[Cite as *Harris v. Rossi*, 2016-Ohio-7163.]

.IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

FRED HARRIS, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2016-T-0014**
- vs -	:	
MICHAEL D. ROSSI, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2014 CV 01442.

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

James D. Falvey, Miller, Stillman & Bartel, 1422 Euclid Avenue, Suite 800, Cleveland, OH 44115 (For Plaintiffs-Appellants).

Randi J. Rudloff, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendants-Appellees).

THOMAS R. WRIGHT, J.

{¶1} Appellants, Fred Harris, Forest Glen Properties, LLC (Forest), and their counsel, James Falvey, Esq., appeal the trial court's decision adopting the magistrate's decision and awarding appellees, Michael D. Rossi and Guarnieri & Secrest PLL, $18,974 in attorney fees and $524 in costs. For the following reasons, we affirm in part and reverse and remand in part.

{¶2} In 2005, Harris contacted Rossi to pursue an action on behalf of Forest Glen Properties, LLC against the United States Department of Housing and Urban Development. Appellees filed the action in the federal court of claims on behalf of Forest Glen Properties, LLC. The case was ultimately dismissed in 2013 based on lack of subject matter jurisdiction. Harris was not a party plaintiff, but was one of two member owners of Forest. Harris advised Rossi that he wanted to appeal, but the time to appeal had passed.

{¶3} In July 2014, Harris and Forest filed a malpractice suit against appellees based on their alleged failure to timely notify appellants of the dismissal and their right to appeal. The malpractice complaint also asserted a breach of fiduciary duty claim.

{¶4} Appellees moved for summary judgment against Harris only arguing that Harris was not its client, and as such, he had no cause of action. Appellees did not argue that Forest lacked capacity to sue in Ohio in its summary judgment motion or in its supplemental motion for summary judgment. Appellants eventually responded to the summary judgment motion and subsequently voluntarily dismissed the lawsuit without prejudice before the trial court addressed the merits of appellees' motions.

{¶5} Appellees moved for attorney fees under Civ.R. 11 and R.C. 2323.51. The trial court magistrate held a hearing and awarded attorney fees and costs under R.C. 2323.51 only. She found Harris, Forest and their counsel jointly and severally responsible for appellees' fees and costs. Appellants filed objections and supplemental objections, but the trial court agreed with the magistrate and adopted her decision in full.

{¶6} Appellants assert four assigned errors:

{¶7} "[1] The trial court erroneously concluded Plaintiff-Appellant Forest Glen Properties, LLC cannot maintain an action in Ohio courts because the foreign limited liability company did not register with the Ohio Secretary of State.

{¶8} "[2] The trial court erroneously concluded Plaintiff-Appellant Harris was not personally represented by Defendants.

{¶9} "[3] The trial court erred by making no finding regarding the Complaint's allegations that Defendant-Appellee owed fiduciary duties to Plaintiff-Appellant Harris.

{¶10} "[4] The trial court erred in failing to apply the correct standard for awarding sanctions under R.C. 2323.51."

{¶11} R.C. 2323.51(B) provides in part:

{¶12} "[A]ny party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct * * *."

{¶13} R.C. 2323.51(A)(2) defines "frivolous conduct," in relevant part, as:

{¶14} "(a) Conduct of [a] party to a civil action, * * * that satisfies any of the following:

{¶15} "* * *

{¶16} "(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."

{¶17} As explained by the Ohio Supreme Court,

{¶18} "Frivolous conduct is not proved merely by winning a legal battle or by proving that a party's factual assertions were incorrect. *Ohio Power Co. v. Ogle*, 4th Dist. Hocking No. 12CA14, 2013-Ohio-1745, ¶29-30 ("'A party is not frivolous merely because a claim is not well-grounded in fact. * * * [R.C. 2323.51] was designed to chill egregious, overzealous, unjustifiable, and frivolous action. * * * [A] claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim'"), quoting *Hickman v. Murray*, 2d Dist. Montgomery No. CA-15030, 1996 Ohio App. LEXIS 1028, 1996 WL 125916, *5 (Mar. 22, 1996)." *State ex rel. DiFranco v. City of S. Euclid*, 144 Ohio St.3d 571, 2015-Ohio-4915, 45 N.E.3d 987, ¶15.

