Supreme Court of Ohio Clerk of Court - Filed August 13, 2015 - Case No. 2015-1326

REC'D JUN 30 2015
FILED
COURT OF APPEALS
JUN 30 2015
TAMI PENTEK, CLERK OF COURTS
ASHTABULA COUNTY, OHIO

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**ASHTABULA COUNTY, OHIO**

| | | |
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| CITY OF CONNEAUT, OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellant/ Cross-Appellee, | : | **CASE NO. 2014-A-0053** |
| - vs - | : | |
| DARLENE F. BUCK, et al., | : | |
| Defendants-Appellees/ Cross-Appellants. | : | JUN 30 2015 |

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CV 1168.

Judgment: Affirmed in part, reversed in part, and vacated.

*Carly I. Prather,* Assistant Conneaut Law Director, City Hall Building, 294 Main Street, Conneaut, OH 44030 (For Plaintiff-Appellant/Cross-Appellee, City of Conneaut, Ohio).

*Kenneth L. Piper,* 3503 Carpenter Road, Ashtabula, OH 44041 (For Defendants-Appellees/Cross-Appellants, John Peaspanen and Judy C. Peaspanen).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant/cross-appellee, the city of Conneaut ("the City"), appeals from the judgment entry of the Ashtabula County Court of Common Pleas, awarding attorney fees to appellees/cross-appellants, John and Judy Peaspanen. The Peaspanens have filed a cross-appeal from that entry. For the reasons discussed below, the judgment of the trial court is affirmed in part, reversed in part, and vacated.

{¶2} On August 29, 2008, the City filed a complaint for declaratory judgment, seeking a declaration that properties in the Craytor Brother Willow Beach Park Plat, owned by Darlene Buck, John Peaspanen, A.J. Delprince, and Milton and Tina Mueller, abutted a portion of real estate recorded as a "street" was "'dedicated to public use.'" The complaint further noted that "referenced on said plat is a [second, separate] 'roadway' between original sublots 3 and 4," which connected to a common driveway.

{¶3} The City averred that "said roadways/streets are dedicated but unaccepted and unimproved public streets," asserting the streets were dedicated to public use pursuant to the 1897 recording of the plat. The complaint alleged that "a dispute has arisen whereby * * * Peaspanen claims that the dedicated streets/roadways are private property and are his sole and exclusive property." The City asked that a declaratory judgment be issued, declaring the street/roadway is public property.

{¶4} John Peaspanen filed an answer, counter-claim, and cross-claim. The counter-claims asserted the street shown in the plat has never been accepted as such by the trustees and, in any event, it has become private property by operation of adverse possession. The Muellers subsequently filed an answer and cross-claim. And, later, the City filed a reply to Peaspanen's answer.

{¶5} Following discovery and a status conference, the City filed an amended complaint for declaratory judgment. The complaint added Judy Peaspanen and Raymond Buck as owners and alleged the street at issue, located between subplots 73 and 74, "is public property dedicated to public use or, alternatively, that said street/roadway is for the use of the property owners of the Craytor Brothers Willow

Beach Park Plat." The complaint also noted that survey maps from 2004 and 2007 by the Ashtabula County Engineer's Office showed the existence of the roadway.

{¶6} The Peaspanens filed a motion for summary judgment, arguing the unnamed street at issue was never accepted by any public entity and, thus, was never a legally established street. They further argued that, even if it was a public street, the street had been abandoned and belonged to them by virtue of adverse possession. Attached to the motion was a March 28, 2008 letter from Lori Lamer, the Law Director, to the City Manager, in which she noted that, although the plat map designated a portion of the property as a street, no documentation could be found "to reflect that the City ever accepted this piece of property as a City street," and stated that the matter was a private property dispute between the Muellers and the Peaspanens.

{¶7} The City filed a memorandum in opposition asserting "[i]t is not the intent of the City to take a position regarding whether this is a public or private roadway," even though it had submitted evidence indicating the property was originally dedicated to the City. Instead, the City maintained, given disputes that had arisen between the defendant-Peaspanens and cross-defendant-Muellers, it filed the declaratory judgment action to obtain a judicial determination of the legal status of the property.

{¶8} In its response memorandum, the Peaspanens asserted that the City's failure to take a position on whether the street was public demonstrated that the complaint was premised upon a private dispute in which it had no stake. Thus, the Peaspanens concluded, the City lacked standing to initiate the complaint.

