUDGE

General Inquiry



New Search...

Search Criteria: [] [] [] **Dockets** [] []

Docket Search

2006 CA 0020 BOZSIK, STEVEN A VS HUDSON, STUART

Search Criteria

Docket Desc. [ALL]
Begin Date [] **Sort**
End Date [] Ascending
 Descending

Search

Search Results 27 Docket(s) found matching search criteria.

| Docket Date | Docket Text | Amount | Amount Due | Images |
|-------------|---|--------|------------|--------|
| 11/03/2006 | COPY MAILED TO COURT OF APPEALS | 0.00 | 0.00 | |
| 11/03/2006 | ENTRY FILED. ORDERED: MOTION FOR RECONSIDERATION IS DENIED | 2.00 | 2.00 | |
| 11/03/2006 | ENTRY FILED. ORDERED: FROM THE SUPREME COURT OF OHIO THAT A MANDATE BE SENT TO COURT OF APPEALS FOR RICHLAND COUNTY TO CARRY THIS JUDGMENT INTO EXECUTION; A COPY OF THIS ENTRY BE CERTIFIED TO THE CLERK OF COURT OF APPEALS FOR RICHLAND COUNTY | 2.00 | 2.00 | |
| 04/24/2006 | SUCCESSFUL SERVICE Method : CERTIFIED MAIL Issued : 04/17/2006 Service : TRANSCRIPT OF DOCKET & ALL ORIGINAL PAPERS Served : 04/20/2006 Return : 04/24/2006 On : SUPREME COURT OF OHIO Signed By : MARCIA MENGEL, CLERK Reason : SUCCESSFUL SERVICE Comment : Tracking #: 7160390198495405554 | 0.00 | 0.00 | |

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| | | | |
|------------|---|------|------|
| 04/17/2006 | Issue Date: 04/17/2006 Service: TRANSCRIPT OF DOCKET & ALL ORIGINAL PAPERS Method: CERTIFIED MAIL Cost Per: \$ 7.00 SUPREME COURT OF OHIO 65 SOUTH FRONT STREET 8TH FLOOR COLUMBUS, OH 43215 Tracking No: 7160390198495405554 | 7.00 | 7.00 |
| 04/17/2006 | TRANSCRIPT DOCKET & ALL ORIGINAL PAPERS - | 5.00 | 5.00 |
| 04/17/2006 | COPY OF JE / ORDER, NOTICE OF APPEAL & COPY OF DOCKET MAILED TO - STEVEN BOZSIK | 0.00 | 0.00 |
| 04/17/2006 | COPY OF JE / ORDER, NOTICE OF APPEAL & COPY OF DOCKET MAILED TO - CORRECTIONS LITIGATION | 0.00 | 0.00 |
| 04/17/2006 | COPY OF JE/ORDER, NOTICE OF APPEAL MAILED TO COURT OF APPEALS | 0.00 | 0.00 |
| 04/17/2006 | TRANSCRIPT DOCKET & ALL ORIGINAL PAPERS - MAILED TO OHIO SUPEREME COURT | 5.00 | 5.00 |
| 04/10/2006 | NOTICE OF APPEAL TO OHIO SUPREME COURT CASE NUMBER 06- 0695 Attorney: PRO SE () | 1.00 | 1.00 |
| 04/10/2006 | ORDER TO CERTIFY RECORD TO SUPREME COURT SCANNED 4-17-06 JB | 2.00 | 2.00 |
| 03/15/2006 | COPY OF JE / ORDER MAILED TO - STEVEN BOZSIK | 0.00 | 0.00 |
| 03/15/2006 | COPY OF JE / ORDER MAILED TO - CORRECTIONS LITIGATION | 0.00 | 0.00 |
| 03/15/2006 | ENTRY FILED. ORDERED: RELATOR FAILED TO ESTABLISH THAT THE COMMON PLEAS COURT LACKED JURISDICTION OVER HIS FELONY CONVICTION AND SENTENCE. RELATOR FAILED TO STATE A CLAIM UPON WHICH HABEAS CORPUS RELIEF MAY BE GRANTED. RELATOR'S PETITION FOR HABEAS CORPUS IS HEREBY SUA SPONTE DENIED. MOTION FOR LEAVE TO WAIVE COPY REQUIREMENTS IS DENIED. scanned 4-3-06 jb | 8.00 | 8.00 |
| 03/13/2006 | SUCCESSFUL SERVICE Method : CERTIFIED MAIL Issued : 03/03/2006 Service : WRIT OF HABEAS CORPUS Served : 03/07/2006 Return : 03/13/2006 On : STATE OF OHIO CORRECTIONS | 0.00 | 0.00 |

16B

LITIGATION SECTION Signed By :
STEVE ATHMAN Reason :
SUCCESSFUL SERVICE Comment :
Tracking #: 7160390198494890947

03/07/2006 SUCCESSFUL SERVICE Method : 0.00 0.00
CERTIFIED MAIL Issued : 03/03/2006
Service : WRIT OF HABEAS CORPUS
Served : 03/06/2006 Return : 03/07/2006
On : HUDSON, STUART Signed By :
C/O ? Reason : SUCCESSFUL SERVICE
Comment : Tracking #:
7160390198494890946

