[Cite as *Judd v. Meszaros*, 2011-Ohio-4983.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stanton E. Judd,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1189 (C.P.C. No. 95DV-979)
Cheryl L. Meszaros,	:	(REGULAR CALENDAR)
Defendant-Appellee,	:	
(Trytan Investment Properties, LLC and Terrence W. Lyden,	:	
Defendants-Appellants).	:	

D E C I S I O N

Rendered on September 29, 2011

Vincent A. Dugan, Jr.; and *Robert D. Cohen,* for appellees.

Terrence W. Lyden Company, LLC, and *Terrence W. Lyden,* for appellants.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

BRYANT, P.J.

{¶1} Appellants, Terrence W. Lyden and Trytan Investment Properties, LLC (collectively "Lyden"), appeal from a judgment of the Franklin County Court of Common

Pleas, Division of Domestic Relations, denying Lyden's motion for sanctions against Robert D. Cohen, Vincent A. Dugan, Jr., and Stanton E. Judd. Lyden assigns a single error:

> The Trial Court Erred in Denying Trytan Investment Properties LLC and Terrence W. Lyden's Motion for Sanctions Pursuant to Ohio Revised Code Section 2323.51 and Ohio Civil Procedure Rule 11 against Attorney's [sic] Vincent Dugan and Robert Cohen.

Because the trial court did not err in denying Lyden's motion for sanctions, we affirm.

I. Facts & Procedural History

{¶2} The action underlying Lyden's motion for sanctions arose out of a domestic dispute in Morrow County. Prior to 2005, Stanton E. Judd and Cheryl L. Meszaros, an unmarried couple with one child together, lived at a residence in Fredericktown, Ohio. Meszaros was the sole titled owner of the Fredericktown property and the sole obligor on the mortgage on the property. Even so, all money used to purchase the property and to construct the residence located on it came from Judd and his immediate family. Judd admitted that he arranged for the property to be titled in Meszaros' name in an attempt to shield his assets from his creditors.

{¶3} Meszaros left the Fredericktown property in January 2005, took the couple's child with her, and moved to Hilliard, Ohio. On October 5, 2005, Judd filed in the Franklin County Court of Common Pleas, Division of Domestic Relations, a petition for a domestic violence civil protection order ("CPO") against Meszaros. Judd alleged Meszaros shut the water off to the Fredericktown residence and then came to the residence where she kicked in a dining room window, verbally threatened Judd and the others, and placed

them all in fear of physical danger. The court granted Judd an ex parte domestic violence CPO, effective until October 19, 2005.

{¶4} On October 27, 2005, the parties entered into a consent agreement and CPO, which the court approved. The CPO, effective until October 27, 2006, ordered Meszaros immediately to vacate the Fredericktown residence and granted Judd exclusive possession of the residence. It further prohibited Meszaros from interfering with Judd's "right to occupy the residence including, but not limited to canceling utilities or insurance, interrupting phone service, [or] mail delivery." (R. 16-17.) Under the CPO, Meszaros could not enter the residence, remove, damage or dispose of any of Judd's property, or cause or encourage any person to do any act the CPO prohibited. Meszaros was named the legal custodian of the child, but the court granted Judd visitation. Throughout the time period relevant to the CPO, Attorney Vincent Dugan represented Judd; another local attorney represented Meszaros.

{¶5} Almost immediately after the trial court approved the CPO, Meszaros' attorney and Dugan began negotiating, on behalf of their respective clients, to have Meszaros convey the property to Judd and to refinance the mortgage in his name. Meszaros, however, determined she had no option but to sell the property. Meszaros' attorney commissioned a title company to conduct a title search on the property, and the search did not reveal any unknown encumbrances. The title company referred Meszaros' attorney to Lyden as a potential buyer; Lyden knew the attorney from playing on the same softball team. Prior to purchasing the property, Lyden stated Meszaros' attorney told him about the CPO, informed him Meszaros no longer lived on the property, and advised "the

ex-boyfriend was living in the property" and had "some type of a possessionary [sic] interest." (Tr. 77.)