{¶9} In its March 22, 2010 judgment, the trial court determined that, if there had been a public roadway/street on the Craytor Brothers Willow Beach Plat, it had been

abandoned; and, since the lawsuit involved a dispute among private parties, the City had no standing to sue. The court enjoined the City from interfering with the rights of the Peaspanens, Delprince, and the Bucks, finding that the street/roadway had been obtained by the parties through adverse possession. It further found the Muellers had no rights to use the "street." Thus, it granted the Peaspanens' motion for summary judgment on the cross-claim.

{¶10} The Peaspanens subsequently filed a motion for attorney fees, pursuant to R.C. 2323.51, which permits a trial court to award reasonable attorney fees for any party to a civil case who is adversely affected by frivolous conduct. In support, the Peaspanens asserted the Law Director/the City instituted frivolous proceedings, knowing that the matter was a private property dispute, and then chose not to take a position regarding whether the roadway was public or private. The City filed a brief in opposition, as well as a supplemental brief. The Peaspanens later filed a second brief in support of their position.

{¶11} At the hearing on the Peaspanens' motion, Lori Lamer, former Conneaut Law Director, testified regarding a March 2008 memorandum she drafted stating the City should not become involved in the dispute between the Peaspanens and the Muellers as it was a private matter. She explained that similar language was included in a later memorandum to the City Director as she was unable to find any document reflecting the City's acceptance of the property as a city street. She maintained, however, that the determination of whether the street was public or private was not a matter the City had authority to resolve. Lamer testified she eventually developed the

belief "that there was a question regarding whether [the City] accepted the street [and/or] whether the City ever abandoned the street * * *."

{¶12} Lamer asserted she was unsure whether the street had been accepted by the City at any time and could find no direct evidence of any acceptance; if, however, it was accepted, Lamer was similarly uncertain whether the city had abandoned the road. Eventually, Lamer reviewed certain deeds referencing the dedication of the street, which suggested the City may have owned the road. As a result of the foregoing, Lamer filed a declaratory judgment action seeking a judicial declaration of whether the road was public or private; and, if it was, at some point, public, whether the City had vacated or abandoned the property.

{¶13} Lamer acknowledged that the City, in its memorandum in opposition to the Peaspanens' motion for summary judgment, had previously indicated it was not taking a position on whether the road was public or private; Lamer clarified, however, this did not mean the City had no stake in the outcome of the case. Lamer testified that the City filed the declaratory judgment action for the court to make a judicial declaration regarding ownership so the City could, "if called upon, enforce the laws of the State of Ohio and the ordinances of the City of Conneaut."

{¶14} Attorney Kenneth Piper, the Peaspanens' attorney, testified to his lengthy experience practicing law and his specialization in real estate law. He testified to the time and details of the work he had completed while representing the Peaspanens. And he submitted a statement of fees for the lawsuit as of the September 2, 2010 hearing, totaling $57,062.35. Attorney Piper testified that some of his research was related to responding to the Muellers' cross-claim. Attorney Piper maintained, however, it was not

possible to separate the research conducted on the cross-claim from the research premised upon the declaratory judgment action. And, in any event, he asserted, all of his work was a result of the City's filing its complaint.

{¶15} Edward Sompi, the former City Manager for Conneaut, testified that he was aware of the ongoing dispute in 2008 between the Peaspanens and the Muellers relating to the ownership of the street. After speaking with Lamer about the matter, he agreed that a declaratory judgment action should be filed.

{¶16} Following the hearing, each party filed closing arguments/post-hearing briefs. In March 2011, Attorney Piper filed a supplemental affidavit, asserting, as of that date, the total attorney fees charged were $66,829.35.

{¶17} On July 22, 2014, the trial court entered judgment granting the Peaspanens' motion for attorney fees. The court found the City's claim, that the property constituted a street dedicated to public use, was an "assertion [that] was never established by [the City]." It noted that the City later "refused to take a stand as to whether the property * * * was [the City's] public property" in response to the Peaspanens' motion for summary judgment.

{¶18} The court found that the City engaged in frivolous conduct by bringing the declaratory judgment action "without doing the necessary research to establish that fact because it did not wish to incur the expense thereof. Instead, it passed that burden onto the [Peaspanens]. * * * Once the research was performed in this matter [by the Peaspanens' attorney] neither the City of Conneaut nor the Muellers responded. The fact that [the City] did not respond is quite telling." The court determined the City could and should have properly researched the issues prior to filing suit.