03/03/2006 Issue Date: 03/03/2006 Service: WRIT OF 14.00 14.00
HABEAS CORPUS PETITION,
MOTION, AFFIDAVITS Method:
CERTIFIED MAIL Cost Per: \$ 7.00
HUDSON, STUART WARDEN
MANSFIELD CORRECTIONAL
INSTITUTION P O BOX 788
MANSFIELD, OH 44901 Tracking No:
7160390198494890946 STATE OF OHIO
CORRECTIONS LITIGATION
SECTION 150 E GAY STREET 16TH
FLOOR COLUMBUS, OH 43215
Tracking No: 7160390198494890947

03/03/2006 WRIT OF HABEAS CORPUS PETITION 2.00 2.00

03/03/2006 COURT'S COMPUTER FEE 3.00 3.00

03/03/2006 CLERK'S COMPUTER FEE-GEN DIV 10.00 10.00

03/03/2006 CLERKS FEES 25.00 25.00

03/03/2006 COPY OF PETITION, AFFIDAVITS & 0.00 0.00
MOTION MAILED TO COURT OF
APPEALS

03/03/2006 MOTION FOR LEAVE TO WAIVE THE 2.00 2.00
COPY REQUIREMENTS BY THE
COURT'S LOCAL RULES FILED BY
PETITIONER Attorney: PRO SE ()

03/03/2006 AFFIDAVIT OF PRIOR CIVIL 3.00 3.00
ACTIONS

03/03/2006 AFFIDAVIT OF INDIGENCY 5.00 5.00

03/03/2006 WRIT OF HABEAS CORPUS PETITION 150.00 150.00
Attorney: PRO SE ()

16B

FILED
IN COMMON PLEAS COURT

2006 JAN 31 AM 11:32

DENISE L. KRAMIRSKI
CLERK OF COURTS
GEAUGA COUNTY

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

GEAUGA COUNTY PROSECUTOR : CASE NO. 05M000504

Plaintiff(s) : JUDGE DAVID L. FUHRY

-vs- : JUDGMENT ENTRY

WILLIAM GODALE :

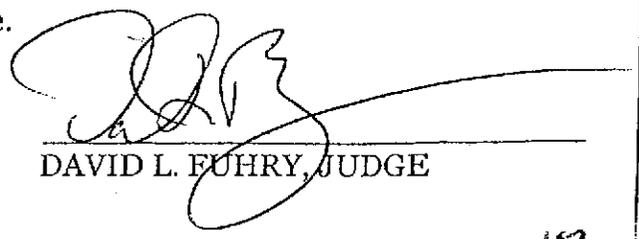
Defendant(s) :

Plaintiff has, on December 1, 2005, moved for Summary Judgment in its favor. Defendant filed his brief in Opposition on December 12, 2005. Leave to file such brief in opposition of such date is granted (previously leave to so oppose was not granted until December 16, 2005).

The Court has carefully reviewed the motion, and the briefs of both parties. On consideration thereof, and on good cause shown, the Court hereby finds in favor of plaintiff, Geauga County Prosecutor, and against defendant, William Godale. Plaintiff is therefore granted summary judgment and the Court hereby enters the following judgment and order pursuant thereto:

- 1) William Godale is hereby declared to be a vexatious litigator;
- 2) William Godale is hereby prohibited from instituting or continuing any legal proceedings in the Court of Claims, in the Court of Common Pleas, Municipal Court or County Court without first obtaining leave of this Court to proceed, or making any application other than application for leave to proceed in such Courts.
- 3) Defendant is to pay the costs of this proceeding, for which judgment is rendered and execution may issue.

IT IS SO ORDERED.



DAVID L. FUHRY, JUDGE

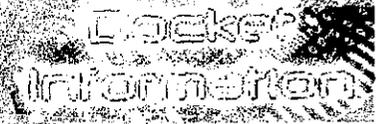
cc: D.P. Joyce, Esq. —
W. Godale —



Denise M.
Kaminski

Geauga County
Clerk of Courts

New Search
Clerk Home



DOCKET ENTRIES

BOTTOM

Date: 12/29/2007

Geauga County
General Division
Denise M. Kaminski

Time: 8:46:34 AM

DOCKET SHEET

STYLE: GEAUGA COUNTY PROSECUTOR vs. GODALE **CASE:** 06G002692
ACTION: COURT OF APPEALS (G) **FILE DATE:** 3/1/2006

| | | | | |
|--------------------------|--|-----------|-------------------------|----------|
| GEAUGA COUNTY PROSECUTOR | | PLAINTIFF | | |
| DAVID P JOYCE | | AKA | REBECCA F SCHLAG | ATTORNEY |
| 8216 MAYFIELD RD | | | ASSISTANT PROSECUTOR | |
| | | | 231 MAIN ST | |
| | | | CHARDON OH 44024 | |
| | | | DAVID P JOYCE | ATTORNEY |
| | | | COURTHOUSE ANNEX | |
| | | | 231 MAIN STREET STE 3-A | |
| | | | CHARDON, OH 44024 | |
| WILLIAM GODALE | | DEFENDANT | PROSE | ATTORNEY |
| 8216 MAYFIELD RD | | | | |
| CHESTERLAND, OH 44026 | | | | |

