[Cite as *Ferron v. Video Professor, Inc.* , 2009-Ohio-3133.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN W. FERRON, et al.	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CAE-09-0055
VIDEO PROFESSOR, INC.	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas Case No. 06 CV H 09 0922
JUDGMENT:	AFFIRMED IN PART; REVERSED AND REMANDED IN PART
DATE OF JUDGMENT ENTRY:	June 25, 2009

APPEARANCES:

For Plaintiffs-Appellants:

LISA A. WAFER
JESSICA G. FALLON
580 N. 4th St., Suite 450
Columbus, OH 43215-2125

For Defendant-Appellee:

JOSEPH ELLIOT
41 S. High St.
Columbus, OH 43215

Delaney, J.

{¶1} Plaintiff-Appellant, John W. Ferron and Appellants, Lisa A. Wafer and Ferron and Associates, LPA, appeal the August 12, 2008 decision of the Delaware County Court of Common Pleas to grant the motions for sanctions pursuant to R.C. 2323.51 and Civ.R. 11 filed by Defendant-Appellee, Video Professor, Inc. For the reasons that follow, we affirm in part, and reverse and remand in part.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Video Professor, a corporation based in Colorado, develops and sells computer-training software for such computer programs as Windows, Word for Windows, Excel for Windows, etc. Video Professor advertises its software through television advertisements and its website. The television advertisements and website state that the Video Professor training software is "free*." The asterisk refers the customer to language that states the customer will pay shipping and processing fees in the amount of $6.95.

{¶3} On or about January 8, 2005, after viewing a television advertisement by the Video Professor, Ferron visited the Video Professor's website to order software on how to use the internet. He wanted to send the software to his mother who had just purchased a computer. Ferron placed his order through the Video Professor website using his debit card. Ferron's debit card was only charged $6.95 for the shipping and handling of this software lesson plan.

{¶4} By initially purchasing the "free" software from Video Professor, Ferron was enrolling in Video Professor's subscription program, commonly known as a "negative option plan." Every five weeks, Video Professor automatically ships the

customer another software lesson plan that is billed to the customer's credit card on record from the first purchase. The customer is billed $6.95 for shipping and handling, and the purchase price of the subsequent software. The customer can contact Video Professor and cancel their subscription at any time. The terms of the subscription plan are available to the customer.

{¶5} Pursuant to the terms of the subscription plan, Video Professor mailed Ferron three software lessons and charged Ferron's debit card for the purchase price and shipping and handling for the software. Ferron wrote a letter to Video Professor in February and March 2005 to request that Video Professor stop mailing him software and to stop making any more charges to his debit card. Ferron enclosed the software in the letters submitted to Video Professor. Video Professor alleges that it did not receive Ferron's letters and continued to send software to Ferron and charge his debit card.

{¶6} On April 7, 2005, Ferron contacted Video Professor customer service by telephone. Ferron demanded that Video Professor stop mailing him any more software and that he wanted a full refund of the charges to his debit card. In total, Video Professor had charged Ferron's debit card for $237.65 (including the shipping and handling for the first "free" software purchase). On April 12, 2005, Ferron's bank records reflect that Video Professor credited Ferron's bank account for $236.65. On May 18, 2005, Video Professor credited Ferron's bank account for $1.00.

{¶7} Eighteen months later, in October 2006, Ferron filed a complaint with the Delaware County Court of Common Pleas against Video Professor, alleging violations of the Ohio Consumer Sales Practices Act ("CSPA"). Ferron is an attorney with Ferron

and Associates, LPA, but Lisa A. Wafer, an attorney with Ferron and Associates, LPA, represented Ferron in this action and signed the pleadings filed with the trial court.

{¶8} Ferron failed to include within the claims of his original complaint the fact that Video Professor had refunded Ferron's money, so Ferron filed a First Amended Complaint on November 1, 2006. In his complaint, Ferron alleged Video Professor violated the CSPA under R.C. 1345.02 when it (1) used the word "free" in a consumer transaction and failed to set forth clearly and conspicuously at the outset of the offer all of the terms, conditions and obligations upon which receipt and retention of the "free" goods or services were contingent; (2) used the word "free" in a consumer transaction and failed to print all terms, conditions, and obligations of the offer in a type size half as large as the word "free;" (3) used the word "free" in a consumer transaction and failed to print all terms, conditions, and obligations of the offer in close proximity with the offer of "free" goods or services; (4) failed to register with the Ohio Secretary of State prior to doing business in Ohio; (5) made a false and/or misleading statement to a consumer in regard to a consumer transaction, and (6) failed to make a prompt refund to a consumer upon request. Ferron sought statutory damages under the CSPA, declaratory judgment and a permanent injunction.

{¶9} The case proceeded contentiously through discovery and Video Professor filed its motion for summary judgment on all claims of Ferron's first amended complaint on May 14, 2007. A trial date was set for December 2007. On November 29, 2007, Ferron voluntarily dismissed his complaint, without prejudice.[1]

[1] The trial court noted during the hearing on Video Professor's motion for sanctions that it had ruled on the motion for summary judgment and was walking the judgment entry to the Clerk of Courts to be filed, when it received Ferron's notice of dismissal. (T. 239-240).