{¶6} Meszaros and Lyden agreed on a price of $250,000, and the sale closed on January 19, 2006. Lyden stated he received a copy of the CPO either at the closing or a couple of days after the closing. On January 26, 2006, Lyden went to the Fredericktown residence and served Judd with a 30-day notice to leave premises. The notice informed Judd his month-to-month tenancy had been terminated, he unlawfully possessed the premises, and he had 30 days to vacate the premises in order to avoid eviction proceedings. Lyden entered the residence, took pictures, and attempted to change the locks, Judd forestalling the latter when he provided Lyden with a key to the residence. While Lyden was at the house, Judd called Dugan and handed the phone to Lyden. Lyden admitted to Dugan that he was aware of the CPO. (Tr. 80.)

{¶7} On February 8, 2006, Dugan filed three motions in the trial court: (1) a motion to join Lyden, Meszaros' attorney, and Fifth Third Bank as respondents to the domestic violence action giving rise to the CPO; (2) an ex parte emergency motion seeking orders to restrain Lyden, Meszaros, and her attorney not only from disposing of the funds resulting from the sale of the property but from taking any action to remove Judd from his home; and (3) a motion to hold Lyden, Meszaros, and her attorney in contempt of court for violating the terms of the CPO. The trial court granted the motions that same day, restraining the named persons from interfering with Judd's exclusive occupancy of the property and from transferring or selling the property, except to transfer title to Judd.

{¶8} Lyden, through counsel, filed motions to dissolve, dismiss, and set aside the February 8, 2006 orders. On March 17, 2006, Attorney Robert Cohen entered his appearance as co-counsel for Judd; on May 26, 2006, the court granted Dugan permission to withdraw as counsel of record for Judd, leaving Cohen as Judd's sole attorney. After conducting a hearing on the motions to dismiss, dissolve, and set aside, the court on November 1, 2006 dismissed them as moot, noting the CPO expired on October 27, 2006.

{¶9} Pursuant to Civ.R. 11 and R.C. 2323.51, Lyden then filed a motion for sanctions against Dugan, Cohen, and Judd. Lyden contended Dugan filed the February 8, 2006 motions to harass and maliciously injure Lyden, as Judd had no right to remain in the property rent free and "[n]othing in the CPO purport[ed] to determine such occupancy right as between [Judd and Meszaros] and any third party." (R. 161.) The record reflects the motion was dismissed as moot.

{¶10} On April 10, 2007, Lyden filed a motion with the Supreme Court of Ohio seeking to have the trial judge disqualified from presiding over the sanctions hearing. The Chief Justice of the Supreme Court denied the motion, as the trial court had denied the motion for sanctions, and the underlying case was closed. The trial judge subsequently filed an entry of recusal in the case, and for unexplained reason the case was re-assigned to a different trial judge and set for a hearing on Lyden's motion for sanctions. After all of the judges of the Franklin County Court of Common Pleas, Division of Domestic Relations filed a joint entry of recusal on April 22, 2009, the matter was assigned to a visiting judge, who, in turn, recused himself due to an ex parte communication. Ultimately, a second

visiting judge conducted a hearing on May 26, 2010. At the hearing, Lyden testified on behalf of his motion for sanctions; Dugan and Cohen did not present any evidence.

{¶11} On November 1, 2010, the visiting judge filed a judgment entry dismissing Lyden's motion for sanctions, but correcting a typographical error in a nunc pro tunc judgment entry of November 29, 2010. The visiting judge determined the February 8, 2006 motions were not without any potential merit and were not meant solely to harass, delay, or maliciously injure Lyden. As the visiting judge concluded, "Dugan, Cohen, and the Court all had a good faith belief that Lyden, who admitted that he was aware of the Consent Order prior to purchase, could be held in contempt of the prior orders of this Court and restrained for dispossessing Judd of his occupancy in the real estate." (Decision, 26.) Even if the parties "were mistaken in their belief that the Court could enforce its order against Lyden, that mistaken belief is not sufficient to impose an award of sanctions against Cohen and Dugan." (Decision, 27.) Lyden timely filed a notice of appeal.

