[Cite as *Jacobson v. Jonathan Paul Eyewear*, 2012-Ohio-3021.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

BRUCE JACOBSON, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2011-L-098**
- vs -	:	
JONATHAN PAUL EYEWEAR, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 003340.

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

Joseph R. Compoli, Jr., 612 East 185th Street, Cleveland, OH 44119; and *James R. Goodluck*, 3517 St. Albans Road, Cleveland Heights, OH 44121 (For Plaintiffs-Appellees).

Christopher W. St. Marie, *Michael B. Pascoe*, and *Daniel A. Demarco*, Hahn Loeser & Parks, LLP, 200 Public Square, Suite 2800, Cleveland, OH 44114 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Jonathan Paul Eyewear, appeals the decision of the Lake County Court of Common Pleas overruling a portion of the magistrate's decision granting sanctions under Civ.R. 37 and adopting the balance of the decision denying sanctions under R.C. 2323.51. For the reasons that follow, we affirm in part, reverse in part, and remand this matter for proceedings consistent with this opinion.

{¶2} On October 13, 2009, appellees, Bruce Jacobson and Ophthalmology Consultants, Inc., filed a five-count complaint for damages and injunctive relief against appellant under the federal Telephone Consumer Protection Act. The complaint alleged that appellant sent three unsolicited advertisements via fax to appellees without express invitation or permission. Appellant's answer set forth several affirmative defenses, including that appellant sent the facsimile with prior express permission. Specifically, appellant contended that it had express permission from Freda Martello, an employee at Ophthalmology Consultants, Inc., to send advertisements via fax. Appellant subsequently subpoenaed Ms. Martello for a deposition in an effort to expeditiously resolve the entire issue. In response, appellees filed a motion to quash the subpoena and a motion to limit the scope of the deposition. The trial court denied the motions and ordered Ms. Martello to be deposed. A date and time was set for the deposition. However, Ms. Martello and appellees' counsel, Joseph R. Compoli, Jr. both failed to appear at the scheduled deposition. Appellees then filed an FCC complaint and dismissed the case in the Lake County Court of Common Pleas without prejudice.

{¶3} As a result of appellees' failure to appear at the deposition and the voluntary dismissal, appellant filed a motion for sanctions pursuant to Civ.R. 37 for disobedience of a court order. Appellant also filed a supplemental motion for sanctions pursuant to R.C. 2323.51 for frivolous conduct. The motions were sharply opposed and a magistrate's hearing on the matter was held. After the lengthy hearing, appellees moved for sanctions under R.C. 2323.51 claiming that appellant's attorney falsely testified and additionally moved to strike appellant's previous supplemental motion for sanctions. In response, appellant further defended its request for sanctions under R.C.

2323.51 but stated in a footnote that "JP Eyewear is not proceeding under Civ.R. 37, only under R.C. 2323.51." Appellees, cognizant of the footnote, filed a response motion arguing that appellant had essentially waived its argument for sanctions under Civ.R. 37. The magistrate may have determined the footnote reference was either inadvertent or inapplicable, because in spite of the footnote, he released a decision granting appellant's request for sanctions under Civ.R. 37, but denying its request under R.C. 2323.51. Appellees' request for sanctions was denied.

{¶4} The magistrate issued 20 conclusions of law, finding that Attorney Compoli's failure to notify opposing counsel that neither he nor Ms. Martello would appear at the deposition was not substantially justified. Specifically, the magistrate noted the conduct was sanctionable under both Civ.R. 30 and Civ.R. 37. The magistrate awarded appellant the sum of $1,482 to be paid by Attorney Compoli. The magistrate also concluded that Attorney Compoli's conduct was not frivolous; thus, sanctions were not warranted under R.C. 2323.51. Appellees filed objections to the decision, renewing its previous contention that appellant had waived its Civ.R. 37 claim for sanctions via its footnote expressly stating such.

{¶5} One year after the case had been voluntarily dismissed and 15 sanctions pleadings later, the court issued its judgment entry on the matter. The trial court found that appellant's claim for relief under Civ.R. 37 was withdrawn. Thus, the court granted appellees' objections and rejected the portion of the magistrate's decision relating to Civ.R. 37 sanctions.