{¶10} On December 7, 2007, Video Professor filed its motion for Civ.R. 11 sanctions and on December 28, 2007, its motion for sanctions pursuant to R.C. 2323.51. The trial court held a hearing on the motions on April 30, 2008 and May 15, 2008. The parties filed post-hearing memoranda, including a supplemental affidavit from Video Professor in regards to its attorney fees accrued based upon the hearings.

{¶11} On August 12, 2008, the trial court issued its judgment entry, granting Video Professor's motions for sanctions pursuant to Civ.R. 11 and R.C. 2323.51. The trial court first found Ferron's claim for statutory damages was unwarranted under existing law because prior to litigation, Ferron chose the remedy of rescission. Therefore, the assertion of the claim amounted to frivolous conduct under R.C. 2323.51(A)(2)(a)(i) and (ii). The trial court also found Ferron's counsel in violation of Civ.R. 11 for bringing a claim which was unsupported by the facts. As to Ferron's claim for permanent injunction pursuant to R.C. 1345.09(D), the trial court found no evidence that Ferron had suffered irreparable injury. It then found Ferron and his counsel in violation of R.C. 2323.51 and Ferron's counsel in violation of Civ.R. 11 for the pursuit of this cause of action. Finally, the trial court analyzed Ferron's claim for declaratory judgment under R.C. 1345.09(D). The trial court found that the law may support Ferron's first three arguments regarding the word "free" in Video Professor's advertisements, but the trial court did not reach such a decision because Ferron voluntarily dismissed his claim before a decision could be rendered. The trial court found the remaining arguments in Ferron's claim for declaratory judgment to be without merit, so therefore sanctions were appropriate against Ferron and his counsel.

{¶12} The trial court awarded sanctions against Ferron, Ferron's counsel, Lisa A. Wafer, and Ferron and Associates, LPA, in the amount of $135,340.00, jointly and severally. Because the trial court found that some of Ferron's claims for declaratory judgment might not be frivolous, it determined Video Professor was not entitled to recover $202,878.46, the full amount of attorneys' fees incurred in the case.

{¶13} It is from this decision Appellants now appeal.

ASSIGNMENTS OF ERROR

{¶14} Appellant Ferron raises nine Assignments of Error:

{¶15} "I. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT ENGAGED IN FRIVOLOUS CONDUCT UNDER R.C. §2323.51. (R. 115)

{¶16} "II. THE TRIAL COURT ERRED IN PRECLUDING APPELLANT'S EXPERT WITNESS' TESTIMONY REGARDING APPELLANT'S GOOD FAITH BASIS FOR HIS CLAIMS. (R. 97; APRIL 30, 2008 TR. 44-46; MAY 15, 2008 TR. 285-286).

{¶17} "III. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE AFFIDAVIT OF BETTYE HARRISON. (APRIL 30, 2008 TR. 9, 11, 12, 16; MAY 15, 2008 TR. 159-160; R. 115, P. 3).

{¶18} "IV. THE TRIAL COURT ERRED IN RELYING UPON APPELLEE'S UNAUTHENTICATED EVIDENCE. (R. 115, P. 3; APRIL 30, 2008 HEARING TR. 9, 12, 26, 28-30).

{¶19} "V. THE TRIAL COURT ERRED IN IMPOSING SANCTIONS AGAINST APPELLANT. (R. 115).

{¶20} "VI. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO APPELLEE BECAUSE APPELLEE FAILED TO ESTABLISH THAT IT WAS OBLIGATED TO PAY THE ATTORNEY'S FEES IN THIS MATTER. (R. 115).

{¶21} "VII. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO APPELLEE BECAUSE APPELLEE FAILED TO ESTABLISH THAT IS [SIC] ATTORNEY'S FEES WERE REASONABLE. (R. 115).

{¶22} "VIII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE SECOND SUPPLEMENTAL AFFIDAVIT OF JOSEPH ELLIOT AND ITS ATTACHMENTS. (R. 115, P. 13).

{¶23} "IX. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR THE ISSUANCE OF SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW PERTAINING TO THE COURT'S AUGUST 12, 2008 JUDGMENT ENTRY. (R. 135)."

{¶24} Appellants Lisa A. Wafer and Ferron & Associates, LPA (collectively "Wafer") raise thirteen Assignments of Error.

{¶25} "I. THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS FERRON AND ASSOCIATES, LPA AND LISA A. WAFER ENGAGED IN FRIVOLOUS CONDUCT UNDER R.C. §2323.51. (R. 115).

{¶26} "II. THE TRIAL COURT ERRED IN IMPOSING SANCTIONS UPON APPELLANT FERRON AND ASSOCIATES, LPA UNDER R.C. §2323.51. (R. 115).

