[Cite as *Sutherland v. Lasson*, 2004-Ohio-5834.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

KAREN SUTHERLAND	:	
Plaintiff-Appellee	:	C.A. CASE NO. 20217
v.	:	T.C. CASE NO. 99-0776
GERRY LASSON	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 29th day of October, 2004.

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Attorney for Plaintiff-Appellee

GERRY LASSON, P. O. Box 30, Donnelsville, Ohio 45319
Defendant-Appellant

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FREDERICK N. YOUNG, J.

{¶ 1} Defendant Gerry Lasson is appealing from the October 9, 2003, order of the trial court overruling his objections to the magistrate's decision finding that the defendant was engaged in a frivolous conduct and consequently awarding attorney fees

and consequently ordering that defendant pay the attorney fees incurred by the plaintiff. The place to begin to understand this case and the defendant's conduct is with the magistrate's decision, as follows:

{¶ 2} "By order of the Court dated November 22, 1999, this case was referred to the Magistrate for trial and decision on all issues of fact and law. On February 18, 2003, Plaintiff, Karen Sutherland, filed this motion for award of attorney fees pursuant to R.C. 2323.51 for frivolous conduct. Defendant, Gerry Lasson, filed a motion contra to Plaintiff's frivolous conduct motion on March 14, 2003. The Magistrate conducted a hearing on Plaintiff's motion for attorney fees on June 6, 11, 12, and 13, 2003. Plaintiff was represented by counsel at the hearing, and Defendant appeared Pro Se. This matter is now ready for decision.

"FACTUAL BACKGROUND

{¶ 3} "Defendant was involved in the rent-to-own real estate business. He operated a sole proprietorship under many business names: RTO/Best Homes, Best Homes & Management Co., Affordable Homes, Beta Gamma I, Affordable Best Homes Company, Miami Valley Best Homes, Best Homes, and other variations. Plaintiff was a customer of Defendant's and obtained a judgment against him.

{¶ 4} "In seeking to enforce the judgment, Plaintiff pursued a non-wage garnishment of an account under the name of Miami Valley Best Homes Mortgage Trust Account at Huntington National Bank. The address and phone number on the said account was the same one used with most of Defendant's DBAs: P. O. Box 3027, Springfield, Ohio, 44501, Phone 937-325-7495.

{¶ 5} "The Ohio Secretary of State certifies that the Miami Valley Best Homes &

Management Co., Ltd. is an Ohio corporation in good standing. Defendant owns shares of the Lasson Family Partnership, which has an interest in the said corporation.

{¶ 6} "Defendant filed an eviction suit regarding the real estate transaction he entered into with Keith and Debra Howard. The Plaintiff in that action was, 'G. Lasson dba Beta Gamma I.' On a credit report done regarding the Howards by Credit Infonet, Inc., Miami Valley Best Homes reported its involvement as holder of a real estate mortgage with the Howards.

{¶ 7} "Paul and Kimberly Remsen were also customers of Defendant, and received at least one check from the subject account. The check was signed by Joan Lasson and Carol Cotterman. Joan Lasson and Carol Cotterman worked as bookkeeper and assistant secretary, respectively, for Defendant under his other DBAs and are co-signors on the subject account.

{¶ 8} "Following the garnishment of the said account, Defendant filed a request for a hearing to dispute it. Plaintiff then filed this motion asserting that such request constitutes frivolous conduct.

"LAW AND ANALYSIS

{¶ 9} "Plaintiff brings the motion for attorney fees pursuant to R.C. 2323.51(B)(1) which states, in relevant part: 'Subject to divisions (B)(2) and (3), (C), and (D) of this section, at any time prior to the commencement of the trial in a civil action or within twenty-one days after the entry of judgment in a civil action, the court may award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action adversely affected by frivolous conduct . . . .'

{¶ 10} "R.C. 2323.51(B)(2) sets forth the procedure the court must follow before awarding attorney fees pursuant to R.C. 2323.51(B)(1). In accordance with R.C. 2323.51(B)(2), the Magistrate conducted hearings on June 6, 11, 12, and 13, 2003, to determine if Defendant's request for a hearing pursuant to R.C. 2716.13 was frivolous and, if Defendant's conduct was frivolous, if the Plaintiff was adversely affected by the frivolous conduct. Plaintiff's counsel and Defendant were present at the hearings.