II. Motion to Strike

{¶12} Lyden also filed a motion to strike Dugan and Cohen's appellate brief, contending they improperly certified service of their brief. Dugan and Cohen filed their appellate brief on April 29, 2011. The certificate of service states a true and accurate copy of the brief was served on Lyden that same day, but Lyden asserts in his motion that Dugan and Cohen instead mailed Lyden a copy of their brief on May 3, 2011.

{¶13} App.R. 13(B) provides that "[c]opies of all documents filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for the party on all other parties to the appeal."

Dugan and Cohen explained in their memorandum opposing Lyden's motion that they mistakenly believed they needed a time-stamp from the court, demonstrating their brief was timely filed, before serving the brief on Lyden. Their independent contractor, hired to file the brief, did not return the filed, time-stamped brief to them until May 3, 2011, the day they served the brief on Lyden. Lyden does not describe how the four-day discrepancy prejudiced his ability to present his appeal, and we discern none. *Huffer v. Huffer*, 10th Dist. No. 09AP-574, 2010-Ohio-1223, ¶10 (denying motion to strike appellate brief, based on appellee's noncompliance with App.R. 16, where appellant could not demonstrate "prejudice arising from [appellee's] technical deviation from App.R. 16"). Accordingly, Lyden's motion to strike Dugan's and Cohen's appellate brief is denied.

III. Appellate Posture

{¶14} The appellate procedural posture of this case is unusual. The trial docket indicates Lyden's motion for sanctions was dismissed as moot. In response to Lyden's affidavit seeking to disqualify the trial judge, the Chief Justice of the Supreme Court of Ohio filed an entry noting Lyden's motion for sanctions had been denied as moot and the underlying case was closed. The trial court's ruling and the Chief Justice's entry both suggest not only that res judicata would bar subsequent litigation of the same motion before the visiting judge, but that Lyden should have filed his notice of appeal within 30 days of the trial court's denying his motion for sanctions as moot. To the extent he should have, his current appeal from the visiting judge's resolution of the motion for sanctions is untimely under App.R. 4(A), and we would dismiss this appeal for lack of jurisdiction.

{¶15} The record, however, does not contain the trial court's entry regarding its determination that Lyden's motion for sanctions be dismissed as moot. The suggestion

comes from an unsigned document in the file and the content of the trial court's computerized docket. In such circumstances, we will presume the visiting judge acted properly in conducting a hearing and in resolving Lyden's motion for sanctions, and so we address Lyden's assigned error.

IV. Frivolous Conduct Standard

{¶16} 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" encompasses "[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). "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).

{¶17} "Since 'willfulness' is not a prerequisite for relief," under R.C. 2323.51, "analysis of a claim under this statute boils down to a determination of (1) whether an action taken by the party to be sanctioned constitutes 'frivolous conduct,' and (2) what amount, if any, of reasonable attorney fees necessitated by the frivolous conduct is to

be awarded to the aggrieved party." *Ceol v. Zion Indus., Inc* (1992), 81 Ohio App.3d 286, 291; R.C. 2323.51(B).

{¶18} No single standard of review applies in R.C. 2323.51 cases; the inquiry is one of mixed questions of law and fact. *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 51. The initial determination of whether a party's conduct was frivolous requires a factual determination. *Ceol* at 291. Review of a trial court's factual determinations involves some degree of deference, and we will not disturb a trial court's findings of fact where the record contains competent, credible evidence to support such findings. *Wiltberger* at 52.

{¶19} However, "[a] determination that conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law requires a legal analysis." *Stuller v. Price,* 10th Dist. No. 03AP-30, 2003-Ohio-6826, ¶14, citing *Wiltberger*. See also *Tomb & Assoc., Inc. v. Wagner* (1992), 82 Ohio App.3d 363, 366, citing *Passmore v. Greene Cty. Bd. of Elections* (1991), 74 Ohio App.3d 707. Purely legal questions are subject to de novo review. *Stuller* at ¶14, citing *Wiltberger* at 51-52. Finally, "[w]here a trial court has found the existence of frivolous conduct, the decision to assess or not to assess a penalty lies within the sound discretion of the trial court." Id., citing *Wiltberger* at 52.