***** DOCKET ENTRIES *****

| | |
|-----------|--|
| 3/1/2006 | COURT OF APPEALS DEPOSIT: \$150.00 RECEIPT # BILL'S AUTO Receipt: 5679 Date: 03/01/2006 |
| 3/1/2006 | INITIAL FILING FEES FOR CIVIL CASES Receipt: 5679 Date: 03/01/2006 |
| 3/1/2006 | NOTICE OF APPEAL, DOCKETING STATEMENT AND INSTRUCTIONS FOR SERVICE FILED. (ORIGINAL CASE NO. 05M000504) |
| 3/3/2006 | MEMO SENT TO APPELLEE'S ATTORNEY WITH NOTICE OF APPEAL BY CERTIFIED MAIL, RRR. SAME TO COURT OF APPEALS AND MEMO TO APPELLANT. |
| 3/9/2006 | RETURN RECEIPT FROM REBECCA F. SCHLAG, SIGNED BY CATHY SCHIMMELMAN ON 03/07/06. |
| 3/16/2006 | ACCELERATED CALENDAR SCHEDULING NOTICE FILED. RECORD DUE ON OR BEFORE 04/10/06. |
| | APPELLANT'S MOTION FOR LEAVE TO FILE HIS MOTION FOR EXTENSION OF |

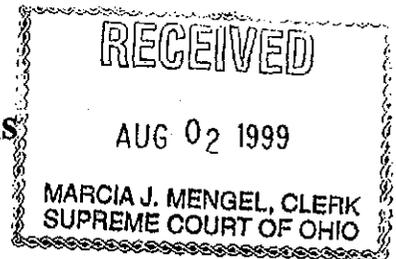
| | |
|-----------|---|
| 4/10/2006 | TIME TO FILE APPELLATE BRIEF, INSTANTER FILED. COPIES TO COURT OF APPEALS. |
| 4/12/2006 | RECORD FILED. MEMOS AND COPY OF NUMBERED DOCKET TO ALL PARTIES. |
| 4/28/2006 | JUDGMENT ENTRY FILED. 11/676 ***GRANTED APPELLANT'S PRO SE MOTION FOR EXTENSION OF TIME TO FILE HIS BRIEF TO 05/10/06*** COPIES TO R.SCHLAG, W.GODALE AND COURT OF APPEALS. |
| 5/11/2006 | APPELLANT'S MOTION FOR LEAVE TO FILE HIS MOTION FOR EXTENSION OF TIME TO SEEK FURTHER LEGAL ADVICE FILED. COPIES SENT TO COURT OF APPEALS |
| 5/15/2006 | APPELLANT'S MOTION FOR LEAVE TO FILE HIS APPELLATE BRIEF AND ASSIGNMENTS OF ERRORS, INSTANTER FILED. COPIES TO COURT OF APPEALS. |
| 5/15/2006 | APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR FILED. COPIES TO COURT OF APPEALS. Attorney: PROSE (WILLIAM GODALE) |
| 5/19/2006 | COPY OF LETTER FROM 11TH DISTRICT COURT OF APPEALS TO WILLIAM GODALE FILED. |
| 5/19/2006 | JUDGMENT ENTRY FILED. 11/686 ***GRANTED APPELLANT'S PRO SE MOTION FOR EXTENSION TO FILE HIS BRIEF TO 05/22/06*** COPIES TO R.SCHLAG, W.GODALE AND COURT OF APPEALS. |
| 5/25/2006 | JUDGMENT ENTRY FILED. 11/691 ***OVERRULED AS MOOT, APPELLANT'S PRO SE 05/15/06 MOTION FOR EXTENSION TO FILE BRIEF IS OVERRULED AS MOOT*** COPIES TO R. SCHLAG, W.GODALE AND COURT OF APPEALS. |
| 5/25/2006 | APPELLANT'S REQUEST FOR ORAL ARGUMENT FILED. COPIES TO COURT OF APPEALS. |
| 5/30/2006 | BRIEF OF PLAINTIFF-APPELLEE FILED. COPIES TO COURT OF APPEALS. Attorney: JOYCE, DAVID P (0022437) |
| 7/20/2006 | FILE RELEASED TO COURT OF APPEALS. |
| 8/8/2006 | NOTICE OF CHANGE OF ADDRESS (OF APPELLANT) FILED. COPIES TO COURT OF APPEALS. |
| 2/5/2007 | JUDGMENT ENTRY AND OPINION FILED. 12/119 ***FOR THE REASONS STATED IN THE OPINION OF THIS COURT, THE JUDGMENT OF THE GEAUGA CTY COURT OF COMMON PLEAS IS REVERSED AND THE MATTER IS HEREBY REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION***0001 |
| 2/15/2007 | MOTION TO CERTIFY A CONFLICT FILED. COPIES TO COURT OF APPEALS. Attorney: SHERIDAN, CHRISTOPHER J (0079948) |
| 3/13/2007 | COPIES MADE FOR ATTORNEY CHRISTOPHER SHERIDAN. |
| 3/27/2007 | NOTICE OF APPEAL TO SUPREME COURT FILED. COPY SENT TO COURT OF APPEALS. |
| 4/6/2007 | JUDGMENT ENTRY FILED. 12/194 - 12/199 ***DENIED APPELLE'S MOTION TO CERTIFY CONFLICTS. ANY PENDING MOTIONS ARE OVERRULED AS MOOT*** R.SCHLAG. W.GODALE AND COURT OF APPEALS. |