{¶19} The court determined Lamer was immune from personal liability pursuant to R.C. 2744.02; based upon a detailed itemization of the Peaspanens' attorney fees, however, the court awarded attorney fees in the amount of $57,062.35. This court subsequently granted the City's request for a stay of execution of judgment pending the instant appeal.

{¶20} The City assigns four errors for this court's review. Its first assignment of error provides:

{¶21} "Appellant alleges that the trial court abused its discretion and erred to the prejudice of the appellant in granting attorney's fees to the appellee in this matter without having jurisdiction under O.R.C. Section 2721.09."

{¶22} Under this assigned error, the City argues the Peaspanens' motion for attorney fees was not properly before the trial court since, in a declaratory judgment action, "further relief" may be granted only through the filing of a complaint. The Peaspanens argue that an award of attorney fees is not "based on" a declaratory judgment and, therefore, does not have to be raised in a separate action or complaint. This issue relates to the interpretation and applicability of a statute; hence, it is a question of law we review de novo. *Ivancic v. Enos*, 11th Dist. Lake No. 2011-L-0050, 2012-Ohio-3639, ¶48.

{¶23} R.C. 2721.09 provides, in relevant part:

{¶24} Subject to section 2721.16 of the Revised Code[, dictating when attorney fees are appropriate in declaratory judgment actions], whenever necessary or proper, a court of record may grant further relief based on a declaratory judgment or decree previously granted

under this chapter. The application for the further relief shall be by a complaint filed in a court of record with jurisdiction to grant the further relief.

{¶25} This statute requires the filing of a complaint for "further relief based on a declaratory judgment * * * previously granted." In this case, the relief requested was based solely on the Peaspanens' allegation that the filing of the lawsuit was frivolous. It was not related to or premised upon a declaratory judgment previously granted.

{¶26} Recovery for frivolous conduct is generally governed by R.C. 2323.51, which allows that, "at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal." R.C. 2323.51(B)(1). R.C. 2323.51 specifically governs the process for filing for attorney fees based upon frivolous conduct. And, to the extent the Peaspanens' motion was not based upon a declaratory judgment previously granted, R.C. 2721.09 is inapplicable. We therefore hold no additional complaint was required and the trial court had jurisdiction to rule on the motion.

{¶27} The City's first assignment of error lacks merit.

{¶28} We shall next address the City's third assignment of error. It provides:

{¶29} "Appellant alleges that the trial court erred in awarding attorney's fees to the appellees based upon a finding that the appellant engaged in frivolous conduct in filing an action for declaratory judgment."

{¶30} Pursuant to R.C. 2323.51, a court may "award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with a civil action or appeal * * * to any party to the civil action or appeal who was adversely affected by frivolous conduct." R.C. 2323.51(B)(1). "Conduct" includes "[t]he filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, * * * or the taking of any other action in connection with a civil action." R.C. 2323.51(A)(1)(a). Furthermore, "frivolous conduct" is defined as conduct that (1) obviously serves merely to harass or maliciously injure another party to the civil action, (2) is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law, or (3) consists of allegations or other factual contentions that have no evidentiary support or are not likely to have evidentiary support after a reasonable opportunity for further investigation. R.C. 2323.51(A)(2)(a).

{¶31} The purpose of R.C. 2323.51 is not to punish a party for an unsuccessful claim, but "addresses conduct that serves to harass or maliciously injure the opposing party in a civil action or is unwarranted under existing law and for which no good faith argument for extension, modification, or reversal of existing law may be maintained." *Ferron v. Video Professor, Inc.*, 5th Dist. Deleware No. 08-CAE-09-0055, 2009-Ohio-3133, ¶69.

{¶32} No single standard of review applies in R.C. 2323.51 cases. *Wiltberger v. Davis*, 110 Ohio App.3d 46, 51 (10th Dist.1996). "Rather, in a frivolous conduct appeal, we must consider mixed questions of law and fact." *Lozada v. Lozada*, 11th Dist. Geauga No. 2012-G-3100, 2014-Ohio-5700, ¶13, citing *Judd v. Meszaros*, 10th Dist.