{¶19} R.C. 2323.51 uses an objective standard in determining whether sanctions may be imposed for frivolous conduct. *Kester v. Rogers*, 11th Dist. Lake Nos. 93-L-056 and 93-L-072, 1994 Ohio App. LEXIS 1949, *10 (May 6, 1994). Thus, a finding of frivolous conduct under R.C. 2323.51 is decided without inquiry as to what the individual knew or believed, and instead asks whether a reasonable lawyer would have brought the action in light of existing law. *Omerza v. Bryant & Stratton*, 11th Dist. Lake No. 2006-L-147, 2007-Ohio-5216, ¶15, citing *City of Wauseon v. Plassman* (Nov. 22, 1996), 6th Dist. No. F-96-003, 1996 Ohio App. LEXIS 5168, 8.

{¶20} This court's standard of review is dependent upon which of the four R.C. 2323.51(A)(2)(a) subsections the trial court based its decision. Here, the trial court decided under R.C. 2323.51(A)(2)(a)(ii), that appellants' decision to file suit was frivolous because the claims were "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." This subsection in particular invokes de novo review requiring an appellate court to determine whether the suit was either not warranted by existing law or supported by a good-faith argument for an extension or modification of existing law. *Weaver v. Pillar*, 5th Dist. Tuscarawas No. 2012-CA-32, 2013-Ohio-1052, ¶20, citing *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857, ¶27; (1st Dist.); *Mainsource Bank v. Winafeld*, 5th Dist. Stark No. 2008-CA-00001, 2008-Ohio-4441, ¶7. However, we must defer to the trial court's factual determinations in support of a sanctions order under R.C. 2323.51 where the record contains competent, credible evidence supporting its findings. *Id.*

{¶21} Upon finding frivolous conduct, the decision to impose sanctions under R.C. 2323.51 rests in the sound discretion of the court, which we will not reverse absent an abuse of that discretion. *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶11; *Ron Scheiderer & Assocs. v. London*, 81 Ohio St.3d 94, 98, 1998 Ohio 453, 689 N.E.2d 552.

{¶22} "'[T]he term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record.' *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009 Ohio 2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678, 3 Ohio Law Abs. 187, 3 Ohio Law Abs. 332, 148 N.E. 362 (1925). * * * an abuse of discretion is the trial court's 'failure to exercise sound, reasonable, and legal decision-making.' * * * When an appellate court is reviewing a pure issue of law, 'the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue

on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.' [*State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900,] at ¶67." *Ivancic v. Enos*, 2012-Ohio-3639, 978 N.E.2d 927, ¶70 (11th Dist.).

{¶23} Thus, absent an abuse of discretion, this court must affirm.

{¶24} The trial court determined that appellants' claims were baseless and frivolous for two reasons. First, it found Harris, as a member owner of Forest, did not have an individual cause of action against Attorney Rossi or his law firm, Guarnieri and Secrest PLL. Second, it found that Forest lacked capacity to sue in Ohio based on two reasons, i.e., it was a foreign limited liability company not registered to transact business in Ohio, and its status as a Delaware limited liability company was canceled at the time this lawsuit was commenced.

{¶25} A motion for sanctions under R.C. 2323.51 requires a three-step determination. First, did an individual engage in frivolous conduct. Second, if the conduct was frivolous, was another party adversely affected by it. And third, the amount of award, if any. *Tipton v. Directory Concepts Inc*., 5th Dist. Richland App. No. 13CA61, 2014-Ohio-1215, ¶32, citing *Ferron v. Video Professor Inc*., 5th Dist. Delaware No. 08-CAE-09-0055, 2009-Ohio-3133.

{¶26} Appellants' first assignment of error claims that the trial court erroneously found that a foreign limited liability company cannot maintain a cause of action in Ohio unless it registers with the Ohio Secretary of State. Appellants argue the trial court ignored applicable case law recognizing that a foreign LLC does not need to register with Ohio's Secretary of State unless it regularly conducts business in the state.

{¶27} As appellants contend, the magistrate's decision concludes in part, "there were no good grounds to support the filing of the action because Plaintiff Forest failed to register with the Secretary of State to do business in Ohio, [and that] the conduct of Plaintiffs and their counsel rose to the level of frivolous conduct pursuant to R.C. 2323.51." The court's decision did not reach the merits of appellants' argument that it was exempt from registering since it was not regularly conducting business in Ohio at the time suit was commenced.

{¶28} R.C. 1705.58(A) "Effect of transacting business in Ohio without registration" states in part "[a] foreign limited liability company transacting business in this state may not maintain any action or proceeding in any court of this state until it has registered in this state."