{¶ 11} "The trial court can award the Plaintiff attorney fees pursuant to R.C. 2323.51(B)(1) only if Defendant's conduct was frivolous. R.C. 2323.51(A)(1) defines 'conduct' to include the taking of any action in connection with a civil action. Following the filing of a non-wage garnishment to satisfy Plaintiff's judgment against Defendant, Defendant requested a hearing pursuant to R.C. 2716.13. Defendant's action is obviously considered 'conduct,' as it was in connection with the civil action that Plaintiff pursued.

{¶ 12} "Plaintiff alleges that Defendant's request for a hearing pursuant to R.C. 2716.13 was frivolous conduct according to R.C. 2323.51(A)(2)(a) which states, in relevant part: '(a) Conduct . . . of the other party to a civil action . . . that satisfies either of the following: (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal. (ii) It is not warranted under the existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.' Plaintiff does not argue under subsection (i), but under subsection (ii), asserting that Defendant's request for a hearing was 'not warranted under the existing law.'

{¶ 13} "Defendant, like any judgment debtor, may request a hearing regarding

the garnishment of his property if he disputes it. R.C. 2716.13(C)(2). However, Ohio R. Civ.P. 11 dictates that any document of a civil action must be signed such, 'that to the best of the . . . party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.' Therefore, the question is whether or not Defendant filed his request for a hearing with good faith or if he was engaging in frivolous conduct, and unduly obstructing Plaintiff's satisfaction of the judgment.

{¶ 14} "First, however, recall that Defendant is pro se. The United States Supreme Court has voiced its opinion regarding pro se litigants and frivolous conduct. '[T]he Court waives filing fees and cost for indigent individuals in order to promote the interests of justice. The goal of fairly dispensing justice, however, is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests. Pro se petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the financial considerations - filing fees and attorney's fees - that deter other litigants from frivolous petitions.' *In Re Michael Sindram* (1991) 498 U.S. 177 at 179-80 (citations omitted). Therefore, Defendant faces a fairly stringent standard of review to show that he was not wasting the Court's resources.

{¶ 15} "The subject account is with Huntington National Bank under the business name of Miami Valley Best Homes Mortgage Trust Account. Defendant was involved in the rent-to-own real estate business. He operated under many business names: RTO/Best Homes, Best Homes & Management Co., Ltd., Affordable Homes, Beta Gamma I, Affordable Best Homes Company, Miami Valley Best Homes, Best Homes, and other variations. The address and phone number on the subject account was the

same one used with most of his DBAs: P. O. Box 3027, Springfield, Ohio, 44501, Phone 937-325-7495.

{¶ 16} "Defendant presented an affidavit from the Ohio Secretary of State stating that the Miami Valley Best Homes & Management Co., Ltd. is an Ohio corporation in good standing. However, he failed to explain clearly the connection between the corporation and the subject account. The use of the name on the account being similar to, but not the same as, the name of the corporation is illustrative of Defendant's pattern of use of many names that are just slightly different to do business. This can mislead and deceive parties who are dealing with Defendant. Defendant alleges that he owns no shares in the corporation, yet he has presented no evidence to support such an allegation. He admits that he did have an interest in the Lasson Family Partnership, which owns shares of the corporation.

{¶ 17} "The evidence shows that the corporation, assuming it owns the account, permits Defendant to use the subject account as a 'conduit.' Defendant submitted a check (on the subject account) into the record that is made payable to Paul and Kimberly Remsen. The Remsens were customers of Defendant. Defendant was using the account as a 'conduit' to pay mortgages.

{¶ 18} "There is even more evidence linking Defendant to Miami Valley Best Homes and Management Co., Defendant filed an eviction suit regarding the real estate transaction he entered into with Keith and Debra Howard. On a credit report done by Credit Infonet, Inc. regarding the Howards, Miami Valley Best Homes reported its involvement as holder of a real estate mortgage with the Howards. Defendant filed the eviction as a proprietor using the name Beta Gamma I, but the name of the corporation,

at least, most of the words, is used as the holder of a mortgage on the Howard's credit report. Therefore, the evidence suggests that both Defendant and Miami Valley Best Homes were one and the same party in this 'Howard transaction.'