{¶6} Appellant now appeals and asserts two assignments of error. Appellant's first assignment of error states:

{¶7} "The trial court committed error in finding that JP Eyewear withdrew its argument for sanctions under Civ.R. 37 by way of a footnote stating that JP Eyewear was not proceeding under such a rule. Without this finding of a withdrawal, the Magistrate's Decision awarding sanctions under Civ.R. 37 should be reinstated."

{¶8} As a preliminary matter, we note a voluntary dismissal under Civ.R. 41(A)(1) generally divests a court of jurisdiction. *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, ¶23. However, a court may still consider collateral issues not related to the merits of the case. *Id*. Sanctions pursuant to Civ.R. 11 and R.C. 2323.51 have been determined to be collateral issues. *Id*. at ¶6. The sanctions in this case, while requested under R.C. 2323.51, were also requested under Civ.R. 37. As such, appellees assert that the trial court lacked jurisdiction to entertain appellant's motion for sanctions under Civ.R. 37.

{¶9} In support of this proposition, appellant cites *Dyson v. Adrenaline Dreams Adventures*, 143 Ohio App.3d 69 (8th Dist.2001). There, the Eighth Appellate District considered whether the trial court had jurisdiction to award sanctions under Civ.R. 37(D) and 41(D) after the case was voluntarily dismissed. *Id*. at 71. The court answered the question in the negative, finding that because the request for sanctions was made after the dismissal of the case, the trial court lost jurisdiction. *Id*. at 72. Thus, the court concluded there was no need to determine whether sanction requests under Civ.R. 37(D) or 41(D) were collateral matters to the underlying litigation because there was no jurisdiction to retain. *Id*. at 73.

{¶10} However, the Eighth District recently held (after appellees filed their brief) that its *Dyson* decision was effectively overruled by the Ohio Supreme Court in *Hummel*

and the application of *Hummel* to multiple subsequent decisions. *ABN AMRO Mtge. Group, Inc. v. Evans*, 8th Dist. No. 96120, 2011-Ohio-5654, ¶19. In *Evans*, the Eighth District was faced with the issue of whether the filing of a Civ.R. 41 notice of voluntary dismissal divested the trial court of jurisdiction to consider a postdismissal motion for sanctions pursuant to Civ.R. 11 and R.C. 2323.51. *Id*. at ¶8. The court concluded that it did not. *Id*. In support, the court first noted that *Dyson* "implicitly held that motions for sanctions filed pursuant to Civ.R. 11 and its statutory counterpart, R.C. 2323.51, are considered collateral, *even though those motions are filed postdismissal*." (Emphasis added.) *Id*. at ¶12. The court went on to explain that a Civ.R. 11 motion for sanctions can be filed after a Civ.R. 41(A) voluntary dismissal, in part because Civ.R. 11 does not set forth a time frame for when a motion must be filed. *Id*. at ¶13. "To hold otherwise would effectively leave an alleged aggrieved party without a remedy to pursue a claim for frivolous conduct." *Id*. at ¶21. Under this reasoning, we similarly determine that a postdismissal request for sanctions under Civ.R. 37 does not strip a court of jurisdiction.

{¶11} Further, the Supreme Court in *Hummel* explained that "collateral proceedings" are not limited to Civ.R. 11 and R.C. 2323.51. The appellant in *Hummel* sought sanctions under Civ.R. 45(E). *Hummel*, 2002-Ohio-3605, ¶25. The court explained: "[W]hen a case is dismissed, the trial court is not divested of jurisdiction to hear a claim for attorney fees simply because the basis for the claim is a statute or rule different from Civ.R. 11 or R.C. 2323.51." *Id*. As the court had jurisdiction to consider the collateral issue of sanctions under Civ.R. 37 and R.C. 2323.51, we can proceed to the merits of the case.

{¶12} "A trial court's decision to impose sanctions will not be reversed absent an abuse of discretion." *Monea v. Lanci*, 5th Dist. No. 2011CA00050, 2011-Ohio-6377, ¶100, citing *State ex rel. Fant v. Sykes*, 28 Ohio St.3d 65 (1987). "An abuse of discretion is the trial court's 'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004).