{¶29} In *Premier Capital, LLC v. Baker*, 11th Dist. Portage No. 2011-P-0041, 2012-Ohio-2834, this court considered a comparable issue and allowed a suit to continue in spite of the fact that the plaintiff limited liability company was *not* registered with the Ohio Secretary of State. Instead, upon considering the facts in *Premier Capital, LLC,* we found that foreign corporations should generally obtain a license to conduct business in Ohio. However, a foreign corporation that is not "transacting business" in Ohio does not need to register to have the capacity to sue. We defined "transacting business" in part as when a businesses' agents enter the state and regularly conduct and transact "'some substantial part of its ordinary or customary business, usually continuous in the sense that it may be distinguished from merely casual, sporadic, or occasional transactions and isolated acts.'" (Citations omitted.) *Id*. at ¶27. "'A foreign

corporation's activities must be permanent, continuous, and regular to constitute "doing business"' in Ohio." (Citations omitted.) *Id.*

{¶30} Further, in *Issuer Advisory Group LLC v. Tech. Consumer Prods*., N.D. Ohio 5:14CV1705, 2015 U.S. Dist. LEXIS 12719, the United States District Court for the Northern District of Ohio, Eastern Division held Fed.R. 12(b)(6) dismissal was inappropriate because there was insufficient evidence to determine whether the company in question was "transacting business" in Ohio such that it was required to register with the Secretary of State. The *Issuer* court found that this is a fact-intensive inquiry into the business operations that must be determined on a case-by-case basis. *Id*. at 12.

{¶31} According to Harris' testimony, Forest owned an apartment building in Cleveland from 2000 until approximately 2002 when the city acquired the building as a result of unpaid property taxes. Forest had not conducted business in Ohio since at least 2002. Assuming Forest's business in Ohio in 2002 was regular and continuous, it should have registered with Ohio's Secretary of State. However, upon filing the instant suit, Forest was not regularly transacting business in Ohio. Based on the law presented by appellants, it at least arguably did not need to register to file suit since it was not "transacting business" in Ohio at the time. Thus, we disagree that the pursuit of this claim was wholly frivolous since appellants presented a reasonable argument based on existing law.

{¶32} In addition, appellants urge this court to find that it had the capacity to cure its lack of registration defect after filing its malpractice suit against appellees by subsequently registering with the Ohio Secretary of State.

{¶33} In *Capital City Energy Group, Inc. v. Kelley Drye & Warren*, S.D. Ohio No. 2:11-cv-00207, 2011 U.S. Dist. LEXIS 125784, the United States District Court for the Southern District of Ohio, Eastern Division considered a comparable issue and, upon applying Ohio law, held that an unlicensed foreign corporation that filed suit should be allowed to continue to pursue the lawsuit since the company had since registered and cured the defect. *Id.* at *18. *See also Auto Driveway Co. v. Auto Logistics of Columbus*, 188 F.R.D. 262, 265 (S.D. Ohio 1999) (staying the lawsuit until the unregistered foreign corporation plaintiff obtained its license to transact business in the state.) See also *ECP Commer. IV LLC v. LH Dev. LLC*, N.D.Ohio No. 1:14-CV-02449, 2015 U.S. Dist. LEXIS 51517, at *5 (Apr. 20, 2015) (stating if the Ohio Supreme Court was "confronted with the issue, [it] * * * would * * * hold that subsequent registration cures any capacity defect that may have existed.")

{¶34} However, in *Sta Rite v. Preferred Pump & Equip*., N.D.Ohio No. 5:08CV1072, 2008 U.S. Dist. LEXIS 117242, *9-10, the United States District Court for the Northern District of Ohio, Eastern Division held that a company's failure to register in Ohio *before* filing suit cannot be cured by registering after the suit is commenced. *Sta Rite* noted that the Ohio Supreme Court has yet to consider this issue. *Id.*

{¶35} In light of the foregoing, we disagree that Forest's pursuit of its malpractice claim against appellees was wholly frivolous. Instead, appellants set forth a reasonable argument based on an undecided area of Ohio law.

{¶36} The trial court also found that Forest lacked capacity to sue because its status as a Delaware LLC was canceled at the time suit was commenced and for the duration of the lawsuit. Appellants argue that the trial court's finding of frivolous conduct

on this basis is also erroneous because Forest's status as a Delaware limited liability company has since been reinstated and because they presented a reasonable argument applying existing case law, i.e., they had the capacity to cure its canceled status.

{¶37} In *In re All Cases against Sager Corp*., 132 Ohio St.3d 5, 2012-Ohio-1444, 967 N.E.2d 1203, the Ohio Supreme Court considered whether a dissolved foreign corporation was subject to being sued in Ohio courts. *Sager* held that the law of the state in which the company is incorporated governs whether it can sue or be sued after it is dissolved. *Id.* at ¶28. Accordingly, upon applying the applicable Illinois five-year survival statute, the Supreme Court found that "Sager no longer exists and because it no longer has the capacity to be sued, no judgment can be taken against it." *Id.* at ¶28.