| | |
|-----------|---|
| 4/12/2007 | APPELLANT'S MOTION FOR PREVAILING PARTY FEES FILED. COPIES TO COURT OF APPEALS. Attorney: PROSE (WILLIAM GODALE) |
| 4/16/2007 | FILE RETURNED FROM COURT OF APPEALS. |
| 4/18/2007 | MOTION IN OPPOSITION TO APPELLANT'S MOTION FOR PREVAILING PARTY FEES FILED. COPIES TO COURT OF APPEALS. Attorney: SHERIDAN, CHRISTOPHER J (0079948) |
| 5/4/2007 | JUDGMENT ENTRY FILED. 12/226 - 12/227 ***DENIED APPELLANT'S MOTION FOR PREVAILING PARTY FEES*** COPIES TO R.SCHLAG, D.JOYCE AND COURT OF APPEALS. |
| 7/9/2007 | ENTRY FROM SUPREME COURT FILED 12/297 ***COURT DECLINES JURISDICTION TO HEAR THE CASE*** |

Top of Page



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO



KATHRYN H. PAVARINI *et al*)
)
 Plaintiffs)
)
 vs.)
)
 ROBERT MANNING)
)
 Defendant)
)
)

CASE NO. 377857

JUDGE JUDITH KILBANE-KOCH

ORDER



Defendant's Motion for Default Judgment and Motion for Sanctions Pursuant to Civ. R. 37 came on for hearing on the 29th day of July 1999 at 8:30 a.m. -- postcards were mailed by the Court to all Parties.

Defendant presented return receipts for certified mail, which demonstrate delivery to Kathryn Pavarini on July 16, 1999, and to Philip Pavarini on July 17, 1999, of letters advising both Pavarinis of the date and time of the default hearing and of the fact that judgment may be rendered against them at said hearing. Both receipts were signed by Bridget Richmond, and were delivered to the address supplied by Plaintiffs upon their complaint. Additionally, Defendant provided a receipt from the US Post Office which demonstrated payment for the postage for certified mail, as well as payment for postage for regular delivery mail, a copy of which Defendant sent to, and which was received by this Court. Plaintiff provided copies of the letters sent via regular and certified mail to the Pavarinis; said letters indicated that judgment may be rendered against each of the Pavarinis on July 29, 1999 when the motions for default and for sanctions would be heard. This Court finds that Plaintiffs were served with notice of this hearing, and were served with notice that judgment may be rendered against them.

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Defendant filed his answer and counterclaim on May 7, 1999, and was served upon Plaintiffs in accordance with the Rules of Civil Procedure. Further, this Court finds that Plaintiffs have failed to answer or otherwise move in regard to the counterclaim, and this Court further finds that Plaintiffs are in default of answer regarding Defendant's counterclaim.

This Court also finds that Defendant has served Requests for Production, Requests for Admission, Interrogatories, and Notices of Deposition upon each Plaintiff, and this Court finds that Plaintiffs have failed to make response or otherwise move regarding any of these requests, interrogatories or notices. This Court finds that Defendant complied with the requirements of Local R. 11 by requesting Plaintiffs to resolve the discovery impasse by issuing letters to both Plaintiffs on June 15, 1999. Further, this Court finds that Plaintiffs failed to attend properly noticed depositions of the Plaintiffs on June 22, 1999, that there was no good reason for Plaintiffs' failure to attend their depositions, and that sanctions against Plaintiffs for their complete and utter refusal to make meaningful discovery are appropriate.

Accordingly, this Court dismisses with prejudice the complaint of Kathryn Pavarini and Philip Pavarini as the appropriate sanction for their failure to make response to any discovery and for their failure to attend their properly noticed depositions.

Further, as Plaintiffs are in default of answer regarding the counterclaim of Defendant, and as the conduct of Plaintiffs in regard to this matter, and in regard to other matters where Plaintiffs have acted in a *pro se* capacity, has been found to be frivolous and vexatious, this Court finds that Kathryn Krinek Pavarini and Philip Pavarini are found to be vexatious litigators subject to O.R.C. 2323.52(D)(2), and it this Court also finds that the vexatious and frivolous conduct by Kathryn Krinek Pavarini and Philip Pavarini has occurred in cases which have been active within one (1) year prior to the entry of this order and in cases in which the Defendant/counterclaimant was a party.