{¶20} Civ.R. 11 requires the attorney of record of every party represented by counsel to sign every pleading, motion, or other document. "The signature of an attorney * * * constitutes a certificate by the attorney * * * that the attorney * * * has read the document; that to the best of the attorney's * * * knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

{¶21} An attempt to invoke Civ.R. 11 and seek sanctions under the rule involves a three-step process. *Ceol* at 290. Initially, the trial court must consider whether the attorney signing the document has read the pleading, harbors good grounds to support it to the best of his or her knowledge, information, and belief, and did not file it for purposes of delay. Id. If the court determines the attorney willfully violated the rules, it may award the opposing party its attorney fees and expenses. Civ.R. 11.

{¶22} While Civ.R. 11 applies a subjective bad-faith standard, R.C. 2323.51 employs an objective standard in determining whether sanctions may be imposed for frivolous conduct. *Stafford v. Columbus Bonding Ctr.*, 177 Ohio App.3d 799, 2008-Ohio-3948, ¶8. Because a finding of frivolous conduct under R.C. 2323.51 is determined without reference to what the individual knew or believed, R.C. 2323.51 is broader in scope than Civ.R. 11. Id.

V. No Violation of R.C. 2323.51 or Civ.R. 11

{¶23} Lyden argues Dugan and Cohen engaged in frivolous conduct in presenting the trial court with false and misleading information, in asserting that Judd had a right to live in the real estate for one year that precluded Lyden from selling or entering onto the real estate, in initiating a contempt action against Lyden, and in accusing Lyden of conspiracy and fraudulent conduct. Although each of Lyden's contentions is grounded in the same facts, we address Lyden's contentions separately for ease of discussion.

A. *False and Misleading Information – "Legal Interest" Statement*

{¶24} Judd's affidavit, filed to support the February 8, 2006 motions, stated Judd had "a legal interest in the property which can be substantiated by documentary evidence." (R. 38, 33.) Lyden asserts Dugan knew the statement was false because

Dugan knew Judd titled the property in Meszaros' name to hide his assets. See Civ.R. 11. Lyden also contends the statement lacked evidentiary support because Judd had no legal interest in the real estate reflected in any deed, mortgage lien, or affidavit of record. See R.C. 2323.51(A)(2)(a)(iii). Lyden lastly claims Dugan and Cohen intentionally misled the trial court into granting the ex parte motions by informing the court that Judd "was the legal owner of the real estate." (Appellant's, brief 14.)

{¶25} Contrary to Lyden's contentions, Dugan and Cohen did not allege in the trial court that Judd was the legal owner of the real estate but, rather, made clear that Meszaros was the sole titled owner of the property. Instead, supporting their contentions with evidence, they asserted only that Judd had a legal interest in the property because Judd financed the residence construction, at least half of the manual labor came solely from him, and "[t]he funds used to purchase the vacant land and to pay for the building of the house, a sum in excess of three hundred thousand dollars ($300,000), came (100%) from [Judd], [Judd's] father, and [Judd's] brother." (R. 34.) They further noted the CPO provided Judd with a one-year right to tenancy in the property.

{¶26} On appeal, Dugan and Cohen acknowledge Judd's interest was an equitable rather than a legal interest. A "legal interest" is "[a]n interest that has its origin in the principles, standards, and rules developed by courts of law as opposed to courts of chancery" or "[a]n interest recognized by law, such as legal title." Black's Law Dictionary (9 ed. 2009). By contrast, an "equitable interest" is "[a]n interest held by virtue of an equitable title or claimed on equitable grounds, such as the interest held by a trust beneficiary." Id. Here, the ownership relationship between Judd and Meszaros appears to be equitable, perhaps a "purchase-money resulting trust" which "arises when property is

transferred to one person but the entire purchase price is paid by another." *Glick v. Dolin* (1992), 80 Ohio App.3d 592, 597, citing Restatement of the Law 2d, Trusts (1959) 393, Section 440; 5 Scott on Trusts (4 ed. 1967), Section 440. In such a situation, the "equitable owner has an interest in such proportion as the amount he paid bears to the total purchase price." Id.

