

[Cite as *Bowling v. Stafford & Stafford Co., L.P.A.*, 2010-Ohio-2769.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

RICHARD G. BOWLING	:	APPEAL NO. C-090565
	:	TRIAL NO. A-0507272
and	:	
BRENDA BOWLING,	:	<i>DECISION.</i>
Plaintiffs-Appellees,	:	
vs.	:	
STAFFORD & STAFFORD CO.,	:	
L.P.A.,	:	
Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 18, 2010

*Peter A. Schmid and Dressman Benziger Lavelle, PSC and Ernest V. Thomas III and Thomas & Thomas Attorneys LLC, for Plaintiffs-Appellees,*

*H. Toby Schisler and Dinsmore & Shohl, LLP, for Appellant.*

Please note: This case has been removed from the accelerated calendar.

**HILDEBRANDT, Presiding Judge.**

{¶1} Appellant, Stafford & Stafford Co., L.P.A. (“Stafford”), appeals the judgment of the Hamilton County Court of Common Pleas awarding attorney fees to plaintiffs-appellees, Richard G. Bowling and Brenda Bowling.

**The Lawsuit and the First Appeal**

{¶2} In 2005, the Bowlings filed suit against a number of parties, alleging that their conduct had caused damage to the Bowlings’ real property. Stafford represented the defendants in the case. The trial court granted summary judgment in favor of the Bowlings and awarded them attorney fees based on the allegedly frivolous conduct of Stafford.

{¶3} The defendants and Stafford appealed, and this court reversed the trial court’s judgment.<sup>1</sup> In doing so, we held that genuine issues of material fact remained with respect to whether the defendants’ actions had caused the alleged damage.<sup>2</sup> We also reversed the granting of sanctions on the grounds that neither the defendants nor Stafford had received notice that the issue of sanctions would be addressed at a May 2007 hearing and that the Bowlings had failed to present evidence of the amount and reasonableness of the claimed fees.<sup>3</sup> Accordingly, we remanded the cause for further proceedings.

**The Proceedings on Remand**

{¶4} On remand, the Bowlings voluntarily dismissed their claims against two of the defendants. The Bowlings also indicated to the trial court that they would not pursue claims against the remaining defendants because they deemed them

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<sup>1</sup> See *Bowling v. Gordon Real Estate, LLC* (Sept. 24, 2008), 1st Dist. Nos. C-070377, C-070378, and C-070387.

<sup>2</sup> Id.

<sup>3</sup> Id.

judgment-proof. Nonetheless, the Bowlings continued to pursue their motion for sanctions against Stafford for its allegedly frivolous conduct in defending the lawsuit.

{¶5} On July 29, 2009, respective counsel for the Bowlings and Stafford appeared before the trial court. At the ensuing hearing, the Bowlings submitted a binder with exhibits documenting the allegedly frivolous conduct. In an affidavit, counsel attested to the amount and the reasonableness of the requested fees that had been incurred as a result of the claimed misconduct. The trial court accepted the binder without objection and designated it as a court exhibit.

{¶6} In an entry journalized August 6, 2009, the trial court awarded the Bowlings attorney fees in the amount of \$105,877.61.

#### The Hearing Under R.C. 2323.51

{¶7} In its first assignment of error, Stafford now argues that the trial court erred in granting the Bowlings' motion for sanctions. R.C. 2323.51 permits a trial court to award sanctions to any party adversely affected by frivolous conduct. The statute defines frivolous conduct as conduct by a party to a civil action that (1) serves merely to harass or maliciously injure another party to the action or is for another improper purpose, such as causing unnecessary delay or a needless increase in the cost of litigation; (2) is not warranted under existing law and cannot be supported by a good-faith argument for a modification of existing law or the establishment of new law ;(3) consists of allegations or other factual contentions that have no evidentiary support or are unlikely to have support after further investigation or discovery; or (4) consists of denials or factual contentions that are not warranted by the evidence or are not reasonably based on a lack of information or belief.<sup>4</sup> There is no requirement in the statute that the party seeking sanctions be the prevailing party in the underlying action.