{¶ 19} "While it is true that Joan Lasson's and Carol Cotterman's signatures are on the check (of the subject account) submitted in evidence, those women worked as the bookkeeper and assistant secretary, respectively, for the Defendant under his other DBAs. It follows logically that their names would be on such an account so that they might perform their job functions efficiently.

{¶ 20} "Another persuasive fact is one of omission, that no third party has come forward to claim any interest in this garnished account. Plaintiff is correct in asserting that this trust is simply an alter-ego of Defendant. Miami Valley Best Homes and Management Co., Ltd. is just another alias of the Defendant and should be subject to garnishment in order to settle judgments against him. There is no evidence Miami Valley Best Homes and Management Co. Ltd. observed corporate governance formalities. There is evidence from the Howard and Remsen cases, among others, that Defendant himself disregarded the separate corporate entity and treated the business of himself and that of the corporation as one in the same. According to the record, there is no evidence that the Defendant could have had a good faith belief that the subject account was not under his proprietorship. There being no factual basis in which to request a hearing to dispute the garnishment his action amounts to frivolous conduct, thus wasting the Court's time and resources.

{¶ 21} "Plaintiff has sought attorney fees which may be granted under R.C. 2323.51(B)(1). Plaintiff's attorney, J. Joseph Walsh, has submitted his itemized

statement of time expended in this suit, which was estimated to be 17.9 hours. However, the hearing lasted longer than expected and therefore counsel requests an additional 5.5 hours, for a total of 23.4 hours. The Magistrate has reviewed the hours expended and has found them to be necessary and not unduly numerous for this particular case. Mr. Walsh charges one hundred eighty-five dollars ($185.00) per hour, which the Magistrate agrees to be reasonable for a lawyer of such experience as Mr. Walsh. Therefore, Plaintiff is awarded four thousand three hundred twenty-nine dollars ($4,329.00), for attorney fees to pay for the cost of this frivolous conduct by the Defendant.

"CONCLUSION

{¶ 22} "Accordingly, the Magistrate decides as follows:

{¶ 23} "1) that judgment be entered in favor of Plaintiff, Karen Sutherland, and against Defendant, Gerry Lasson, on Plaintiff's motion for attorney fees and court costs; and

{¶ 24} "2) that Defendant, Gerry Lasson, is ordered to pay Plaintiff's attorney fees in the amount of four thousand three hundred twenty-nine dollars ($4,329.00); and,

{¶ 25} "3) that Defendant, Gerry Lasson, pay the court costs of this action.

{¶ 26} "Counsel are referred to Ohio Civil R. 53 and Rule 2.31 of the Rules of Montgomery County Common Pleas Court regarding the filing of objections to the Magistrate's Decision.

{¶ 27} "A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law in that decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3)." (Docket

5).

{¶ 28} Defendant timely filed objections to the decision which were overruled by the trial court in its decision entered October 9, 2003, as follows:

{¶ 29} "This matter is before the Court on Defendant Gerry Lasson's Objections to the Magistrate's Decision filed on July 14, 2003. Plaintiff Karen Sutherland did not file a memorandum opposing Defendant's Objections. The Magistrate's Decision at issue was filed on June 30, 2003.

{¶ 30} "In his Objections to the Magistrate's Decision, Defendant advances numerous arguments wherein he claims the Magistrate erred by granting Plaintiff's request for attorney's fees for frivolous conduct. In doing so, however, Defendant failed to provide the Court with a transcript of the proceedings wherein he was found to be liable for Plaintiff's attorney's fees. Moreover, Defendant did not provide the Court with any affidavits that would reinforce his position.