Franklin No. 10AP-1189, 2011-Ohio-4983, ¶18. "The question of what constitutes frivolous conduct may be either a factual determination, e.g., whether a party engages in conduct to harass or maliciously injure another party, or a legal determination, e.g., whether a claim is warranted under existing law." *Curtis v. Hard Knox Energy, Inc.*, 11th Dist. Lake No. 2005-L-023, 2005-Ohio-6421, ¶15. A trial court's findings of fact must be given deference, and, as such, this court will not disturb such determinations save an abuse of discretion. *McPhillips v. United States Tennis Assn. Midwest*, 11th Dist. Lake No. 2006-L-235, 2007-Ohio-3595, ¶28. Alternatively, legal questions are reviewed under a de novo standard of review. *Id.*

**{¶33}** In this case, the trial court found the City engaged in frivolous conduct by not conducting proper research concerning the ownership of the property prior to filing its lawsuit. According to the trial court, this required the Peaspanens to expend considerable money on attorney fees to establish their clear title to the property. In light of the evidence in the record, we find the court's findings and conclusion problematic.

**{¶34}** The record demonstrates that the City filed its declaratory judgment action based upon an official plat map filed in the Ashtabula County Recorder's Office indicating the street subject to the controversy was dedicated to the City. Although the City was unable to find objective evidence that the street was ever accepted as a public street, Lamer testified a judicial declaration of ownership was necessary to aid the City in its response to complaints of trespassing, as well as any future, potential conflicts that might arise as a result of neighbor disputes regarding ownership of the property.

**{¶35}** In determining whether conduct is frivolous, courts must be cautious in applying R.C. 2323.51 so that legitimate claims are not chilled. *Ferron*, *supra*, at ¶45. A

party's conduct is not frivolous simply because a claim is not well-grounded in fact or impervious to dispute. *See Hickman v. Murray* 2d Dist. Montgomery No. 15030, 1996 Ohio App. LEXIS 1028, *5 (Mar. 22, 1996), citing *Richmond Glass & Aluminum Corp. v. Wynn*, 7th Dist. Columbiana No. 90-C-49, 1991 Ohio App. LEXIS 4195, *13 (Sept. 5, 1991). Further, the statute was not designed to punish coincidental misjudgment or mere tactical error. *Turowski v. Johnson,* 70 Ohio App.3d 118, 123 (9th Dist.1991). To the contrary, the purpose of the statute is to discourage egregious, overzealous, unjustifiable, and frivolous action. *Oakley v. Nolan*, 4th Dist. Athens No. 06CA36, 2007-Ohio-4794, ¶16, citing *Turowski v. Johnson*, 68 Ohio App.3d 704, 706, (9th Dist.1990).

**{¶36}** In this case, the trial court failed to specifically identify or fully elucidate how the City's failure to conduct a thoroughgoing investigation concerning ownership of the property before filing would support a finding of frivolous conduct. This is troublesome, especially in light of the City's reasons for filing.

**{¶37}** First of all, given Lamer's testimony, it is clear the action was not filed merely to harass or maliciously injure the Peaspanens. Rather, Lamer had legitimate questions regarding whether, in light of the property's dedication over 100 years ago, it was ever accepted and, if so, whether it was abandoned. These points were critical as to whether the neighboring property owners had a legitimate claim to enforce personal rights of ownership; and, furthermore, such a declaration would obviously affect the manner in which the City would respond to any future complaints regarding violations of these purported rights.

**{¶38}** Moreover, "[w]hether a claim is warranted under existing law is an objective consideration. The test * * * is whether no reasonable lawyer would have

brought the action in light of the existing law. In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim." *Pingue v. Pingue*, 5th Dist Delaware No. 06-CAE-10-0077, 2007-Ohio-4818, ¶20, citing *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, ¶30 (1st Dist.), quoting *Hickman v. Murray* 2d Dist. Montgomery No. 15030, 1996 Ohio App. LEXIS 1028 (Mar. 22, 1996). Here, a declaration of ownership, in light of the underlying private ownership dispute as well as the evidence that the street was dedicated to the City, is both reasonable and prudent in this case. Indeed, given the City's interests, as testified to by Lamer, and the parties' relative positions, the declaration was necessary.

