

[Cite as *Bigelow v. Nguyen*, 2009-Ohio-3325.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JEFFREY S. BIGELOW,	)	
	)	CASE NO. 08 CO 48
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
KATHLEEN NGUYEN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Case No. 2008CV00645.
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Jeffrey S. Bigelow, Pro-se 335 North Shady Lane Drive, #137 East Liverpool, OH 43920
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For Defendant-Appellant:	Kathleen Nguyen, Pro-se P.O. Box 464 East Liverpool, OH 43920
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JUDGES:  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: June 29, 2009

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DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the appellant's brief and oral argument before this Court. Pro-se appellant, Kathleen Nguyen, appeals the decision of the Columbiana County Common Pleas Court that denied her motion for attorney fees after dismissing a petition for a stalking civil protection order filed against her by appellee, Jeffrey S. Bigelow. On appeal, Nguyen asserts that Bigelow's action against her was entirely frivolous because it was purportedly filed to harass or maliciously injure her, and because it lacked evidentiary support. She therefore argues the trial court abused its discretion by failing to order Bigelow to pay attorney fees as a sanction for frivolous conduct pursuant to R.C. 2323.51. Nguyen also contends that the trial court erred by failing to order attorney fees as a Civ.R. 11 sanction. Finally, Nguyen argues that the trial court abused its discretion and "humiliated" her by granting the ex parte stalking civil protection order against her.

{¶2} Upon review, Nguyen's three assignments of error are meritless. A trial court has significant discretion in deciding whether to order attorney fees pursuant to R.C. 2323.51, and may decline to do so without holding a hearing, even with evidence of frivolous conduct. In this case, the trial court's decision to deny Nguyen's motion for attorney fees is reasonable in light of the circumstances. Nguyen's argument that the trial court erred by declining to award attorney fees as a sanction pursuant to Civ.R. 11 is meritless, because she never requested Civ.R. 11 sanctions during the trial court proceedings and has waived appellate review of this issue. Finally, Nguyen's challenge to the ex parte order is moot because this order was subsequently dissolved. Accordingly, the trial court's decision is affirmed.

### **Facts**

{¶3} On June 23, 2008, Bigelow filed a stalking civil protection order against Nguyen, in which he alleged that Nguyen harasses him, follows and calls him and his friends, and calls the police three to six times per week to complain about him. Bigelow alleged that Nguyen was engaging in this behavior in retaliation for his rejection of her sexual advances, and because a separate criminal case she initiated against him had been dismissed. Following an ex parte hearing, the magistrate issued an ex parte

stalking civil protection order. Through her counsel, Nguyen then filed three motions: a motion for attorney fees for frivolous conduct pursuant to R.C. 2323.51(A)(2)(a)(i)-(iii); a motion to dismiss; and, a motion for judgment on the pleadings. The case proceeded to a full hearing before the magistrate. Bigelow represented himself, and Nguyen appeared with counsel. At the start of the hearing, Nguyen asked the magistrate to rule on the motions she filed, and the court summarily denied all three.

{¶4} Bigelow then testified that he knows Nguyen because she lives in the apartment beneath his. He testified that the day he moved into the building, Nguyen walked into his apartment unannounced, while his door was propped open. He testified Nguyen then began to follow him, and stand in her doorway and watch him. He alleged that Nguyen complained about him to the apartment complex management, the police and the Mayor's office. He alleged that Nguyen fabricated a complaint against him for vandalism, which led to a criminal charge for which he was ultimately found not guilty. Bigelow alleged that Nguyen had attempted to obtain a civil stalking protection order against him, but that it was denied. He further claimed that although he feels he has done nothing wrong to Nguyen, he is nonetheless "being harassed constantly twenty-four seven." Finally, Bigelow alleged that Nguyen had broken the ex parte protection order.