{¶27} "III. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT FERRON AND ASSOCIATES, LPA COULD BE LIABLE UNDER RULE 11 OF THE OHIO RULES OF CIVIL PROCEDURE. (R. 115).

{¶28} "IV. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT LISA A. WAFER WILLFULLY VIOLATED RULE 11 OF THE OHIO RULES OF CIVIL PROCEDURE. (R. 115).

{¶29} "V. THE TRIAL COURT ERRED BY PROHIBITING APPELLANT LISA A. WAFER'S TESTIMONY, AT THE ORAL HEARING ON APPELLEE'S MOTION FOR SANCTIONS, CONCERNING HER GOOD FAITH BASIS FOR ASSERTING THE CLAIMS IN PLAINTIFF'S FIRST AMENDED COMPLAINT. (MAY 15, 2008 TR. 222, 275, 278).

{¶30} "VI. THE TRIAL COURT ERRED IN PRECLUDING APPELLANT'S EXPERT WITNESS' TESTIMONY REGARDING THE GOOD FAITH BASIS FOR THE CLAIMS ASSERTED IN THE FIRST AMENDED COMPLAINT. (R. 97; APRIL 30, 2008 TR. 44-46; MAY 15, 2008 TR. 285-285).

{¶31} "VII. THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE THE AFFIDAVIT OF BETTYE HARRISON. (APRIL 30, 2008 TR. 9, 11, 12, 16; MAY 15, 2008 TR. 159-160; R. 115, P. 3).

{¶32} "VIII. THE TRIAL COURT ERRED IN RELYING UPON APPELLEE'S UNAUTHENTICATED EVIDENCE. (R. 115, P.3; APRIL 30, 2008 TR. 9, 12, 26, 28-30).

{¶33} "IX. THE TRIAL COURT ERRED BY IMPOSING SANCTIONS AGAINST APPELLANTS FERRON AND ASSOCIATES, LPA AND LISA A. WAFER. (R. 115).

{¶34} "X. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO APPELLEE BECAUSE APPELLEE FAILED TO ESTABLISH THAT IT WAS OBLIGATED TO PAY THE ATTORNEY'S FEES IN THIS MATTER. (R. 115).

{¶35} "XI. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO APPELLEE BECAUSE APPELLEE FAILED TO ESTABLISH THAT IS [SIC] ATTORNEY'S FEES WERE REASONABLE. (R. 115).

{¶36} "XII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE SECOND SUPPLEMENTAL AFFIDAVIT OF JOSEPH ELLIOT AND ITS ATTACHMENTS. (R. 115, P. 13).

{¶37} "XIII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR THE ISSUANCE OF SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW PERTAINING TO THE COURT'S AUGUST 12, 2008 JUDGMENT ENTRY. (R. 135)."

FRIVOLOUS CONDUCT PURSUANT TO R.C. 2323.51

Ferron I., II., III., IV. / Wafer I., VI., VII., VIII.

{¶38} Before reaching the Appellants' arguments, we must first note that it is perhaps an understatement when we say Ferron's pursuit of this CSPA claim raised the trial court's ire.[2] The trial court's judgment entry reflects that Ferron, as Plaintiff, has filed numerous complaints alleging CSPA violations.[3] Ferron's law firm, Ferron and Associates, LPA, specializes in the CSPA.

[2] The trial court's August 12, 2008 judgment entry states, "It is clear to the Court that the Plaintiff and Plaintiff's counsel have based their practice upon seeking out and prosecuting potential violations of Ohio Consumer Sales Practices Act. * * * This is not a factor to be considered in issuing sanctions for frivolous conduct and bears no effect on the findings of the Court. However, the Court feels compelled to address the tenor of the communications and the actions of the Plaintiff and Plaintiff's counsel throughout these proceedings. * * * The communications between the parties have been offered to the Court, along with the demeanor in which the Plaintiff and his associates presented throughout this action, have been disappointing and embarrassing to the Court. * * * It is even more disappointing in this case because Mr. Ferron is an attorney himself and his conduct is an embarrassment to the legal profession."

[3] *Ferron v. Fifth Third Bank*, Franklin App. No. 08AP-473, 2008-Ohio-6967; *Ferron v. Echostar Satellite, LLC* (Feb. 6, 2008), 2008 WL 341310 (S.D. Ohio); *Ferron v. Radioshack Corp*., 175 Ohio App.3d 257, 2008-Ohio-1511, 886 N.E.2d 286; *Ferron v. Fifth Third Bank*, Delaware App. Nos. 06CAE110086, 07CAG020010, 2007-Ohio-3084; *Ferron & Assoc., LPA v. U.S. Four, Inc*., Franklin App. No. 05AP-659,

{¶39} That aside, we will first determine whether the trial court erred in finding Ferron, Wafer and Ferron and Associates, LPA engaged in frivolous conduct under R.C. 2323.51 in pursuing their CSPA claims against Video Professor.