{¶27} As a result, although the motions filed in the trial court stated Judd had a legal interest in the property, his affidavit factually suggests an equitable interest in the real estate: he informed the court the property was in Meszaros' name but he financed its purchase and had a right to occupancy under the CPO. The visiting judge so concluded, noting Dugan and Cohen knew Judd had only an equitable interest in the real estate. The visiting judge recognized that Dugan provided the trial court with that information in the motions, and accordingly determined "[t]he Court was not misled by Dugan's disclosure of the true nature of Judd's claims regarding the real estate." (Decision, 13.)

{¶28} The visiting judge properly concluded Dugan's misstatement of his client's interest in the property, in the midst of a paragraph where Dugan informed the court that Meszaros was the sole titled owner of the property, does not rise to the sort of egregious conduct subject to sanction as frivolous conduct. *Miller v. Miller* (Sept. 22 1995), 6th Dist. No. WD-95-016. Cf. *Resources for Healthy Living, Inc. v. Haslinger*, 6th Dist. No. WD-10-073, 2011-Ohio-1978, ¶30-32 (concluding an appellant's using the terms "billings," "receivables," and "receipts" interchangeably in the complaint, causing the complaint to misstate the terms of the contract, did not amount to frivolous conduct because the material allegations in the complaint did not lack evidentiary support); *Riston v. Butler*,

149 Ohio App.3d 390, 2002-Ohio-2308, ¶31 (noting an attorney does not act unreasonably in relying on the representations of his or her client).

{¶29} Lyden nonetheless contends Dugan and Cohen made the factually inaccurate "legal interest" statement "in an effort to maliciously injure Lyden and tie up the real estate." (Appellant's brief, 14); R.C. 2323.51(A)(2)(a)(i). The visiting judge concluded Dugan did not file the motions to maliciously injure Lyden, but rather to "protect and preserve Judd's one-year right to tenancy in the property against Lyden's unqualified 30-day notice to vacate." (Decision 16, 19.) Competent, credible evidence supports that conclusion, as not only did the CPO give Judd a one-year right to exclusively possess the property, but Lyden admitted he was aware, and received a copy, of the CPO prior to purchasing the property and serving Judd with the 30-day notice to leave premises.

{¶30} Accordingly, the "legal interest" statement did not amount to frivolous conduct under R.C. 2323.51(A)(2)(a)(i), (iii), or violate Civ.R. 11.

B. *Judd's Right to Live in the Real Estate/ Prohibition against Sale*

{¶31} Lyden also points to Dugan's and Cohen's legal assertions that the CPO not only gave Judd a right to live in the real estate for one year rent free, but also prohibited Meszaros from selling the property. Lyden contends the assertions were not warranted under existing law and could not be supported by a good-faith argument for an extension or modification of the law. See R.C. 2323.51(A)(2)(a)(ii). In resolving Lyden's argument, " 'the test is whether no reasonable lawyer would have brought the action in light of the existing law.' " *L & N Partnership v. Lakeside Forest Assn.*, 183 Ohio App.3d 125, 2009-Ohio-2987, ¶37, quoting *Stafford* at ¶6. "In other words, a claim is frivolous if it

is absolutely clear under the existing law that no reasonable lawyer could argue the claim." *Riston* at ¶30.