{¶5} At the close of Bigelow's testimony, the magistrate advised him that the acts about which he testified do not qualify as stalking under Ohio law. The magistrate noted that there must be a pattern of conduct that would cause the petitioner to believe that respondent would commit harm to him or her. The magistrate noted that Bigelow had not testified that he believed Nguyen would harm him in any way. The magistrate then asked Bigelow if his witnesses would be able to testify that Nguyen had engaged in a pattern of conduct that caused Bigelow to believe there was a threat of physical harm or mental distress. Bigelow replied that they probably would not. The magistrate ruled that based on the facts Bigelow provided, she was dismissing his petition. Nguyen renewed her motion for attorney fees, and the magistrate took that issue under advisement.

{¶6} On September 4, 2008, the magistrate issued a written decision dismissing the petition. The magistrate found that Bigelow failed to present evidence that Nguyen

had engaged in a pattern of conduct that would cause him to believe she would cause physical harm or mental distress to him. The magistrate found that the acts complained of do not constitute menacing by stalking as defined by the Ohio Revised Code, and therefore there was insufficient evidence to grant a civil protection order. The magistrate also denied the motion for attorney fees.

{¶7} Nguyen filed objections to the magistrate's decision, claiming that the magistrate erred by denying the motion for attorney fees as a sanction pursuant to R.C. 2323.51(A)(2)(a)(i)-(iii). On November 25, 2008, the trial court overruled the objections and affirmed the magistrate's decision, stating specifically:

{¶8} "The parties in this action have been feuding in and out of various courts for a considerable time period. Neither party has been able to substantiate their various claims and complaints. The court will not make a determination that attorney fees is reasonable, when the court believes that neither party is credible and deserves an award of attorney fees. \* \* \*"

{¶9} This appeal followed. Initially, we note that Bigelow has failed to file a brief in this matter, and thus pursuant to App. R. 18(C), this court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if Nguyen's brief reasonably appears to sustain such action. However, Nguyen's brief does not reasonably appear to support reversal.

{¶10} Nguyen lists the following three assignments of error:

{¶11} "The trial court erred and abused its discretion in overruling and in denying summary judgment [sic] for Defendant-Appellant attorney fees and cost due to the case dismissed with insufficiency [sic] evidence."

{¶12} "The trial court erred and abused discretion in denying all three motions filed by Attorney King, and failing to impose sanctions upon Mr. Bigelow for his continued pursuit of the frivolous claim in his pleadings, and failed to conduct a hearing to award attorney fees."

{¶13} "The trial court erred and abused its discretion for failing to impose sanction when the record clearly evidences frivolous conduct caused by Mr. Bigelow action when

he signed in his pleadings for false CPO litigation."

{¶14} Because Nguyen repeats the same arguments within each of the above assignments of error, we will review the trial court's decision via three distinct arguments she raises throughout.

#### **Attorney Fees Pursuant to R.C. 2323.51**

{¶15} Nguyen argues that the trial court abused its discretion by failing to hold a hearing on the attorney fee motion, and by failing to order attorney fees as a sanction for frivolous conduct pursuant to R.C. 2323.51.

{¶16} R.C. 2323.51(B)(1) provides, in pertinent part:

{¶17} "[A]t any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court *may* assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section." R.C. 2323.51(B)(1) (emphasis added).

{¶18} "Frivolous conduct" includes conduct of a party to a civil action or the party's counsel of record that satisfies any of the following:

{¶19} "(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.

{¶20} "(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.

{¶21} "(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.

{¶22} "(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." R.C. 2323.51(A)(2)(a)(i)-(iv).

{¶23} The decision to award attorney fees pursuant to R.C. 2323.51 is reviewed for an abuse of discretion. *Ortiz v. Frye*, 7th Dist. No. No. 06JE41, 2008-Ohio-2750, at ¶44, citing *Stohlmann v. Hall*, 158 Ohio App.3d 499, 2004-Ohio-5219, 817 N.E.2d 118, at ¶13. When reviewing a trial court's decision for an abuse of discretion, this court cannot simply substitute its judgment for that of the trial court. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597. The term "abuse of discretion" means more than an error of law or judgment, rather it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶24} The trial court denied Nguyen's motion for attorney fees without a hearing. The court's failure to hold a hearing on the motion does not constitute an abuse of discretion. "[A]lthough R.C. 2323.51 requires a trial court to hold a hearing before it grants a motion for attorney fees, a hearing is not required when the court determines, upon consideration of the motion and in its discretion, that the motion lacks merit." (internal citations omitted). *Papadelis v. Makris*, 8th Dist. No. 84046, 2004-Ohio-4093, at ¶12. See, also, *Adlaka v. Giannini*, 7th Dist. No. 05MA105, 2006-Ohio-4611, at ¶44 (in dicta).