A. Frivolous Conduct under R.C. 2323.51

{¶40} R.C. 2323.51 provides that a court may award court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. R.C. 2323.51(A)(2)(a) defines "frivolous conduct" in the following manner:

{¶41} "(i) * * * [conduct that] 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.

{¶42} "(ii) * * * [conduct that] is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

{¶43} "(iii) * * * [conduct that] consists of allegations or other factual contentions that have no evidentiary support or, if specifically identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

{¶44} A motion for sanctions brought under R.C. 2323.51 requires a three-step analysis by the trial court: (1) whether the party engaged in frivolous conduct, (2) if the conduct was frivolous, whether any party was adversely affected by it and (3) if an

---

2005-Ohio-6963; *Ferron v. DirectTV, Inc*., (Feb. 6, 2008), 2008 WL 360684 (S.D. Ohio); *Ferron v. VC E-Commerce Solutions, Inc*. (Jan. 29, 2007), 2007 WL 295455 (S.D. Ohio).

award is to be made, the amount of the award. R.C. 2323.51(B)(2)(a). The question of what constitutes frivolous conduct may be either a factual determination, or a legal determination. *Pingue v. Pingue*, Delaware App. No. 06-CAE-10-0077, 2007-Ohio-4818, ¶ 20 citing *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46. A determination that the 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. *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 233. With respect to purely legal issues, we follow a de novo standard of review and need not defer to the judgment of the trial court. *Wiltberger,* supra, at 51-52. However, we do find some degree of deference appropriate in reviewing a trial court's factual determinations and will not disturb such factual determinations where the record contains competent, credible evidence to support such findings. Id.

{¶45} In determining whether conduct is frivolous, the courts must be careful to apply the statute so that legitimate claims are not chilled. *Beaver Excavating Co. v. Perry Twp*. (1992), 79 Ohio App.3d 148, 606 N.E.2d 1067. The statute was designed to chill egregious, overzealous, unjustifiable and frivolous action. *Oakley v. Nolan*, Athens App. No. 06CA36, 2007-Ohio-4794, ¶16 citing *Turowski v. Johnson* (1990), 68 Ohio App.3d 704, 706, 589 N.E.2d 462. "Whether a claim is warranted under existing law is an objective consideration. The test * * * is whether no reasonable lawyer would have brought the action in light of the existing law. In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim." *Pingue*, supra, citing *Riston v. Butler,* 149 Ohio App.3d 390, 2002-Ohio-2308, at

¶ 30, quoting *Hickman v. Murray* (Mar. 22, 1996), Montgomery App. No. 15030 (citations omitted).

{¶46} This case never reached judgment. Ferron dismissed his complaint pursuant to Civ.R. 41(A) before the trial court ruled on the pending motion for summary judgment. We will review Ferron's complaint to determine whether no reasonable attorney would bring these claims.

B. CSPA Private Remedies under R.C. 1345.09

{¶47} Ferron's complaint against Video Professor sought remedies pursuant to R.C. 1345.09(B) and R.C. 1345.09(D).

{¶48} R.C. 1345.09 states in pertinent part:

{¶49} "(A) Where the violation was an act prohibited by section 1345.02 * * * of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover the consumer's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages.

{¶50} "(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 * * * of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand

dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

{¶51} * * *

{¶52} "(D) Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter."

{¶53} Video Professor argued in its motion for sanctions that Appellants engaged in frivolous conduct when Ferron sought multiple remedies under R.C. 1345.09 for the alleged CSPA violations. It is Video Professor's contention that when Ferron demanded a refund of his money and requested that Video Professor not send any more software to him, Ferron terminated his subscription plan with Video Professor. The termination of the subscription plan equates to the remedy of rescission. Because Ferron chose the remedy of rescission, Video Professor asserts all of Ferron's causes of action under the CSPA must fail, including Ferron's request for declaratory judgment and injunctive relief.

{¶54} Ferron conversely argued in his response to the motion for summary judgment and motions for sanctions that Ferron's dealings with Video Professor resulted in multiple consumer transactions, as defined under R.C. 1345.01. A "consumer transaction" is defined as "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. * * *." R.C. 1345.01(A). Ferron argues that when he viewed the Video Professor television advertisements, viewed the Video Professor website, and purchased the software from the website, he was a consumer and each of these

interactions resulted in a separate consumer transaction for which he argues he is entitled to sue for all of the remedies available under R.C. 1345.09. A "consumer" means a person who engages in a consumer transaction with a supplier. R.C. 1345.01(D).

1. Statutory Damages

{¶55} We will first address whether Appellants engaged in frivolous conduct as it relates to Ferron's pursuit of statutory damages for multiple violations of the CSPA under R.C. 1345.09. R.C. 1345.09 has been consistently construed as requiring an election between the mutually exclusive remedies of rescission or damages for the same transaction. *Eckman v. Columbia Oldsmobile, Inc*. (1989), 65 Ohio App.3d 719, 722, 585 N.E.2d 451. Courts differ on the reasoning for the holding, finding that it is either based on the clearly expressed intent of the legislature embodied in the statute, or because of the inconsistency between the underlying theories of rescission, in which the contract is repudiated, and recovery of damages, in which the rights under the contract are retained and form the basis for the suit. *Cuoto v. Gibson, Inc*. (Feb. 26, 1992), Athens App. No. 1475. If Ferron elected the remedy of rescission prior to filing his complaint, he cannot then bring an action for statutory damages under the CSPA. The question then is: did the multiple CSPA violations (the television advertisements, website and purchase of software) result from the same transaction? Alternatively, were they separate acts that violated different rules of the CSPA?