**{¶39}** Finally, despite the court's finding that the City failed to conduct "proper research," it does not follow that the City's allegations were neither unsupported by evidence or stood no likelihood of developing further evidentiary support after additional investigation. Indeed, the trial court actually concluded the Peaspanens owned the property by virtue of adverse possession. This necessarily implies the property, at one point, was owned by the City, possibly abandoned, and the Peaspanens exercised adequate dominion over it for the requisite period to become the legal owners.

**{¶40}** The facts in evidence provided a prima facie, reasonable basis for the City's decision to file the declaratory judgment action. Lamer, under the circumstances, did not act so egregiously, overzealously, or unjustifiably in filing the action to rise to the level of frivolous conduct. And the arguable failure to unequivocally determine, via "proper research," that the City had actually accepted the purported dedication prior to filing the suit cannot, standing alone, rise to the level of frivolous conduct. We therefore

hold the trial court abused its discretion when it found the City acted frivolously, pursuant to R.C. 2323.51, when it filed the underlying declaratory judgment action.

{¶41} Moreover, even assuming arguendo the City's conduct in filing the action could be considered frivolous, the Peaspanens were not adversely affected by that conduct, as required by R.C. 2323.51(B)(1). The City's filing of the declaratory judgment action was a direct conduit for the Peaspanens obtaining relief, which they were seeking pursuant to their voluntarily-filed counter-claim against the City and their voluntarily-filed cross-claim against the Muellers. Accordingly, the adjudication declaring the Peaspanens owners of the property through adverse possession necessarily benefitted them. It therefore follows that, even if the City engaged in frivolous conduct when it filed the declaratory judgment action, the Peaspanens, far from being adversely affected, actually obtained the relief to which they claimed entitlement; namely, ownership of the property at issue.

{¶42} For the foregoing reasons, we hold the City did not act frivolously in filing the declaratory judgment action; moreover, even if the City's conduct was arguably frivolous, the Peaspanens were not adversely affected by the filing of the suit. We therefore hold the trial court abused its discretion in awarding the Peaspanens attorney fees.

{¶43} The City's third assignment of error has merit.

{¶44} The City's remaining assignments of error provide:

{¶45} "[2.] Appellant alleges that the trial court erred to the prejudice of the appellant in not determining that the appellant had qualified immunity.

{¶46} "[4.] Appellant alleges that the trial court erred to the prejudice of the appellant by excluding the testimony of the appellant's expert witness pursuant to Evid. R. 702."

{¶47} Because our disposition of the City's third assignment of error is dispositive of this appeal, the City's second and fourth assignments are rendered moot. They are accordingly without merit.

{¶48} On cross-appeal, the Peaspanens assign the following error:

{¶49} "The trial court failed to award appellees the proper amount of attorney fees established by the record against appellant."

{¶50} In light of our conclusion that the trial court abused its discretion in finding the City's conduct frivolous, the Peaspanens' cross-appeal is also moot. It is therefore similarly without merit.

{¶51} For the reasons discussed in this opinion, the judgment of the Ashtabula County Court of Common Pleas is affirmed in part, reversed in part, and the order granting the Peaspanens attorney fees is vacated.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDELL, J., concurs in part and dissents in part, with a Dissenting Opinion.

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DIANE V. GRENDELL, J., concurs in part and dissents in part, with a Dissenting Opinion.

{¶52} I concur in the judgment of the court, finding no merit in the first assignment of error, since attorney's fees for frivolous conduct are properly sought

through a timely motion. I dissent, however, as to the third assignment of error, and disagree with the conclusion that the City of Conneaut did not engage in frivolous conduct by instituting the lawsuit against the Peaspanens.

{¶53} In the present matter, the trial court properly concluded that Conneaut's actions constituted frivolous conduct. "Frivolous conduct" includes a party's filing of a complaint that "consists of allegations or other factual contentions that have no evidentiary support or are not likely to have evidentiary support after a reasonable opportunity for further investigation." *Lozada v. Lozada*, 11th Dist. Geauga No. 2012-G-3100, 2014-Ohio-5700, ¶ 11; R.C. 2323.51(A)(2)(a).