{¶38} Here, Forest was formed as a Delaware limited liability company, and thus, Delaware law governs its capacity to sue. The trial court relies on 6 Delaware Code Section 18-803(b), which provides in part:

{¶39} "Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in §18-203 of this title, the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits * * *."

{¶40} Reading this provision in isolation, we agree with the trial court that Forest lacked capacity to file suit when it filed this malpractice suit because its status as a Delaware LLC was canceled at the time. However, pursuant to Civ.R. 12(H), a plaintiff's lack of capacity to sue is waived if the defendant does not raise the defense by specific negative averment in the answer or by motion pursuant to Civ.R. 12. Civ.R.

9(A); *Allstate Ins. Co. v. Lacivita*, 11th Dist. Portage No. 94-P-0118, 1996 Ohio App. LEXIS 3365, *9-10 (Aug. 9, 1996). The pleading burden is on the defendant. *Id.* Ohio Civ. R. 9(A) states:

{¶41} "It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

{¶42} In *Donahue & Scanlon v. Tobin*, 8th Dist. Cuyahoga No. 75149, 1999 Ohio App. LEXIS 5918, *6-7 (Dec. 9, 1999), the Eighth Appellate District reversed the trial court's decision granting the defense motion for directed verdict based on plaintiff's lack of capacity to sue explaining that plaintiff's lack of capacity was waived because defendants did not raise the issue by specific averment. *Id.* A general denial in an answer is insufficient and waives the issue of capacity to sue. *Gove Associates, Inc. v. Thomas*, 59 Ohio App.2d 144, 145, 392 N.E.2d 1093 (1977). In *Wanamaker v. Davis*, 2nd Dist. Greene No. 2005-CA-151, 2007-Ohio-4340, ¶43-45, the Second District held that the trial court could not rule on the plaintiff's capacity to sue because the issue was waived. It explained that although the defendant raised the affirmative defense of real party in interest and generally denied the plaintiff's status as the executrix of the estate, these allegations were insufficient since Civ.R. 9(C) requires a specific negative averment. *Id.* at ¶44.

{¶43} Thus, because appellees' capacity to sue argument is an affirmative defense with the burden of production on appellees, we cannot find that Forest's act in filing suit in Ohio, in spite of its status as a canceled Delaware LLC, constitutes frivolous conduct.

{¶44} Based on the foregoing, and in light of the delicate balance that attorneys must strike in furthering their client's interests versus facing motions for sanctions for the creative pursuit of said claims, we find appellants' first assignment of error has merit. "Unless there is a clear-cut violation of the statute, a potential dilemma confronts a lawyer in satisfying his obligation of professional responsibility which requires zealous representation on one hand and satisfying his obligation under R.C. 2323.51 on the other hand." *Richmond Glass & Aluminum Corp. v. Wynn*, 7th Dist. Columbiana No. 90-C-46, 1991 Ohio App. LEXIS 4195, at *6 (Sep. 5, 1991); *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857, ¶46 (1st Dist.).

{¶45} Appellants' second assigned error contends the trial court erred in finding that Harris was not personally represented by appellees. At a minimum, appellants assert their argument regarding the ambiguity of the attorney-client agreement was warranted under existing law, and thus, a finding of frivolous conduct under R.C. 2323.51(A)(2)(a)(ii) was improper. We disagree.

{¶46} "In reviewing a contract, the court's primary role is to ascertain and give effect to the intent of the parties. *O'Bannon Meadows Homeowners Ass'n., Inc. v. O'Bannon Properties, LLC*, 12th Dist. Clermont No. CA2012-10-073, 2013-Ohio-2395, ¶19, citing *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St. 3d 270, 273, 1999 Ohio 162, 714 N.E.2d 898 (1999). In ascertaining the intent of the parties, the

court must presume that the intent resides in the language the parties chose to employ in the agreement. *Towne Dev. Group, Ltd. v. Hutsenpiller Contrs.*, 12th Dist. Butler No. CA2012-09-181, 2013-Ohio-4326, ¶17, citing *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 1997 Ohio 202, 678 N.E.2d 519 (1997). 'A court will resort to extrinsic evidence in its effort to give effect to the parties' intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning.' *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132, 31 Ohio B. 289, 509 N.E.2d 411 (1987). When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Safe Auto Ins. Co. v. Semenov*, 192 Ohio App.3d 37, 2011-Ohio-163, ¶8, 947 N.E.2d 1267 (12th Dist.)." *Ownerland Realty, Inc. v. Zhang*, 12th Dist. Warren Nos. CA2013-09-077, CA2013-10-097, 2014-Ohio-2585, ¶16.