Accordingly, it is ordered, adjudged and decreed that Kathryn Krinek Pavarini and Philip Pavarini are prohibited from instituting and/or maintaining legal proceedings in a *pro se* capacity in a court of common pleas, municipal court, or county court without first obtaining

the leave of this court to proceed. Further, it is ordered that Kathryn Krinek Pavarini and Philip E. Pavarini be prohibited from making any application *pro se*, other than an application for leave to proceed under O.R.C. 2323.51(F) in any legal proceedings instituted by Kathryn Krinek Pavarini and/or Philip E. Pavarini or another person in any Ohio Court of Common Pleas, municipal court, or county court. This order shall remain in force indefinitely pursuant to the authorization of O.R.C. 2323.52. Further, Kathryn Krinek Pavarini and Philip Pavarini are required to comply with all provisions of O.R.C. 2323.52(F).

In accordance with the authorization of O.R.C. 2323.52, the Cuyahoga County Clerk of Courts is instructed to send a certified copy of the order to the Supreme Court of Ohio for publication pursuant to O.R.C. 2323.52(H). Further, Kathryn Krinek Pavarini and Philip E. Pavarini are subject the restrictions of O.R.C. 2323.52(I), such that whenever it appears by suggestion of the parties or otherwise that either Kathryn Krinek Pavarini or Philip Pavarini have instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from this Court pursuant to O.R.C. 2323.52(F), the court in which the legal proceedings are pending shall dismiss the proceedings or application of the vexatious litigator.

Costs to be paid by Plaintiffs Kathryn Pavarini and Philip Pavarini.

No just cause for delay.

Judith Kilbane Koch
 JUDGE JUDITH KILBANE-KOCH

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|---|---|
| THE STATE OF OHIO Cuyahoga County | SS. I. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY. |
| HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <u>order</u> | |
| <u>determining vexatious litigation in</u> | |
| NOW ON FILE IN MY OFFICE. Vol. <u>2365</u> ps. <u>24-81</u> | |
| WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>30th</u> | |
| DAY OF <u>July</u> | A.D. 199 <u>9</u> |
| GERALD E. FUERST, Clerk | |
| By <u>[Signature]</u> | Deputy |

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BY [Signature] DEP.

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Court of Appeals of Ohio,
Eighth District, Cuyahoga County.

SAILING, INC., Plaintiff-Appellee

Phillip PAVARINI, et al., Defendants-Appellants.

No. 89150.

Decided Dec. 20, 2007.

Civil Appeal from the Cuyahoga County, Court of Common Pleas, Case No. CV-560253.

David S. Bartos, Lakewood, OH, for appellants.

Jeffrey P. Posner, Jeffrey P. Posner, LLC, Shaker Heights, OH, for appellee.

Before STEWART, J., CELEBREZZE, A.J., and McMONAGLE, J.

MELODY J. STEWART, J.

¶ 1 Defendants-appellants Phillip and Katherine Pavarini appeal from a summary judgment entered in favor of plaintiff-appellee Sailing, Inc. (“Sailing”), on Sailing’s complaint that the Pavarinis trespassed on its boat yard by failing to remove a damaged sailboat and that they failed to pay a storage fee for the boat. The court entered an award of \$23,332.75 for attorney fees against the Pavarinis as sanctions for their frivolous conduct in defending the action. The Pavarinis’ assignments of error challenge the propriety of the summary judgment, the court’s handling of discovery and other pretrial matters, the issuance of an injunction, the imposition of sanctions, and the conduct of counsel. We find the court erred by granting summary judgment because there are genuine issues of material fact as to whether Sailing effectively terminated its consent for the boat to be on its property. We likewise conclude that the court abused its discretion by awarding attorney fees for matters that were unrelated to frivolous conduct. We reverse and remand.

¶ 2 Before reaching the merits of this appeal, FN1 we must first consider a motion to dismiss the appeal on grounds that the Pavarinis, as vexatious litigators, failed to obtain leave from this court before filing their notice of appeal.

FN1. Appellant assigns seven errors for our review. Finding assignments one and six dispositive, the remaining assignments of error are moot. See App.R. 12(A)(1)(c).

¶ 3 In 1999, the Pavarinis were classified as “vexatious litigators,” apparently under R.C. 2323.52(A)(2)(c) which defines “vexatious conduct” as conduct imposed solely for delay. FN2 See Pavarini v. Manning (July 29, 1999), Cuyahoga C.P. No. 377857. As vexatious litigators, the trial court prohibited them “from instituting and/or maintaining legal proceedings in a pro se capacity in a court of common pleas, municipal court, or county court without first obtaining the leave of court to proceed.” FN3 The Pavarinis did not first seek leave to file an appeal with this court, and Sailing argues that the failure to do so renders the notice of appeal a nullity.

FN2. In its opinion in that case, the court noted that in the pending litigation the Pavarinis had failed to attend a default hearing despite receiving notice; failed to answer a counterclaim; failed to respond to discovery notices; and failed to attend properly noticed depositions.

FN3. R.C. 2323.52(D)(1)(c) states, “[i]f the person alleged to be a vexatious litigator is found to be a vexatious litigator, subject to division (D)(2) of this section, the court of common pleas may enter an order prohibiting the vexatious litigator from doing one or more of the following without first obtaining the leave of that court to proceed * * * (c) Making any application, other than an application for leave to proceed under division (F) of this section, in any legal proceedings instituted by the vexatious litigator or another person in the court of claims or in a court of common pleas, municipal court, or county court.”