{¶32} The motion for emergency orders asked the trial court to restrain Lyden from taking any action to remove Judd from the property, and the supporting memorandum asserted Judd had the right to occupy the residence from October 27, 2005 until October 27, 2006 pursuant to the CPO. The ex parte emergency orders, which the trial court signed but Dugan drafted, restrained Lyden from interfering with Judd's exclusive occupancy of the property, including entering onto the property for any reason. They also restrained Lyden from "transferring, selling, leasing, disposing of, and taking any other action which may affect title to the property." (R. 23.) In denying the motion for sanctions, the visiting judge concluded that the "pleadings [were] not without sufficient arguable merit to be in violation of C.R. 11 or O.R.C. 2323.51." (Decision, 18.)

{¶33} Lyden disputes the visiting judge's conclusion and, citing R.C. 3113.31(E)(5), contends "Judd's right of possession ended when Meszaros' ownership interest ended," so the ex parte emergency order that prohibited Lyden from selling his property was "per se frivolous conduct." (Appellant's brief, 16, 18.) Dugan and Cohen respond that the motions were not frivolous because they had a good-faith basis for arguing that R.C. 3113.31(E)(5) should not apply in the present case: nothing in the CPO affected the title to the real estate, Judd was the victim of domestic violence, and the domestic violence statute should not be applied to allow Judd's assailant to profit at his expense, especially since Judd paid for the property.

{¶34} Domestic relations courts in Ohio have the authority, after a hearing, to "grant any protection order, with or without bond, or approve any consent agreement to

bring about a cessation of domestic violence against the family or household members." R.C. 3113.31(E)(1). The statute, however, includes restrictions. R.C. 3113.31 specifically provides that "[n]o protection order issued or consent agreement approved under this section shall in any manner affect title to any real property." R.C. 3113.31(E)(5). The CPO here did not purport to do so.

{¶35} R.C. 3113.31(E)(1)(b) and (c) provide further conditions to a CPO, allowing the trial court to: (1) grant the petitioner sole occupancy of the residence if the residence is solely owned or leased by the petitioner, (2) grant the petitioner sole occupancy of the residence if the residence is jointly owned or leased by the petitioner and the respondent, or (3) grant the petitioner sole occupancy of the residence even though the residence is solely owned or leased by the respondent only if the respondent has a duty to support the petitioner or other family or household member living in the residence. Here, the CPO granted Meszaros custody of the couple's child, and nothing in the CPO indicated that Meszaros, the sole titled owner of the real estate, had any obligation to support Judd. The CPO arguably violated the third of those restrictions.

{¶36} In response to Lyden's contentions under the statute, the visiting judge noted that the February 8, 2006 motions "were predicated on the validity of the exclusive occupancy orders of paragraphs 2, 3 and 10 of the CPO * * * and given that experienced legal practitioners may believe they are valid, even if mistaken, all of those pleadings are not considered frivolous." (Decision, 22.) We see no basis to disturb the visiting judge's conclusion that Dugan and Cohen had a good-faith basis on which to argue that Judd had the right to live in the residence rent free, as the CPO granted Judd the right to occupy the premises for one year and did not contain a provision relating to

payment of the mortgage or rent. See *Calicoat v. Calicoat*, 2d Dist. No. 08CA32, 2009-Ohio-5869, ¶38 (concluding the terms of R.C. 3113.31(E), authorizing exclusion of perpetrators of domestic violence from the residence of their victims, were reasonable, and orders issued pursuant to that statute constitute valid exercises of the police power). As the trial court appropriately noted, even if Dugan and Cohen ultimately were determined to be legally mistaken in their assertions, the mistake does not render the motions frivolous.

{¶37} Lyden responds by asserting that the visiting judge's holding means a CPO can create property rights in a victim of domestic violence and, in effect, establishes "a requirement that such purchasers (and title companies) must now search the domestic relations court records in all of Ohio's eighty-eight counties to determine if such CPO rights exist." (Appellant's brief ,17.)