{¶56} In *Cuoto v. Gibson, Inc.,* supra, the Fourth District Court of Appeals held that the plaintiff could only recover one award of statutory damages "no matter how many violations are ultimately proven" because all the CSPA violations emanated from

the same transaction, an automobile lease agreement. The plaintiff's complaint enumerated eleven violations of the CSPA, but the court rejected the plaintiff's argument that he could recover statutory damages for each those individual violations. It stated, "[t]he separate violations in the instant case formed a single instance of actionable conduct resulting in a single injury." Id.

{¶57} As to Ferron's claim for statutory damages for the multiple consumer transactions resulting in multiple CSPA violations, we find the multiple violations formed a single instance of actionable conduct resulting in a single injury. The hearing record demonstrates that but for Ferron's purchase of software from Video Professor, the other CSPA violations would not have been raised. In this case, Ferron's software purchase was the impetus for his complaint against Video Professor.

{¶58} Ferron elected the remedy of rescission, which resulted in the complete refund of all of his money and a cessation of the delivery of software from Video Professor. We find that he cannot recover statutory damages for CSPA violations emanating from the same transaction. We agree with the trial court that Ferron's claim for statutory damages is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, and is therefore frivolous under R.C. 2323.51. We therefore affirm the trial court's determination that Ferron and his counsel engaged in frivolous conduct in requesting statutory damages for the alleged CSPA violations.

{¶59} In Ferron's third and fourth Assignments of Error and Wafer's seventh and eighth Assignments of Error, they argue the trial court erred in relying upon evidence of Ferron's telephone call to Video Professor's customer service where Ferron requested

his money back and termination of the subscription plan to support the trial court's decision regarding rescission. We disagree.

{¶60} Unbeknownst to Ferron, his conversation with the Video Professor's customer service representative was recorded. In support of its motion for summary judgment, Video Professor attached the affidavit of Bettye Harrison, President of Video Professor. Video Professor also submitted the affidavit during the evidentiary hearing on the motions for sanctions as Exhibit G. Ms. Harrison stated in her affidavit that upon her personal knowledge, Ferron had entered into a contract with Video Professor on January 8, 2005, and that on April 7, 2005, Ferron contacted Video Professor by telephone and spoke with a customer service representative. Ms. Harrison attested, "[a]t that time, Plaintiff demanded that Video Professor not send him any more software, not make any additional charges to his debit card, and refund all of the previous charges that had been made to his debit card. The customer service representative immediately agreed to cancel Plaintiff's contract and to refund all of the previous charges that had been made to his debit card." Ms. Harrison went on to attest that Video Professor refunded Ferron's charges and attached business records from Video Professor reflecting the refunds.

{¶61} Ferron objected to Ms. Harrison's affidavit as improper because Ms. Harrison had no personal knowledge of the facts that she attested to and it contained hearsay. She testified to a telephone conversation between Ferron and the customer service representative that Ms. Harrison was not present for. The trial court overruled Ferron's objection, stating that the affidavit was a Civ.R. 56(C) exhibit attached to Video Professor's motion for summary judgment. Ferron responded to Video Professor's

motion for summary judgment, without objecting to the admissibility of Ms. Harrison's affidavit. The trial court stated it could consider the case record and pleadings in making its determination on the motions for sanctions, and overruled Ferron's objection to Exhibit G.

{¶62} Ferron also objected to the admission of Video Professor's Exhibits J and K, the audio recording of the customer service telephone call and a transcript of the customer service call, respectively. Ferron argued that the audio recording and transcript of the recording were not properly authenticated. The trial court admitted the exhibits, finding that Ferron testified to the conversation with the customer service representative during his direct and cross-examination.

{¶63} The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. A reviewing court must not disturb a trial court's evidentiary ruling unless the ruling is found to be an abuse of discretion. *Id.,* citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Adams*, supra, at 157, 404 N.E.2d 144.

{¶64} Upon review of the record, we find the trial court did not abuse its discretion in admitting evidence of Ferron's telephone conversation with the customer service representative. Ferron testified that he contacted Video Professor customer service and as a result of the conversation, received a refund of his money. Ferron's bank records substantiate that Video Professor credited Ferron's account shortly after Ferron's phone call. The trial court has the discretion and is in the best position to

select the kind of evidence necessary to make the findings required by R.C. 2323.51 and determine whether an award of attorney fees and costs is proper. We overrule Ferron's third and fourth Assignments of Error and Wafer's seventh and eighth Assignments of Error.