¶ 4 An attorney filed the notice of appeal and currently represents the Pavarinis in this appeal, so they are not “pro se” and not in violation of the court’s order prohibiting them from “instituting and/or maintaining legal proceedings in a pro se capacity.” In any event, the order classifying the Pavarinis as vexatious litigators did not restrict their ability to institute or maintain legal proceedings in a pro se capacity in a court of appeals. The order specifically referenced the “court of common pleas, municipal court, or county court.” The court of appeals is a state court; hence, the Pavarinis did not violate any of the express terms of the vexatious litigator classification by filing this appeal.

{¶ 5} Sailing erroneously maintains that the court could not purport to classify the Pavarinis as vexatious litigators, yet still permit them to institute and/or maintain legal proceedings when represented by counsel. R.C. 2323.52 places no express restriction on the court's ability to qualify a vexatious litigator classification to pro se filings only. We note that in *Roo v. Sain*, Franklin App. No. 04AP-881, 2005-Ohio-2436, the Franklin County Court of Appeals affirmed a vexatious litigator classification that limited the R.C. 2323.52(D) restrictions to "pro se actions by appellant against appellee." *Id.* at ¶ 4. Admittedly, the pro se restriction was not addressed by the court of appeals; nevertheless, its passing without mention by the court of appeals suggests that the court found nothing improper about the restriction.

{¶ 6} A restriction on pro se filings by vexatious litigators is consistent with law predating R.C. 2323.52. Prior to the adoption of the statute, the courts were understood to have inherent powers to limit a particular litigant's access to the courts or to prevent additional filings in a particular case. See *Smith v. Ohio Dept. of Human Serv.* (1996), 115 Ohio App.3d 755, 759. This understanding carried forward after the adoption of R.C. 2323.52. For example, in *Mayer v. Bristow* (1999), 91 Ohio St.3d 3, 14, the supreme court recognized that "principles of reasonableness, rationality, and access to courts apply interdependently to frame a single constitutional inquiry, which is whether the challenged procedure is properly tailored to prevent further abuse of court processes without unduly burdening the submission of legitimate claims." The supreme court's use of the phrase "properly tailored" necessarily implies that courts have discretion to fashion orders as the circumstances dictate.

{¶ 7} Sailing argues, however, that the court's vexatious litigator classification does not limit only the Pavarinis pro se filings. It cites to the final paragraph of the 1999 vexatious litigator order, which omits the "pro se" language of the earlier paragraph:

{¶ 8} "Further, Katherine Krinek Pavarini and Phillip E. Pavarini are subject [sic] the restrictions of O.R.C. 2323.52(I), such that whenever it appears by suggestion of the parties or otherwise that either Katherine Pavarini or Phillip E. Pavarini have instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from this Court pursuant to O.R.C. 2323.52(F), the court in which the legal proceedings are pending shall dismiss the proceedings or application of the vexatious litigator."

{¶ 9} We do not consider the absence of "pro se" language from this part of the court's order to be dispositive of the court's intent when making the classification. The last paragraph of the court's order simply mirrored the language from the version of R.C. 2323.52(I) in effect in 1999.FN4 As noted, there is no language in either the version of the statute in effect in 1999 or the current version of the statute that mentions "pro se" litigants in the sense used by the court.FN5

FN4. The version of R.C. 2323.52(I) in effect in 1999 stated, "Whenever it appears by suggestion of the parties or otherwise that a person found to be a vexatious litigator under this section has instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from the appropriate court of common pleas to do so under division (F) of this section, the court in which the legal proceedings are pending shall dismiss the proceedings or application of the vexatious litigator."

The current version of R.C. 2323.55(I) adds the words "or court of appeals" following the words "appropriate court of common pleas." It is identical in all other respects.

FN5. In either version of R.C. 2323.52, the word "pro se" appears only in the context of licensed attorneys who have been classified as vexatious litigators. The classification only applies when the attorney acts in a pro se capacity; not when actively representing clients.

{¶ 10} In any event, other language in the court's order confirms its intent to limit the vexatious litigator classification to the Pavarinis acting pro se. The court not only mentioned the Pavarinis' conduct in the underlying case, but in "other matters where [the Pavarinis] have acted in a pro se capacity * * *." (Emphasis sic.) The court's use of the term "pro se" is undoubtedly significant, and its absence from the final paragraph of the order is of no moment.

{¶ 11} We conclude that the court could properly restrict the Pavarinis pro se filings in its order classifying them as vexatious litigators. As the Pavarinis were represented by counsel when filing their notice of appeal, they were not required to first seek leave of court. The motion to dismiss the appeal is denied. Our conclusion here necessarily moots Sailing's remaining arguments in favor of dismissal. Consistent with our decision to deny the motion to dismiss the appeal, we likewise deny Sailing's motion for attorney fees.

I

{¶ 12} The Pavarinis' first assignment of error is that the court erred by granting summary judgment because genuine issues of material fact exist as to the claim of trespass and the counterclaim for damages.