{¶54} Conneaut, through Law Director Lori Lamer, filed a Complaint seeking declaratory judgment, on the grounds that a street abutting the Peaspanens' property was a public street. Lamer admitted during the hearing that she had no evidence at the time of the filing of the Complaint that the street had been accepted by Conneaut as a public street. She authored a memorandum to the City Manager on March 28, 2008, several months before filing the Complaint, stating that she was unable to find any document reflecting that Conneaut accepted the property as a city street and that the property dispute between the defendants was a private matter. There is no evidence that this changed prior to the filing of the Complaint, which was apparent from Lamer's testimony. In its Amended Complaint, Conneaut then took the position that the "street/roadway is public property dedicated to public use *or, alternatively, that said street/roadway is for the use of the [private] property owners.*" (Emphasis added.) In summary judgment proceedings, Conneaut adopted no position as to whether the street

was public. There was also testimony presented that Conneaut did not want to pay to do a proper search to determine if the street belonged to the city.

{¶55} On these grounds, the trial court properly decided that Conneaut's conduct in filing the action for declaratory judgment was frivolous. There was a lack of evidence to support a claim that the street was public property and there was no basis for Lamer to believe discovery would lead to such evidence, since it would likely be in the possession of a government agency and not with individual property owners. Lamer herself had believed it was a private dispute but filed a claim anyway. Even after no evidence to support the claim was found, Conneaut did not dismiss the Complaint but instead merely changed its stance to advocate that the private property owners had a dispute over the use of the street, requiring the Peaspanens to continue expending money to defend the matter.

{¶56} As was asserted by the Peaspanens in their Motion for Summary Judgment, pursuant to section 4908*b* of the Revised Statutes of Ohio, effective prior to the recording of the Plat in 1897, a person "may dedicate any tract or strips of ground to the public use as a highway * * * and the county commissioners, or in a proper case the township trustees, may, if they deem such road of sufficient public utility, accept the same, by entry to that effect on their record, and recording as aforesaid. Upon such acceptance, said tract or strip shall become * * * a legally established highway." *See State ex rel. Fitzthum v. Turinsky*, 172 Ohio St. 148, 150-151, 174 N.E.2d 240 (1961). Conneaut never disputed the applicability of this statute in its response to summary judgment, but instead took no position and raised only factual issues relating to the dispute of ownership between the private party defendants.

{¶57} While the majority asserts that conduct is not frivolous when it amounts to "coincidental misjudgment or mere tactical error," *supra* at ¶ 35, the circumstances here can hardly be classified in such a manner. Lamer advised the necessary parties that no evidence was in her possession to support a conclusion that the road in dispute was a public street but the Complaint alleging that the street was public was still filed. This contention was not a mere misjudgment but a statement exactly contrary to what the evidence showed.

{¶58} The majority's position leaves individuals with no recourse when a plaintiff brings a suit, completely unfounded in law and fact, and which results in expenditure of attorney's fees. It is entirely unfair to require the Peaspanens to pay tens of thousands of dollars when the city was already aware that there was no evidence to support its claim of rights to the street.

{¶59} The majority further accepts Conneaut's contention that, due to the claims of ongoing fighting between the Peaspanens and the Muellers over the ownership of the street, which led to police involvement, the action was necessary for the city to enforce its laws and prevent complaints of trespassing. However, no law whatsoever is cited that allows a city to institute an action for the declaration of rights of private citizens in relation to their private property. There is no reason why police officers could not enforce the law pursuant to any documentation on record or instruct the parties they should resolve any dispute in their own civil matter.

{¶60} As to this issue, the trial court correctly found that Conneaut did not have standing to bring a suit to determine the rights of individual property owners. Conneaut did not appeal from this holding. A party who is not "the real party in interest" lacks

standing. *Travelers Indemn. Co. v. R. L. Smith Co.*, 11th Dist. Lake No. 2000-L-014, 2001 Ohio App. LEXIS 1750, 7 (Apr. 13, 2001). "The real party in interest must have a real interest in the subject matter of the litigation and not merely an interest in the outcome of the case." *Id.* at 7-8, citing *Shealy v. Campbell*, 20 Ohio St.3d 23, 24, 485 N.E.2d 701 (1985). Here, although the outcome may have impacted how police enforced the parties' rights to access the street, it does not follow that Conneaut has standing and they have failed to demonstrate otherwise.

**{¶61}** The majority also holds that, even if the lawsuit was frivolous, the Peaspanens were not adversely affected, such that they would be permitted to recover attorney's fees. Specifically, the majority asserts that they benefited because they were able to receive relief, including a declaration that they were owners of the property through adverse possession. *Supra* at ¶ 13.