{¶47} Before filing the federal suit, Harris signed appellees' one-page "attorney representation agreement." Neither the caption nor the body of the agreement specifies the name of the client. However, the body of the agreement uses the pronoun "it" when referencing the client. The agreement also states that the nature of the representation was to pursue breach of contract claims against the U.S. Department of Housing and Urban Development, and the signature lines reflects that Harris signed in a representative capacity:

{¶48} "FOREST GLEN PROPERTIES, LLC

{¶49} "By: FREDERICK D. HARRIS, M.D., Member Client."

{¶50} In Ohio the "[m]anagement of an LLC is vested in its members in proportion to their capital contribution, unless a written agreement provides otherwise." *Brooks Capital Servs., LLC v. 5151 Trabue Ltd.*, 10th Dist. Franklin No. 12AP-30, 2012 Ohio App. LEXIS 3901, at *7 (Sep. 27, 2012), citing R.C. 1705.09, 1705.14, and 1705.24

{¶51} Here, it is apparent from the plain language of the attorney services agreement that the law firm was retained to represent Forest Glen Properties, LLC based on the agreement's use of the pronoun "it" and based on the representative capacity in which Frederick Harris signed the same as a member of the limited liability client. Thus, there is no need to look beyond the four corners of the agreement. *Zhang, supra,* at ¶16 *citing Safe Auto Ins. Co., supra.*

{¶52} Furthermore, R.C. 1705.61(A) "liability of persons providing goods or performing services" states:

{¶53} "Absent an express agreement to the contrary, a person * * * performing services for a limited liability company owes no duty to, incurs no liability or obligation to, and is not in privity with the members or creditors of the limited liability company by reason of providing goods to or performing services for the limited liability company."

{¶54} We agree with the trial court's decision that Harris did not have a cause of action against appellees and that his decision to pursue this claim was not warranted based on existing law or an arguable extension of the law. Thus, if the trial court finds appellees were adversely affected by this claim, then it may award attorney fees and costs incurred in connection with the civil action. R.C. 2323.51(B).

{¶55} Appellants' second assignment of error lacks merit.

{¶56} Appellants' third assignment argues the trial court erred in failing to address its allegation that appellees owed Harris, individually, a fiduciary duty based on its prior representation of him. Appellants rely on cases discussing unrelated fiduciary duties for the proposition that appellees' prior representation of Harris, as an individual, should be extended causing a fiduciary relationship that requires counsel to continue to protect Harris' interests even while pursuing claims on behalf of Forest, a limited liability company. Appellants concede that there is no case law on point, but instead contend that Harris' past relationship with appellees warrant an extension of existing law causing a continuing fiduciary duty to a lawyer's prior clients.

{¶57} The trial court rejected this argument in light of the legislature's clear statutory language to the contrary in R.C. 1705.61. We agree. Absent an express agreement otherwise, Rossi and his law firm's duties and obligations extended only to Forest in this case, not the member owners of this limited liability company. Accordingly, there was no reasonable argument for the extension of Ohio law on this issue, and as such, we do not find the trial court abused its discretion. Accordingly, if appellees were adversely affected by this claim, the trial court may award attorney fees and costs under R.C. 2323.51(B). Appellants' third assigned error lacks merit.

{¶58} Appellants' fourth error asserts the trial court employed the wrong legal standard in addressing appellees' claims of frivolous conduct. Specifically appellants claim the trial court did not address whether their arguments set forth good-faith arguments for the extension or modification of existing law under R.C. 2323.51(A)(2)(a)(ii).

{¶59} Although the trial court did not specifically apply each aspect of R.C. 2323.51(A)(2)(a)(ii) to each allegedly frivolous claim or argument raised by appellees, we disagree that it employed the wrong legal standard in reaching its decision. The trial court set forth the statutory definitions of frivolous conduct from R.C. 2323.51(A)(2), including subsection (a)(ii), and thereafter set forth the facts in support of its decision on each issue. Thus, appellants' fourth assigned error lacks merit and is overruled.

{¶60} Based on the foregoing, the judgment of the Trumbull County Court of Common Pleas is affirmed in part, reversed in part, and remanded. The judgment as to Forest is reversed in whole. On remand, the trial court may award attorney fees and costs incurred in connection with the civil action under R.C. 2323.51(B) to the extent they flow from Harris' individual claims.

CYNTHIA WESTCOTT RICE, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.