{¶38} Lyden's argument attacks the terms of the CPO. The visiting judge did not decide whether the terms were proper; he decided Dugan and Cohen did not act frivolously in seeking to enforce those terms because they had a good-faith basis to assert, based on the terms of the agreed-to CPO and Lyden's attempt to evict Judd from the property, that Lyden should be prohibited from interfering with Judd's one-year right to occupy the real estate. Moreover, the restriction against sale, though not a part of the CPO, was issued as an emergency order in response to Lyden's attempt to remove Judd from the premises, contrary to the terms of the CPO.

{¶39} Under the circumstances of this case, Dugan and Cohen did not engage in frivolous conduct under R.C. 2323.51(A)(2)(a)(ii) or violate Civ.R. 11 in asserting both that Judd had a one-year right to remain in the property and that an order should issue

prohibiting Meszaros or Lyden from selling the property in an effort to defeat that provision of the CPO.

C. *Contempt Motion*

{¶40} Lyden claims Dugan and Cohen knowingly asserted meritless legal theories, not supported by the evidence, when they filed their motion to hold Lyden in contempt of court for his intentional violation of the CPO. The affidavit supporting the motion recounts how, despite the CPO, Judd opened the door on January 26, 2006 to be confronted by a Morrow County sheriff and Lyden. Lyden informed Judd that Lyden had purchased the property from Meszaros and wanted Judd to vacate the residence. Id. Lyden served Judd with the 30-day notice to leave premises and entered the premises. Id. The trial court signed the "Entry/Citation in Contempt" and ordered Lyden to appear before the court and show cause as to why Lyden should not be punished for his failure and refusal to obey the prior orders of the court.

{¶41} "A person who violates a protection order issued or a consent agreement approved under" R.C. 3113.31 may be "subject to * * * [p]unishment for contempt of court." R.C. 3113.31(L)(1)(b). Civil contempt consists of three elements: (1) a prior order of the court, (2) proper notice to the alleged contemnor, and (3) a failure to abide by the court order. *Howell v. Howell,* 10th Dist. No. 04AP-436, 2005-Ohio-2798, ¶25, citing *Armco, Inc. v. United Steel Workers of Am., AFL-CIO-CLC* (June 21, 2001), 5th Dist. No. 00-CA-95. Here, Dugan and Cohen reasonably could argue the CPO constituted the prior court order. Moreover, Lyden admitted that prior to purchasing the property he knew of the CPO and of Judd's interest in the property pursuant to the CPO, received a copy of the CPO either at the closing or a couple of days later, and affirmed he had a copy of the

CPO when he served Judd with the 30-day notice to leave premises. Although Lyden states Dugan could not demonstrate that Lyden ever had " 'proper notice' of any orders regarding the real estate," his testimony belies his contention.

{¶42} Under the third prong, Lyden nonetheless claims nothing in the CPO provided clear and unambiguous notice prohibiting him from purchasing the real estate. Dugan and Cohen did not argue that Lyden's contemptuous act in purchasing the real estate but in attempting to evict Judd from the property during his court-ordered one-year tenancy. The terms of the CPO granting Judd exclusive possession of the real estate for one year were sufficiently clear that Dugan and Cohen reasonably could contend those terms put Lyden on notice that serving Judd with the notice to leave premises would interfere with the court's order.

{¶43} Lyden further asserts he could not be held in contempt for violating the CPO because he was not a party to the CPO. The visiting judge properly concluded the "CPO restraints could apply to Lyden because the terms of the CPO consent agreement prohibited anyone conspiring with Meszaros to defeat the CPO order giving Judd exclusive possession until October 27, 2006, of which Lyden was aware." (Decision, 15.) Moreover, Dugan and Cohen reasonably could argue that Lyden colluded with Meszaros, as Lyden purchased the property from Meszaros, who not only was subject to the CPO, but knew of the terms of the CPO and arguably, as a result of the sale, colluded with Lyden to interfere with Judd's interest in the real estate in violation of the CPO.