**{¶62}** I disagree with this contention. While it is true that there must be an adverse effect to recover in a frivolous action, pursuant to R.C. 2323.51(B)(1), such was the case here. Even if there was some benefit to the Peaspanens, it does not follow that they wished to expend money on attorney's fees to obtain this benefit. Further, the opinion does not address the fact that a large portion of the attorney's fees in this matter was associated with investigating the public street issue which was unfounded and frivolous.

**{¶63}** Expending money on attorney's fees to prove an established legal ownership right against a totally feckless and legally unsupported claim hardly constitutes a "benefit." If that was the case, every time someone wins a frivolous suit,

the prevailing party would be precluded from being awarded attorney's fees because that party had the "benefit" of winning the frivolous litigation.

{¶64} For the foregoing reasons, I dissent on the third assignment of error and would affirm the trial court's award of attorney's fees to the Peaspanens due to Conneaut's frivolous conduct.

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| **STATE OF OHIO** | ) | **IN THE COURT OF APPEALS** |
| | )SS. | |
| **COUNTY OF ASHTABULA** | ) | **ELEVENTH DISTRICT** |

CITY OF CONNEAUT, OHIO,

Plaintiff-Appellant/
Cross-Appellee,

- vs -

DARLENE F. BUCK, et al.,

Defendants-Appellees/
Cross-Appellants.

**JUDGMENT ENTRY**

**CASE NO. 2014-A-0053**

FILED
COURT OF APPEALS
JUN 30 2015
PEGGY PONTIUS, CLERK OF COURTS
ASHTABULA COUNTY, OHIO

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed in part, reversed in part, and vacated.

Costs to be taxed against the parties equally.

JUDGE CYNTHIA WESTCOTT RICE

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDELL, J., concurs in part and dissents in part, with a Dissenting Opinion.

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

FILED
2010 MAR 22 P 3:25
CAROL A. MEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO. OH

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| CITY OF CONNEAUT, OHIO, Plaintiff, | ) | CASE NO. 2008-CV-1168 |
| vs. | ) | **JUDGMENT ENTRY** |
| DARLENE F. BUCK, et al., Defendants. | ) | |

The Plaintiff, City of Conneaut, Ohio, filed its Complaint for Declaratory Judgment on August 29, 2008, naming, as defendants, certain property owners of record in an allotment called the Craytor Brothers Willow Beach Park Plat.

On June 1, 2009, the Plaintiff filed an Amended Complaint for Declaratory Judgment, naming the spouses of Darlene F. Buck and John Peaspanen, who were not named as Defendants in the original Complaint.

The named Defendants are Darlene F. Buck, Raymond E. Buck, John Peaspanen, Judith C. Peaspanen, Milton B. Mueller, Tina L. Mueller, and Anthony J. DelPrince.

The Plaintiff seeks the Court to declare that the named Defendants property owners abut a portion of real estate that was and remains designated and recorded, as public property dedicated to the City of Conneaut for public use as a street or roadway when the plat map was recorded in 1897. Whether it is a public roadway or a private property is the subject of this lawsuit.

On October 29, 2008, an Answer, Counterclaim, and Cross-Claim was filed by the Defendant, John Peaspanen. On November 25, 2008, an Answer and Cross-Claim was filed by the Defendants, Milton B. Mueller and Tina L. Mueller.

Responsive pleadings have been filed to the various Cross-Claims, Counterclaims, and Amended Complaints for the parties represented by counsel. No party represented by counsel is in default of answer.

No appearance or responsive pleading to the Plaintiff's Amended Complaint or to the other pleadings in this matter have been filed by the Defendants, Darlene F. Buck, Raymond E. Buck, and Anthony J. DelPrince, all whom are in default of answer.

On July 10, 2009, the Defendants, John Peaspanen and Judith C. Peaspanen, filed their Motion for Summary Judgment. On December 14, 2009, having been granted additional time to respond, the Plaintiff filed its Response to the Peaspanens' Motion for Summary Judgment, stating that the City of Conneaut was now not taking a position whether the property, that is the subject of this lawsuit, is a public or private roadway. There were no other responses to the Peaspanens' Motion for Summary Judgment filed by the other parties.

On February 8, 2010, a draft of a proposed Judgment Entry was submitted by the Court to all parties represented by counsel, as well as the parties not represented by counsel. Responses were received from the Plaintiff; the Defendants, Milton B. Mueller and Tina L. Mueller; and the Defendants, John Peaspanen and Judith C. Peaspanen.