2. Declaratory Judgment and Injunctive Relief

{¶65} While we found Ferron's claim for statutory damages to be frivolous, the question remains whether Ferron's separate claim for declaratory relief and request for permanent injunction was warranted under existing law. The trial court determined that Ferron's claim for a permanent injunction failed because Ferron failed to establish that he had suffered an irreparable injury because Video Professor reimbursed Ferron for his costs.

{¶66} As to Ferron's claim for declaratory judgment, the trial court partially analyzed Ferron's six alleged CSPA violations to determine whether they were warranted under existing law.[4] The trial court found three of the alleged violations regarding the use of the word "free" in Video Professor's television advertisements and website may have merit. Ferron's fourth allegation, stating that Video Professor failed to register with the Secretary of State prior to conducting business in the state of Ohio, was found to be without merit. Finally, the trial court found the fifth and sixth allegations

[4] To reiterate, Ferron's allegations are that Video Professor: (1) used the word "free" in a consumer transaction and failed to set forth clearly and conspicuously at the outset of the offer all of the terms, conditions and obligations upon which receipt and retention of the "free" foods or services were contingent; (2) used the word "free" in a consumer transaction and failed to print all terms, conditions, and obligations of the offer in a type size half as larges as the word "free;" (3) used the word "free" in a consumer transaction and failed to print all terms, conditions, and obligations of the offer in close proximity with the offer of "free" goods or services; (4) failed to register with the Ohio Secretary of State prior to doing business in Ohio; (5) made a false and/or misleading statement to a consumer in regard to a consumer transaction, and (6) failed to make a prompt refund to a consumer upon request.

to be without merit as they related to Ferron's request for a refund, which Ferron argued was not timely.

{¶67} In the trial court's analysis of Ferron's request for declaratory judgment and injunctive relief, the trial court reviewed Ferron's claims as both questions of law and fact based on the evidence produced at the hearing. This Court likewise will review the issues under a mixed determination of law and fact.

{¶68} We first find that as a matter of law, a party may pursue the equitable remedies of declaratory judgment and injunctive relief under R.C. 1345.09(D), while also requesting the remedy of rescission/statutory damages under R.C. 1345.09(A) or (B). *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, ¶ 12; *Burge v. Kerasotes Showplace Theatres, L.L.C.*, Butler App. No. CA2006-02-023, 2006-Ohio-4560, ¶ 40. R.C. 1345.09(A) and (B) are clear that a party has the option of choosing rescission or damages as his or her remedy. R.C. 1345.09(D) then separately lists a request for declaratory judgment or an injunction as different methods of relief from a CSPA violation. We find Ferron was not precluded from pursuing declaratory judgment or injunctive relief under R.C. 1345.09(D) simply because he elected rescission as his remedy under R.C. 1345.09(A) or (B). However, it remains to be determined whether Ferron engaged in frivolous conduct in raising the six allegations of CSPA violations under his declaratory judgment action or in requesting injunctive relief.

{¶69} We first note that R.C. 2323.51 does not purport to punish a party for raising an unsuccessful claim. Rather, it addresses conduct that serves to harass or maliciously injure the opposing party in a civil action or is unwarranted under existing

law and for which no good faith argument for extension, modification, or reversal of existing law may be maintained. *Independent Taxicab Assoc. of Columbus, Inc. v. Abate*, Franklin App. No. 08AP-44, 2008-Ohio-4070, ¶ 22. In the present case, this matter never reached a judgment on the merits of Ferron's complaint. We find that even though Ferron's claims may have been unsuccessful, that does not automatically warrant a finding of frivolous conduct for bringing the claims.

{¶70} The Ohio Supreme Court recently noted: "The CSPA 'is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to R.C. 1.11'. (Citation omitted). One of its purposes is to make 'private enforcement of the CSPA attractive to consumers who otherwise might not be able to afford or justify the cost of prosecuting an alleged CSPA violation, which, in turn, works to discourage CSPA violations in the first place via the threat of liability for damages and attorney fees.' (Citation omitted)." *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, at ¶ 11.

{¶71} The trial court found that three of Ferron's allegations under his request for declaratory judgment to perhaps have merit, but declined to analyze those because Ferron voluntarily dismissed his complaint before the trial court could adjudicate the issues. The trial court went on, however, to analyze the remaining claims utilizing legal and factual determinations and found them to be without merit. Upon our review of Ferron's request for declaratory judgment, we find that while the claims may be proven to be unsuccessful, that does not rise to the objective level that these claims are not warranted under existing law or cannot be supported by a good faith argument for the extension, modification or reversal of existing law, or for the establishment of a new law.

{¶72} We find this same analysis applies to the trial court's determination that Ferron's prayer for permanent injunction was without merit. Ferron may be unsuccessful on his request for injunctive relief for failure to show irreparable injury, but this again does not rise to the level of his cause of action being objectively unwarranted under the law.