{¶13} Appellant contends the magistrate's decision awarding sanctions should be reinstated because it did not intend to waive its request for sanctions. Civ.R. 37(B) and (D) provide for sanctions as a consequence of failing to follow a court order and allow the aggrieved party to collect reasonable expenses, including attorney's fees, caused by the failure. However, this rule does not mandate that a request be made for sanctions. In fact, it expressly states that "the court in which the action is pending may make such orders in regard to the failure as are just[.]" Civ.R. 37(B)(2). That is, a court may sanction improper conduct regardless of whether a party has requested such. Indeed, this is the very argument appellant made in the lower court in response to appellees' objections to the magistrate's decision: "Thus regardless of whether JP Eyewear's counsel withdrew its sanctions motion, which it did not, the Court still has inherent authority to impose sanctions against Mr. Compoli for his decision to flaunt this Court's authority."

{¶14} However, it appears the trial court may have operated under the belief that it could not award sanctions, notwithstanding appellant's claims that it did *not* waive the request, and even if it did, the court still had power to award sanctions. This is evidenced by the trial court's judgment entry, explaining in part:

> **{¶15}** By granting the objection and denying said motion for sanctions, this court is not condoning the behavior of plaintiffs' counsel in not notifying opposing counsel that neither he nor the deponent intended to appear for a scheduled deposition. At best, such behavior was discourteous and unprofessional. *But for defendant's withdrawal of its Civil Rule 37 claim for sanctions, the outcome herein may have been different*. (Emphasis added.)

{¶16} If sanctions were appropriate in this case, the trial court could clearly have exercised its discretion and awarded them. The record indicates that appellees' counsel had already planned a voluntary dismissal, which is why he failed to appear at the deposition. However, appellees' counsel failed to inform opposing counsel the case was going to be voluntarily dismissed. Further, appellees' counsel failed to notify opposing counsel that neither himself nor Ms. Martello would appear at the deposition. Moreover, appellees' counsel acted in direct contravention of the May 6, 2010 court order adjudging that Ms. Martello was to be deposed.

{¶17} This case is remarkably similar to *Omerza v. Bryant & Stratton*, 11th Dist. No. 2006-L-147, 2007-Ohio-5216. There, Attorney Compoli, counsel for plaintiff-appellee Phillip Berardinelli, Inc. ("PBI"), explicitly agreed in court and on the record that PBI would not file any additional post-trial briefs. *Id.* at ¶23. Despite this agreement, PBI's counsel filed a pleading the next day. *Id.* at ¶26. This court concluded that PBI's counsel filed the pleading in direct contravention of the in-court agreement, thus acting in willful violation of the court's directive that no further pleadings would be accepted. *Id.* at ¶31. The case was remanded for the imposition of sanctions for that conduct. *Id.*

{¶18} The trial court is in the best position to determine whether sanctions are necessary or appropriate. Its familiarity and discussions with the parties, the attorneys, and the manner in which they conduct themselves throughout the litigation is difficult to glean from the record on appeal. Absent a demonstration that the court abused its discretion, we will not disturb its judgment. Here, the trial court opined that the outcome may have been different but for the withdrawal of the claim by appellant's counsel. However, as explained above, if the imposition of sanctions was appropriate, the trial court could, and perhaps should, have imposed them without regard to whether appellant continued to pursue the request. Appellant's first assignment of error has merit. Upon remand, the trial court should consider, in its discretion and irrespective of appellant's footnote, whether the conduct of appellee's counsel should be sanctioned, i.e., whether to affirm the magistrate's findings of fact and conclusions of law.

{¶19} Appellant's second assignment of error states:

{¶20} "The trial court erred in failing to award sanctions against OCI and Compoli as their conduct was meant to harass JP Eyewear and impose further costs in discovery and the litigation process."

{¶21} Appellant argues that the trial court erred in failing to award sanctions under R.C. 2323.51. The statute provides that frivolous conduct may be punishable by an award of sanctions. R.C. 2323.51(A)(2) defines frivolous conduct as follows:

{¶22} (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

{¶23} (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

{¶24} (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

{¶25} (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶26} The magistrate's decision denied appellant's request for sanctions under R.C. 2323.51. Appellant did not file objections to the magistrate's decision in accordance with Civ.R. 53(D)(3)(b). The consequences of not objecting to a magistrate's decision are outlined in Civ.R. 53(D)(3)(b)(iv):

{¶27} Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

{¶28} The Ohio Supreme Court has explained:

{¶29} In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself. *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus.

{¶30} Given this standard, we cannot conclude that Attorney Compoli's "continuous filing of motions," including the motion to quash subpoena and the motion to limit scope and duration of deposition, constituted frivolous action under the statute. As such, appellant's second assignment of error is without merit.

{¶31} The judgment of the Lake County Court of Common Pleas is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.