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{¶ 13} Summary judgment may issue when, construing the evidence most strongly in favor of the non-moving party, there is no genuine issue of

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material fact and reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. See Civ.R. 56(C).

{¶ 14} “A common-law tort in trespass upon real property occurs when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another whereby damages directly ensue * * *.” “Apel v. Katz, 83 Ohio St.3d 11, 20, 1998-Ohio-420, quoting Linley v. DeMoss (1992), 83 Ohio App.3d 594, 598. The Restatement of Law 2d, Torts (1965), Section 160, states the law that applies when an initial permission to be present on land has been revoked:

{¶ 15} “A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land (a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated * * *.” See, also, Garrard v. McComas (1982), 5 Ohio App.3d 179, 181.

{¶ 16} Sailing's complaint alleged that the Pavarinis brought a damaged sailboat to Sailing and asked for a repair estimate, but failed to respond to the estimate and left the boat in Sailing's possession without paying the required storage fee. It filed claims for trespass and nuisance relating to the failure to remove the boat from the premises, as well as breach of contract for the failure to pay the repair estimate and storage in the Sailing boat yard. In addition, it requested a preliminary injunction for the immediate removal of the boat. The court granted the preliminary injunction, making a finding of fact that Sailing had “requested Defendants to enter into a storage contract or remove the vessel numerous times, the boat was not removed by Defendants and remains upon Plaintiff's premises without its permission.” The Pavarinis then removed the boat from the Sailing boat yard. The court granted summary judgment to Sailing on all causes of action, ordering the Pavarinis to pay damages totaling \$8,425.80. The court also awarded exemplary (punitive) damages for trespass in the amount of \$1. In a written opinion, the court awarded Sailing attorney fees in the amount of \$23,335.75. The court cited two grounds for attorney fees: (1) the Pavarinis' “inclusion * * * of meritless and irrelevant counterclaims and defenses, their consistent but baseless excoriation of Plaintiff's counsel * * * and their constant attempts to delay this matter” and (2) as part of the punitive damages award.

{¶ 17} We find that the court erred by granting summary judgment to Sailing because a genuine issue of material facts exists as to whether Sailing effectively terminated its consent to keep the boat on the premises.

{¶ 18} Sailing's general manager submitted an affidavit in which he stated that the Pavarinis brought their damaged boat to Sailing in mid-November 2003. The Pavarinis requested that the boat be lifted from the water and that Sailing prepare an estimate for repairing the boat. Sailing faxed a repair estimate FN6 on November 26, 2003. The cover page to the fax told the Pavarinis that “if the boat is removed within the week no storage fees will be charged, if not let us know what you want.” The Pavarinis did not respond to Sailing.

FN6. The Pavarinis argue that Sailing did not meet its initial burden under Civ.R. 56(C) because Sailing did not properly authenticate the exhibits it attached to the motion for summary judgment, and without that material it produced no evidence in support of the motion. Even if we assume without deciding that these materials were improperly offered in support of the motion for summary judgment, the Pavarinis did not object to them. Absent an objection, the court did not abuse its discretion by considering these documents. See *Brown v. Ohio Cas. Ins. Co.* (1978), 63 Ohio App.3d 37, 90-91; *Alliant Food Servs., Inc. v. Powers*, Cuyahoga App. No. 82189, 2003-Ohio-4193, at ¶ 16.

{¶ 19} In March 2004, Sailing's general manager sent the Pavarinis a fax which contained a storage agreement and rate card. The cover page of the fax stated, in its entirety: “Mr. Pavarini, storage is past due. Please fill out and return with full payment. Thank you. Due \$583.30[.]” (Emphasis sic.)

{¶ 20} An affidavit by Sailing's general manager stated:

{¶ 21} “In November 2003, after the Pavarinis' boat was brought to Sailing Inc.s [sic] yard, it was explained that the repairs should be contracted or the boat should be removed. In March, 2004 it was explained that either a storage contract was necessary or the boat should be removed. No repairs were contracted, no storage contract entered into, and the boat was not removed until June 16, 2005.” Citing to an appended rate sheet for storage, the general manager calculated total storage fees of \$8,280 and a fee of \$145.80 for a repair estimate and a boat “lift.”

{¶ 22} These evidentiary materials, FN7 viewed in a light most favorable to the Pavarinis, would not allow reasonable minds to come to but one conclusion on the issue of whether Sailing effectively terminated its consent for the Pavarinis to keep their boat at the Sailing boat yard. Sailing's “pay up or move out” position could be viewed not as an effective termination of Sailing's permission for the boat to remain on Sailing's property, but as a warning that if the boat remained, a contract for storage would arise. The facts show that Sailing continued to charge storage fees in conformance with the rate card that it faxed to the Pavarinis in March 2004 when the boat was not removed. Importantly, Sailing did not offer any evidence that it communicated with the Pavarinis after March 2004, so reasonable minds could differ on whether this silence constituted a tacit

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recognition that a contract for storage had arisen. Sailing's failure to offer any evidence that it made an unconditional demand for the removal of the boat after March 2004 could lead reasonable minds to differ on whether Sailing expressly terminated its permission for the boat to remain at the boat yard, thus creating an implied contract for storage.