{¶44} Even apart from collusion, Dugan and Cohen reasonably could argue that Lyden could be held in contempt because " '[u]nder the proper circumstances, courts can find nonparties guilty of contempt.' " *State v. Chavez-Juarez*, 185 Ohio App.3d 189, 2009-

Ohio-6130, ¶35, appeal not allowed, 124 Ohio St.3d 1509, 2010-Ohio-799, quoting *Scarnecchia v. Rebhan*, 7th Dist. No. 05 MA 213, 2006-Ohio-7053, ¶9; *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990) 52 Ohio St.3d 56, 61, quoting *Regal Knitwear Co. v. NLRB* (1945), 324 U.S. 9, 14, 65 S.Ct. 478, 481 (stating "[n]onparties are bound by an injunction to ensure 'that defendants [do] not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding' "). Dugan and Cohen reasonably could argue Lyden, although a nonparty to the CPO, was bound by its terms so as to prevent him, where he had received actual notice of the CPO's terms, from carrying out the acts the CPO prohibited.

{¶45} Under the noted circumstances, nothing suggests Dugan and Cohen lacked good grounds to support the motion for contempt or filed it solely for purposes of delay. As a result, the filing and continued prosecution of the motion for contempt did not amount to frivolous conduct under R.C. 2323.51(A)(2)(a)(ii), (ii), (iii) or violate Civ.R. 11.

D. *Fraud & Conspiracy*

{¶46} Lyden lastly alleges neither Dugan nor Cohen sufficiently investigated the claim that Lyden acted fraudulently or unethically, or conspired with Meszaros or her attorney, when he served Judd with a notice to vacate the property. Although Dugan's and Cohen's memorandum supporting the motion to join Lyden as a party alludes to a possible collusion, they did not allege a conspiracy, and the visiting judge thus did not address it. The visiting judge, however, concluded Lyden's 30-day notice to leave premises was a fraudulent representation as "[t]hat representation was knowingly

inaccurate and in violation of the October 27, 2005, CPO consent agreement." (Decision, 15.)

{¶47} When a reasonable inquiry by counsel would have revealed the inadequacy of a claim, a finding that the counsel engaged in frivolous conduct is justified. *All Climate Heating and Cooling v. Zee Properties, Inc.* (Apr. 25, 2002), 10th Dist. No. 01AP-784, appeal not allowed, 96 Ohio St.3d 1512, 2002-Ohio-4950, quoting *Ron Schiederer & Assoc. v. London*, 81 Ohio St.3d 94, 97-98, 1998-Ohio-453. "This court has previously upheld the imposition of sanctions for frivolous conduct where the action was 'based upon suspicions which were generally not supported at all and/or contrary to documentary and other evidence.' " *Crooks v. Consol. Stores Corp.* (Feb. 4, 1999), 10th Dist. No. 98AP-83, quoting *Rossman & Co. v. Donaldson* (Dec. 6, 1994), 10th Dist. No. 94APE03-388.

{¶48} The elements of fraud include: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) that is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance. *Kerns v. Schmidt* (1994), 94 Ohio App.3d 601, 611, quoting *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55.

{¶49} Lyden's contentions reduce to the same argument earlier addressed: because the CPO was unenforceable, all attempts to enforce it were frivolous. For the same reasons noted earlier, the argument fails. Dugan and Cohen, along with Meszaros' attorney, agreed to a CPO that allowed Judd to remain in the property for a year. Despite

knowing those terms, Lyden advised Judd he had to vacate the premises and even offered to pay his expenses in an effort to remove him despite the CPO's terms. On these facts, the visiting judge did not wrongly conclude Dugan's and Cohen's allegations of fraud were not frivolous, even if the contentions would not have resulted in a judgment for fraud.

{¶50} Because the evidence does not support Lyden's assertions that Dugan and Cohen willfully accused Lyden of fraud without grounds to support the claim or that they did so solely for purposes of delay, the allegations did not amount to frivolous conduct under R.C. 2323.51(A)(2)(a)(i), (iii) or violate Civ.R. 11.

VI. Disposition

{¶51} For the reasons stated, Lyden's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, denying Lyden's motion for sanctions, is affirmed.

Motion to strike denied;
judgment affirmed.

KLATT and CONNOR, JJ., concur.

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