{¶25} Further, the trial court's decision to deny the R.C. 2323.51 motion was not unreasonable, arbitrary or unconscionable. Nguyen contends that Bigelow's action against her constitutes frivolous conduct and that an attorney fee award was warranted for two reasons. First, she claims Bigelow filed the action for the purpose of harassment and out of racial hatred. See R.C. 2323.51(A)(2)(a)(i). Second, she argues that Bigelow failed to offer any evidence in support of his petition. See R.C. 2323.51(A)(2)(a)(iii).

{¶26} Nguyen's allegations that the petition was filed out of racial animus, or for harassment purposes are simply unsupported by the record. And as this court has noted, "[t]he trial judge has the benefit of observing the entire course of the proceedings and is most familiar with the parties and attorneys involved. A finding that certain conduct was [or was not] engaged in to harass or injure another party is entitled to substantial

deference by a reviewing court." *Burrell Industries, Inc. v. Central Allied Enterprises* (Dec. 15, 1998), 7th Dist. Nos. 96BA18, 96BA25, at \*8. Further, although Bigelow failed to present much evidence in support of his petition, it is well within the discretion of the trial court to deny a motion for attorney fees, even upon a showing of frivolous conduct. *Papadelis* at ¶11.

{¶27} The trial court's decision to deny the attorney fee motion in this case is reasonably based on the facts and circumstances. The court found that both parties had been "feuding in and out of various courts for a considerable time period," and that "[n]either party has been able to substantiate their various claims and complaints." Further the court found that it "will not make a determination that attorney fees is reasonable, when the court believes that neither party is credible and neither deserves an award of attorney fees." A trial court is in the best position to determine credibility issues. It is "able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 10 OBR 408, 461 N.E.2d 1273. Thus, the trial court did not abuse its discretion by denying the R.C. 2323.51 attorney fee motion in this case. Accordingly, Nguyen's first argument is meritless.

#### **Attorney Fees Pursuant to Civ.R. 11**

{¶28} Nguyen's second of three assignments of error also alleges that the trial court erred by failing to order Bigelow to pay attorney fees as a sanction pursuant to Civ.R. 11. However, Nguyen failed to request attorney fees pursuant to Civ.R. 11 during the trial court proceedings. She only requested attorney fees pursuant to R.C. 2323.51. Failure to request sanctions pursuant to Civ.R. 11 in the trial court waives that issue for review on appeal. See, e.g., *Bank One v. Barclay*, 10th Dist. No. 03AP-870, 2004-Ohio-2718, at ¶20. Accordingly, Nguyen has waived review of this issue, and her second argument is meritless.

### **The Ex Parte Order**

{¶29} Finally, Nguyen argues that the trial court abused its discretion and "humiliated" her by granting the ex parte civil stalking protection order. However, this argument is moot because the ex parte order was ultimately dissolved following a full hearing on the matter. Accordingly, Nguyen's third argument is meritless.

### **Conclusion**

{¶30} All of Nguyen's assignments of error are meritless. The trial court is not required to hold a hearing prior to denying a motion for attorney fees pursuant to R.C. 2323.51. Further, the trial court has significant discretion in deciding whether to order attorney fees pursuant to R.C. 2323.51, and may decline to do so even if there is evidence of frivolous conduct. In this case, the trial court's decision to deny Nguyen's motion for attorney fees is reasonable in light of the circumstances. Nguyen's argument that the trial court erred by declining to award attorney fees as a sanction pursuant to Civ.R. 11 is meritless, because she never requested Civ.R. 11 sanctions during the trial court proceedings and has waived appellate review of this issue. Finally, Nguyen's challenge to the ex parte order is moot because this order was subsequently dissolved. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.