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<sup>4</sup> R.C. 2323.51(A)(2)(a).

{¶8} The standard of review to be applied to a trial court’s decision to grant sanctions under R.C. 2323.51 depends on whether there are questions of law or of fact, or whether there are mixed questions of law and fact.<sup>5</sup> For purely legal questions, the appellate court applies a de novo standard of review.<sup>6</sup> In contrast, an appellate court may not disturb a trial court’s findings of fact if the record contains competent, credible evidence to support those findings.<sup>7</sup> Finally, an appellate court applies an abuse-of-discretion standard with respect to a trial court’s decision to award attorney fees on the basis that frivolous conduct has adversely affected a party.<sup>8</sup>

{¶9} Stafford first contends that the trial court erred in failing to give proper notice of the hearing on sanctions, and that it failed to hold an evidentiary hearing in conformity with R.C. 2323.51(B)(2).

{¶10} As a prerequisite to an award of sanctions, R.C. 2323.51(B)(2) requires a trial court to set a date for a hearing to determine whether particular conduct was frivolous and whether the allegedly frivolous conduct adversely affected a party to the action.<sup>9</sup> The court must provide notice of the hearing to each party or counsel of record who allegedly engaged in frivolous conduct and to any party who allegedly was adversely affected by the frivolous conduct.<sup>10</sup> The court must then conduct a hearing at which the court “allows the parties and counsel of record involved to present any relevant evidence,” including evidence of reasonable attorney fees.<sup>11</sup> Finally, the court determines whether the conduct involved was frivolous, whether a party was adversely affected by it, and the amount, if any, of the award to be made.<sup>12</sup>

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<sup>5</sup> See *Gearhart v. Cooper*, 1st Dist. Nos. C-050532 and C-060170, 2007-Ohio-25, ¶25, citing *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857, ¶25.

<sup>6</sup> *Gearhart*, supra, at ¶25.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, citing *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 52, 673 N.E.2d 628.

<sup>9</sup> R.C. 2323.51(B)(2)(a)

<sup>10</sup> R.C. 2323.51(B)(2)(b).

<sup>11</sup> R.C. 2323.51(B)(2)(c).

<sup>12</sup> *Id.*

{¶11} In this case, the trial court complied with R.C. 2323.51(B)(2). The trial court set a date for the sanctions hearing, and Stafford's counsel was present on the appointed date. Stafford's attorney acknowledged on the record that he was aware of the reason for the hearing, and he stated that he was willing to rely on his written response to rebut the allegations of frivolous conduct. Stafford's assertion on appeal that it had been surprised by the proceedings is thus contradicted by the record.

{¶12} Moreover, we find no merit in Stafford's contention that the court did not receive evidence at the July 29, 2009, hearing. As we have already noted, the Bowlings offered a binder of materials that meticulously chronicled the allegedly frivolous conduct. On the record, the trial court explicitly admitted the binder into evidence and marked it as a court exhibit, and Stafford's counsel did not object to the admission of the evidence. Although Stafford chose not to offer any evidence to rebut the allegations of frivolous conduct and instead submitted the issue on its written response, the hearing was nonetheless an evidentiary hearing within the meaning of R.C. 2323.51(B)(2)(c).

#### Sufficiency of the Evidence for Sanctions

{¶13} We turn next to the quantum of proof required for the award of attorney fees. Stafford cites a case from 2000 for the proposition that the Bowlings were required to demonstrate that they had incurred attorney fees "as a direct and identifiable result of defending the frivolous conduct in particular."<sup>13</sup>

{¶14} But as the Bowlings correctly state, the quoted language is based on the previous version of R.C. 2323.51, which required proof that attorney fees had been "necessitated by the frivolous conduct."<sup>14</sup> The statute was amended in 2005 to require proof only that the fees had been "incurred in connection with the civil

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<sup>13</sup> See *In re Estate of Endslow* (July 8, 2000), 5th Dist. No. 99CAF-11-058, citing *Wiltberger*, *supra*, at 54, 673 N.E.2d 628.