{¶ 31} "Curiously, Defendant is in possession of a C.D. of the hearing with Magistrate O'Connell conducted on June 6, 11, 12, and 13, 2003. In fact, Defendant has been in possession of the C.D. for several months. No transcript of the proceedings, however, has been filed with the Court. Without any record to review, it is impossible for the Court to verify the claims made by Defendant in his Objections. Most importantly, Defendant has had ample time in which to have the record transcribed. He has not done so, nor has the Court been provided a copy of the C.D. by Defendant.

{¶ 32} "In light of this, Defendant's Objections, which contain mixed assertions of both fact and law, can only be viewed as bare assertions with no record to support them.

{¶ 33} "III. CONCLUSION

{¶ 34} "Accordingly, Defendant's Objections to the Magistrate's Decision Granting Plaintiff Attorney's Fees are hereby OVERRULED, and the Magistrate's Decision is adopted in its entirety, and

{¶ 35} "1) that judgment be entered in favor of Plaintiff, Karen Sutherland, and against Defendant, Gerry Lasson, on Plaintiff's motion for attorney's fees and court costs;

{¶ 36} "2) that Defendant, Gerry Lasson, is ordered to pay Plaintiff's attorney's fees in the amount of four thousand, three hundred twenty-nine dollars; and

{¶ 37} "3) that Defendant, Gerry Lasson, pay the court costs of this action." (Docket 15).

{¶ 38} On appeal, Lasson, still pro se, asserts ten assignments of error purporting to present reasons why we should reverse the judgment of the trial court.

{¶ 39} The first thing we note, however, is that defendant did not provide the court or file in the record a transcript of the four-day hearing before the magistrate on the issue of frivolous conduct and awarding attorney fees, required by Civ.R. 53(D)(3) and Local Court Rule 2.31(VI). As pointed out by the appellee in her brief, that when the trial court is not provided a transcript of the magistrate's hearing, our level of the review of its decision is abuse of discretion and, furthermore, this court cannot consider a transcript of the hearing submitted with the appeal record which had not been before the trial court. E.g., *State, ex rel. Duncan v. Chippewa Township Trustees* (1995), 73 Ohio St.3d 728. Transcripts of the hearings were filed in the case two months after the trial court's decision and after the notice of appeal had been filed. While they are in the

file before us, we will not review them because they were not before the trial court when it rendered its decision.

{¶ 40} We note that the garnishment in this case was allowed to go forward after a hearing on February 18, 2003, before the magistrate, which the defendant-appellant did not attend. The garnishment was an attempt to enforce a judgment which the plaintiff-appellee had obtained against the defendant-appellant in the amount of $16,735.00. The defendant's argument before the magistrate in the trial court was that he did not own this account, which belonged to the corporation separate from him. He obviously did not convince the magistrate on that issue and, as the appellee points out in her brief, defendant's actions "to personally interfere with the execution process is in itself frivolous conduct since he has no ownership interest in any asset that is the target of the non-wage garnishment." Brief, 5. If, in fact, the account subject to garnishment was not owned by Lasson, he would be benefitted, not prejudiced, as a result, since the funds recovered from the account would be credited against the judgment outstanding against him.

{¶ 41} In his brief on appeal, the defendant asserts the following ten assignments of error:

{¶ 42} "1. THE TRIAL COURT ABUSED ITS DESCRETION [SIC] AND COMMITTED REVERSIBLE ERROR WHEN IT, TO THE PREJUDICE OF THE APPELLANT, ASSERTED AND IMPLIED FACTS AND CIRCUMSTANCES IN ITS JOURNAL ENTRY UNSUPPORTED OR CONTRADICTED BY THE EVIDENCE PRESENTED FOR THE RECORD UPON WHICH FACTS DETERMINED THE DECISION OF THE TRIAL COURT.

{¶ 43} "2. THE TRIAL COURT COMMITTED AN ERROR OF THE LAW BY NOT NOTIFYING A THIRD PARTY THAT CERTIFIED THAT THE ASSET WAS THEIRS, AND NOT THE DEFENDANTS.