The Court makes the following findings of facts, rulings on motions, and conclusions of law.

(1) The Plaintiff, City of Conneaut, Ohio, takes no position concerning whether the property, subject to this lawsuit, is a public roadway or public drive or private property.

(2) The Court **GRANTS** the Peaspanens' Motion to Strike the Affidavits of Luciana Raterman, Frederick Bennett, and Darlene F. Buck in response to the Peaspanens' Motion for Summary Judgment.

(3) There is no reliable or probative evidence which supports Plaintiff's contention that there is a 5 foot public roadway between lots 3 and 4 of the Craytor Brothers Willow Beach Plat. It was never accepted by Plaintiff and, even if it had been accepted, it is now abandoned. As such, this lawsuit involves a dispute among private parties and the Plaintiff has no standing in this matter.

(4) Title to the subject property has been obtained by the Defendants, John Peaspanen and Judith C. Peaspanen, by adverse possession, subject to private easements for Defendants, Anthony J. DelPrince, Darlene F. Buck, and Raymond E. Buck, their respective heirs, executors, administrators, and assigns, for access to their respective residences, by foot and by vehicle, but not for the parking of any vehicle.

(5) The Plaintiff, City of Conneaut, Ohio, its agents and employees are permanently enjoined from interfering with the rights of John Peaspanen, Judith C. Peaspanen, Darlene F. Buck, Raymond E. Buck, and Anthony J DelPrince, their

respective heirs, administrators, executors, and assigns for the property described and designated as a street in the Craytor Brothers Willow Beach Plat, recorded in plat volume 4, page 29, of the Ashtabula County Record of Plats.

(6) The Defendants, Milton B. Mueller and Tina L. Mueller, and their predecessors in title, have acquired no rights, title or interest in the so called 5 foot public roadway between lots 3 and 4, and their heirs, administrators, executors, and assigns are hereby permanently enjoined from utilizing, accessing, parking on, walking on, crossing, or otherwise interfering with the rights of the Defendants, John Peaspanen, Judith C. Peaspanen, Darlene F. Buck, Raymond E. Buck, and Anthony J. DelPrince, in the area designated as a street or roadway, including the northerly end of the area designated as a street, on the Craytor Brothers Willow Beach Plat, recorded in plat volume 4, page 29, of the Ashtabula County Record of Plats.

(7) There is no public access from or across the lands of Willow Beach Park to the shores of Lake Erie, and the public is hereby enjoined from utilizing, accessing, parking on, walking on, crossing, or otherwise interfering with the rights of the Defendants, Darlene F. Buck, Raymond E. Buck, John Peaspanen, Judith C. Peaspanen, and Anthony J. DelPrince, in the area designated as a street or roadway on the plat map in volume 4, page 29, of the Ashtabula County Records of Plats, which is the subject of this lawsuit.

The Court finds that there are no genuine issues of any material fact and the Defendants, John Peaspanen and Judith C. Peaspanen, are entitled to summary judgment as a matter of law and their Motion for Summary Judgment is **GRANTED**.

Judgment is **GRANTED** in favor of the Defendants, John Peaspanen and Judith C. Peaspanen, on their Answer and Counterclaim against Plaintiff and against the Defendants, Milton B. Mueller and Tina L. Mueller, on the Peaspanens' Cross-Claim.

This matter is **DISMISSED** with prejudice.

One-half (½) of the court costs are assessed against the Plaintiff and one-half (½) of the court costs are assessed against the Defendants, Milton B. Mueller and Tina L. Mueller.

**IT IS SO ORDERED.**

**THIS IS A FINAL APPEALABLE ORDER.** Within three (3) days of the entry of this judgment upon the journal, the Clerk of Courts shall serve notice in accordance with Civ.R.5, of such entry and the date upon every party who is not in default for failure to appear and shall note the service in the appearance docket.

Pursuant to Civil Rule 58(B), the Clerk of this Court is directed to serve notice of this judgment and its date of entry upon the journal upon the following: **Lori B. Lamer, Conneaut Law Director; Kenneth L. Piper, Esq.; Darlene F. Buck; Raymond E. Buck; Brett R. Joseph, Esq.; and Anthony J. DelPrince.**

ALFRED W. MACKEY, JUDGE

March 22, 2010
AWM/mb