FN7. In their brief in opposition to the motion for summary judgment, the Pavarinis argued that they did not receive the estimate and assumed that their boat would be stored at a seasonal rate of \$500. They did not, however, offer any evidentiary material to support this assertion, nor did they submit an affidavit to substantiate their claim. Civ.R. 56(E) states that “ * * * an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” We therefore consider only whether Sailing met its initial burden of demonstrating no genuine issue of material fact. See *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 428-429, 1997-Ohio-259.

¶5 {¶ 23} In a filing captioned “Additional Argument” FN8 to its motion for summary judgment, Sailing cited to the court's findings of fact and conclusions of law issued in conjunction with the preliminary injunction. In conclusion of law number one, the court stated that “[t]he continued presence of Defendants' boat upon Plaintiff's premises is a willful and wanton continuing trespass and a nuisance.” The Pavarinis did not appeal from the preliminary injunction, so Sailing argues that both the trespass and the Pavarinis' willful and wanton conduct have been conclusively established as a fact by principles of res judicata.

FN8. After submitting its motion for summary judgment, Sailing filed an “addendum” to that motion. It also filed a reply brief without leave of court as required by Loc.R. 11(D) of the Cuyahoga County Court of Common Pleas. The “Additional Argument” filing followed the reply brief and was likewise filed without leave of court. The Pavarinis objected to Sailing's submission of “additional argument” but the court did not rule on it. We must presume that the court overruled it. *State ex rel. The v. Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329.

¶24 In *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, the syllabus states, “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” “Final” orders are defined by R.C. 2505.02. R.C. 2505.02(A)(3) classifies a preliminary injunction as a “provisional remedy.” Although ordinarily not final orders, provisional remedies may become final orders if:

¶25 “(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy [and]

¶26 “(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.” R.C. 2505.02(B)(4).

¶27 We conclude that the preliminary injunction was not final for purposes of R.C. 2505.02. Although the preliminary injunction determined the action with respect to subpart (a) of R.C. 2505.02(B)(4), the Pavarinis had the ability to appeal that ruling following a final judgment as to all issues and claims in the case.FN9 Consequently, the preliminary injunction did not satisfy subpart (b) of R.C. 2505.02(B)(4). If the preliminary injunction was non-final, it could not be res judicata on the issue of either trespass or malice. The first assignment of error is sustained.

FN9. The court's use of Civ.R. 54(B) language is of no consequence, as certification language will not convert a non-final order into a final order. See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86; *Deyerle v. City of Perrysburg*, Wood App. No. WD-03-063, 2004-Ohio-4273, at ¶ 16.

II

¶28 The Pavarinis next complain that the court abused its discretion by awarding attorney fees as a sanction for frivolous conduct. They maintain that they were not in violation of any court order relating to discovery violations so there was no basis for awarding attorney fees.

¶29 The court's order granting attorney fees articulated two different grounds for the award: (1) as sanctions for frivolous conduct and (2) as part of the punitive damages award. By reversing the summary judgment, any basis for an award of attorney fees stemming from punitive damages is vitiated. We therefore review the court's order to determine whether it abused its discretion by awarding attorney fees as a sanction for frivolous conduct.

¶30 The total amount of fees awarded by the court was an abuse of discretion because the fee award encompassed counsel's fees for the entire case, irrespective of whether those fees were occasioned by frivolous conduct. For example, the court awarded counsel fees for initial research that was performed before filing the complaint, before any “litigation” existed. In fact, the court's award of attorney fees very closely tracked the fee statement counsel submitted. That statement listed fees of \$23,668.50—a figure which reflected a total of nearly 200 hours worked on the entire case.

The court granted attorney fees in the amount of \$23,332.75, FN10 an amount commensurate with counsel's stated number of hours expended on the case, so its award necessarily encompassed fees for the entire case, not just for time spent defending frivolous conduct. This amount of fees stands in clear contravention of the court's own statement of facts which detailed the Pavarinis' frivolous conduct as failing to appear for a deposition, seeking continuances, denying requests for admissions without first making a reasonable inquiry. The court inexplicably failed to separate out those fees that were not related to the frivolous conduct.

FN10. The court's attorney fee order made three revisions to the fee request. Those revisions reduced counsel's time expended on the case by 1.75 hours.

¶6 {¶ 31} Ohio follows the "American rule" which holds that attorney fees for the prevailing party are not recoverable absent statutory authorization. See *Sorin v. Bd. of Edn.* (1976), 46 Ohio St.2d 177, 183. The court's decision to award attorney fees based on all of counsel's time expended on the case was tantamount to giving the prevailing party its attorney fees. This decision was arbitrary, unreasonable and unconscionable; hence, it was an abuse of discretion. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. We therefore sustain the sixth assignment of error.

{¶ 32} This cause is reversed and remanded for proceedings consistent with this opinion.

It is, therefore, ordered that said appellants recover of said appellee their costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., A.J., and CHRISTINE T. McMONAGLE, J., Concur.

Ohio App. 8 Dist., 2007.

Sailing, Inc. v. Pavarini

Slip Copy, 2007 WL 4443394 (Ohio App. 8 Dist.), 2007 -Ohio- 6844

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