{¶ 44} "3. THE TRIAL REVIEWING COURT COMMITTED AN ERROR IN LAW BY NOT SETTING A DEADLINE FOR COPIES OF THE HEARING RECORD DISKS, OR HARD COPY TRANSCRIPTS, NOR NOTIFYING THE DEFENDANT OF THE DEADLINE BEFORE MAKING THEIR RULING WITHOUT BENEFIT OF THE TRANSCRIPS. [SIC]

{¶ 45} "4. THE TRIAL REVIEWING COURT COMMITTED AN ERROR IN LAW BY NOT GRANTING DEFENDANT'S REQUEST FOR A FRIVOLOUS CONDUCT HEARING OF HIS OWN.

{¶ 46} "5. THE TRIAL COURT COMMITTED AN ERROR IN LAW BY REQUIRING THE DEFENDANT TO DIRECTLY CERTIFY THAT EVERY DOCUMENT OF A CIVIL ACTION MUST BE SIGNED SUCH 'THAT TO THE BEST KNOWLEDGE, INFORMATION, AND BELIEF THERE IS GOOD GROUNDS TO SUPPORT THE FILING, AND THAT IT IS NOT INTERPOSED FOR DELAY.'

{¶ 47} "6. THE TRIAL REVIEWING COURT ERRED IN LAW BY NOT REQUIRING PLAINTIFF'S ATTORNEY TO ANSWER VERY SPECIFIC INTERROGATORIES GOING TO THE HEART OF THE FACTS IN THIS CASE.

{¶ 48} "7. THE TRIAL COURT ERRED IN LAW BY NOT RECOGNIZING THAT A THIRD PARTY DID REGISTER A COMPLAINT AND THAT COPIES OF THIS COMPLAINT EXIST IN BOTH THE CIVIL CASE FILE AND THE EX COURT FILE.

{¶ 49} "8. THE TRIAL REVIEWING COURT ABUSED ITS DESCRETION [SIC]

BY NOT INVESTIGATING THE ALTERED AFFIDAVIT AND ORDER SUBMITTED BY PLAINTIFF IN THE EX FILE, NOR NOT RESPONDING TO THE HARRASSMENT [SIC] RECEIVED BY THE DEFENDANT FROM MR. WALSH.

{¶ 50} "9. THE COURT ABUSED ITS DESCRETION [SIC] BY AWARDING ATTORNEY FEES FOR FRIVOLOUS CONDUCT WHEN THE DEFENDANT IS ALLOWED BY LAW TO ASK FOR A HEARING ON THE NON-WAGE GARNISHMENT.

{¶ 51} "10. THE COURT ERRED IN LAW BY ALLOWING ATTORNEY FEES FOR THE TIME SPENT PREPARING FOR THE HEARING WHICH THE DEFENDANT WAS ENTITLED TO BY LAW."

{¶ 52} We note that the defendant filed his brief in violation of App.R. 19, which requires double spacing, but we will consider it anyway since it is extremely short.

{¶ 53} The first assignment is refuted by the extensive recitation of facts in the magistrate's opinion, which support his decision.

{¶ 54} In the third assignment, the defendant is intending to justify his failure to timely prepare a transcript of the hearing, but in view of the rules of the court, he cannot justify his failure.

{¶ 55} We find nothing in the record to support his seventh assignment of error, or for that matter, in the eighth assignment of error also.

{¶ 56} As to his ninth assignment of error, the defendant did request a hearing, which was held on the issue of the non-wage garnishment, but he simply failed to attend.

{¶ 57} There is no merit to the tenth assignment of error because it was clear to the magistrate that the attorney for the plaintiffs had spent a considerable amount of

time and effort in preparing their case for attorney fees.

{¶ 58} The balance of the assignments of error are not relevant to this appeal.

{¶ 59} The defendant, although disclaiming any interest in the garnished bank account, has vigorously fought this matter. We count at least eight filings in the trial court alone by the defendant, including both motions and memoranda. It seems to us, as it must have seemed to the trial court, that the defendant, in so vigorously fighting this matter, seems to have a substantial interest in the bank account in question, contrary to his protestations otherwise. All of the assignments of error are overruled and the judgment is affirmed.

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FAIN, P.J. and WOLFF, J., concur.

Copies mailed to:

J. Joseph Walsh
Gerry Lasson
Hon. Mary E. Donovan