<sup>14</sup> See *Endslow*, *supra*, citing former R.C. 2323.51(B)(3).

action” in which the frivolous conduct had occurred.<sup>15</sup> Under the amended statute, the requirement that the expenditures be specifically “necessitated by the frivolous conduct” applies only to court costs and expenses, not to attorney fees.<sup>16</sup>

{¶15} Under the amended standard for attorney fees, the Bowlings demonstrated that they were entitled to sanctions. The record is replete with instances in which Stafford delayed and obstructed the proceedings. For instance, documents that the Bowlings had requested in September 2005 had not been produced as of July 2006 despite the court’s granting of a motion to compel discovery; Stafford repeatedly ignored the Bowlings’ request to depose a principal defendant and then cancelled scheduled depositions of the defendant three times; Stafford repeatedly cancelled the deposition of expert witnesses; and Stafford repeatedly failed to serve the Bowlings’ counsel with documents that it had filed with the court.

{¶16} Stafford alleges that the Bowlings requested excessive fees, and it cites various fees that it alleges were not properly assessed. But Stafford’s arguments are based largely on the former version of the statute requiring a more direct nexus between the frivolous conduct and the fees that had been incurred. And in fact, the Bowlings omitted requests for a large number of items that they conceded had not been reasonably incurred in connection with the lawsuit.

#### The Trial Court’s Rationale

{¶17} Stafford also maintains that the award was improper because the trial court failed to provide a basis for its finding that Stafford had engaged in frivolous

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<sup>15</sup> R.C. 2323.51(B)(1). See, also, *Mid-Ohio Mechanical, Inc., v. Eisenman Corp.*, 5th Dist. Nos. 07 CA 000035 and 08 CA 00012, 2009-Ohio-5804, ¶158, citing *Neubauer v. Ohio Remcon, Inc.*, 10th Dist. No. 05AP-946, 2006-Ohio-1481, ¶50.

<sup>16</sup> See R.C. 2323.51(B)(5)(b).

conduct and because the court failed to determine that the amount of requested fees was reasonable.

{¶18} This argument is also without merit. In its entry granting sanctions, the trial court made explicit its reasons for finding Stafford's conduct to have been frivolous. The court stated that "[i]t is clear from the record that The Stafford Law Firm failed to comply with discovery, stonewalled depositions, and failed to comply with court orders. Therefore, the court finds that the conduct of the Stafford Law Firm was frivolous and that the Plaintiffs were adversely affected as a result. \* \* \* The original Case Management Order entered November 28, 2005, ordered Discovery to be completed no later than May 1, 2006. Discovery was not completed by this date and the subsequent conduct of the Stafford Law Firm was unresponsive and frivolous."

{¶19} Also, the court cited the Bowlings' accounting of the attorney fees and found the requested fees to be reasonable. Stafford did not request findings of fact and conclusions of law or otherwise ask the court to clarify its holding, and the court's entry was sufficient to provide a basis for the award of sanctions.

{¶20} Stafford next argues that the sanctions were not merited under the standards for discovery violations set forth in Civ.R. 37. Having held that the sanctions were proper under R.C. 2323.51, we need not decide whether Civ.R. 37 would have provided an independent basis for sanctions.

{¶21} In sum, the sanctions were supported by competent, credible evidence, and the trial court did not abuse its discretion in awarding attorney fees. Accordingly, we overrule the first assignment of error.

#### **Stafford's Requested Return of Garnished Funds**

{¶22} In its second and final assignment of error, Stafford argues that the trial court erred in failing to return funds that had been garnished from its bank

account. The trial court had ordered the funds to be paid into an account of the clerk of courts pursuant to an interpleader motion. Stafford argues that the court was without jurisdiction to withhold the funds.

{¶23} We find no reversible error in the trial court's refusal to return the funds to Stafford. Stafford designated the withheld funds to be applied to the amount of the supersedeas bond in the instant appeal. Accordingly, Stafford suffered no prejudice as a result of the trial court's refusal to return the garnished funds. We overrule the second assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

**DINKELACKER and MALLORY, JJ., concur.**

Please Note:

The court has recorded its own entry on the date of the release of this decision.