{¶73} We therefore affirm the trial court in part and reverse the trial court in part on its determination that Ferron and his counsel engaged in frivolous conduct in requesting equitable relief under R.C. 1345.09(D). We overrule in part and sustain in part Ferron's first Assignment of Error and Wafer's first Assignment of Error.

C. Admission of Expert Testimony

{¶74} Ferron argues in his second Assignment of Error the trial court erred in precluding his expert from testifying regarding Ferron's good faith basis for his claims. Wafer raises this as her sixth Assignment of Error. A trial court's determination regarding the admissibility of evidence will be reviewed under an abuse of discretion standard. The trial court stated in a separate judgment entry issued April 16, 2008 that it would not allow Appellants' expert to testify, finding that he would provide legal conclusions regarding whether Ferron's claims were warranted under law, which is the purview of the trial court. We find the trial court did not abuse its discretion in making this determination. Ferron's second and Wafer's sixth Assignments of Error are overruled.

CIV.R. 11 SANCTIONS

Wafer III., IV., and V.

A. Civ.R. 11 as to Lisa A. Wafer

{¶75} Wafer argues in her fourth Assignment of Error that the trial court erred in finding Wafer violated Civ.R. 11 in that she did not have good grounds to support the claims to the best of her knowledge, information and belief because of the reasons stated above. Civ.R. 11 governs the signing of motions, pleadings and other documents and states as follows in pertinent part:

{¶76} "The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted."

{¶77} "Civ.R. 11 employs a subjective bad faith standard." See *Stone v. House of Day Funeral Serv., Inc. (2000), 140 Ohio App.3d 713, 721, 748 N.E.2d 1200*. Thus, Wafer's actual intent or belief is relevant to the determination of willfulness. *Riston v.*

Butler, Hamilton App. No. C-010572, 2002-Ohio-2308, ¶ 9. The trial court's decision to impose sanctions cannot be reversed absent an abuse of discretion.

{¶78} Based upon our reasoning above regarding whether Ferron and his counsel engaged in frivolous conduct under R.C. 2323.51 in bringing the CSPA action against Video Professor, we affirm the trial court in part and reverse the trial court in part on its decision to find Wafer willfully violated Civ.R. 11. We find there were no good grounds to support Ferron's claims for statutory damages; however, while further discovery or analysis may have resulted in the failure of Ferron's claims for declaratory judgment and injunctive relief, we find the subjective reasons for doing so were adequate. We overrule in part and sustain in part Wafer's fourth Assignment of Error.

B. Civ.R. 11 as to Ferron and Associates, LPA

{¶79} Wafer argues in her third Assignment of Error that the trial court erred in finding Ferron and Associates, LPA liable under Civ.R. 11. Video Professor concedes this point.

{¶80} It is well settled that the language of Civ.R. 11 only permits sanctions against the attorney who signed the document, not the law firm. *Standard Plumbing & Heating Co., v. Farina*, (Sept. 17, 2001), Stark App. Nos. 2001CA00018 and 2001CA00034 citing *Pavelic & LeFlore v. Marvel Entertainment Grp*. (1989), 493 U.S. 120, 107 L.Ed.2d 438, 110 S.Ct. 456. We find Wafer's third Assignment of Error to be well taken and sustain the same.

C. Wafer's Testimony

{¶81} In Wafer's fifth Assignment of Error, she argues the trial court erred in sustaining objections to testimony that she claims established her subjective good faith basis for asserting the claims in Ferron's complaint.

{¶82} The first cited portion of the transcript refers to Ferron's testimony on direct examination. (T. 222). Ferron's counsel had asked if Ferron was generally aware of and could describe the types of remedies available to consumers who pursue claims under the CSPA. (T. 220). Ferron then testified at length as to his understanding of the remedies available under the CSPA. (T. 220-222). Ms. Wafer next asked Ferron,

{¶83} "Q. With respect to the statutory damages that you referred to, can you explain how a consumer is entitled to receive the statutory damages?

{¶84} "MR. ELLIOTT: Objection. Your Honor, aren't we now again verging –

{¶85} "THE COURT: I'll sustain." (T. 222).

{¶86} The trial court sustained Video Professor's objection, based upon the trial court's earlier ruling that there would be no expert testimony on what the law states.

{¶87} The second portion of the transcript cited by Ms. Wafer concerns her testimony on direct examination. Ms. Wafer was testifying as to her knowledge, information and belief that there were good grounds to file the complaint. She recited the pertinent case law she researched before filing the complaint. (T. 264-274). She then testified further:

{¶88} "A. That's correct and this is another section within the Ohio Consumer Sales Practices Act that was contained within my research. And if you look specifically at 1345.09(B), this statute provides that where a violation of the C.S.P.A. has occurred

that has been declared to be an act deceptive or unconscionable and placed in the PIF [public inspection file], the consumer is entitled to multiple remedies, including statutory damages and request for declaratory judgment and injunctive relief.

{¶89} "MR. ELLIOTT: Your Honor, I'd like to move to strike that response. I think, again, we're verging on Miss Wafer sitting now here as an expert witness, telling this court what the law is. Now I don't have an objection to her testifying about the extent of her research that she did before filing the complaint of the places that she looked, but I object to her sitting as an expert and expounding before this court as to what the law is.

{¶90} "THE COURT: Yeah, that's kind of a fine line here governing that issue and I'm sure if I was an attorney representing a plaintiff that was looking at having to pay a hundred and some grand in attorney fees, I'd want to make sure the court understands the reason why you pursued the case, filed the case, continued to pursue the case. But I agree with you, I think that's my ultimate determination. So, since we're getting into a late hour, I'm sustaining the objection." (T. 275).

{¶91} In the final section of the hearing that Ms. Wafer refers this Court to, Ms. Wafer testifies:

{¶92} "Q. Did you conduct any research about Video Professor in general?

{¶93} "A. I did and I do want to back up and clarify my prior answer. One case that I am aware of and that of encompassed within my research is a case of the 10th Appellate District in Franklin County. It's called Crye versus Smolak. It was actually referred to earlier today. That is a case in which the 10th Appellate District held that under the Consumer Sales Practices Act, each separate, distinct violation of the

Consumer Sales Practices Act that occurs by a supplier is separately actionable. Therefore, there can be multiple violations that are actionable within one transaction under that case.

{¶94} "MR. ELLIOTT: We're going down that road again.

{¶95} "THE COURT: Well, are you making an objection?

{¶96} "MR. ELLIOTT: I'm objecting and moving to strike that last response because it's for this court to determine from what that case stands for.

{¶97} "THE COURT: Well, I'll strike the last portion of it in terms of what the case stood for but not the portion of the response concerning the fact that she reviewed that case." (T. 277-278).

{¶98} We again review the trial court's determinations under an abuse of discretion standard. The three cited portions of the transcript refer to testimony regarding interpretation of the CSPA and the available remedies of statutory damages, declaratory judgment and injunctive relief. Upon review of the three cited portions of the hearing transcript, we find the trial court did not abuse its discretion in sustaining Video Professor's objections to the testimony. Ms. Wafer is correct that her subjective intent or belief in the grounds for the complaint is relevant to determining whether she has violated Civ.R. 11. In these cited portions of the transcript, however, we find the trial court did not abuse its discretion in finding Ms. Wafer went beyond the scope of describing her efforts in researching the underlying matter and began to expound on the law's interpretation.

{¶99} Wafer's fifth Assignment of Error is overruled.

AWARD OF ATTORNEYS' FEES

Ferron V., VI., VII., VIII. / Wafer II., IX., X., XI., XII.

{¶100}After determining Ferron and his counsel engaged in frivolous conduct and violated Civ.R. 11 for bringing Ferron's First Amended Complaint, the trial court then addressed the issue of sanctions. In its judgment entry awarding sanctions, the trial court stated in part,

{¶101}"* * * Based upon the testimony, evidence and affidavits presented, the Court finds that the Defendant has incurred $202,878.46 as of June 31, 2008 in reasonable attorneys' fees and expenses in defending the complaint filed in September 2006 by the Plaintiff. (Hr'g Ex. A; Ex. N; 2nd Supp. Aff. J. Elliot, July 18, 2008.)

{¶102}"While an award of the amount of attorneys' fees is appropriate, the Court may only award fees incurred as a direct result of defending the frivolous conduct. Some of the Plaintiff's claims for declaratory judgment may not be frivolous. Accordingly, the Defendant is not entitled to recover the full amount of attorneys' fees expended on this case.

{¶103}"Upon consideration of the evidence and the testimony presented, the Court determines that $135,340.00 is the amount of fees reasonable attributed to the Defendant's expense of defending the frivolous claims raised by the Plaintiff. Moreover, under R.C. 2323.51, a party and the party's counsel may be held jointly and severally liable for any imposed sanctions for frivolous conduct and the Court may sanction the law firm for employing a sanctionable attorney. [Citation omitted] Therefore, the Court holds the Plaintiff, John Ferron; Plaintiff's counsel, Lisa Wafer; and the law firm of John

Ferron and Associates, jointly and severally liable for sanctions in the amount of $135,340.00." (Judgment Entry, Aug. 12, 2008).

A. Standard for Determining Reasonableness of Attorney Fees under R.C. 2323.51

{¶104}Once a court has determined that frivolous conduct has occurred, the trial court must make an additional determination that a party has been adversely affected by such conduct before determining whether an award of attorney fees is appropriate. *In re Estate of Endslow* (July 28, 2000), Delaware App. No. 99CAF-11-058, * 10. "A party is not necessarily or presumptively adversely affected based solely upon the fundamental necessity of expending attorney fees to defend a lawsuit in general. *Id.* [*Wiltberger v. Davis* (1996), 110 Ohio App.3d 46,54, 673 N.E.2d 628] Where a determination has been made that certain claims in a civil action were frivolous, the party seeking attorney fees pursuant to R.C. 2323.51 must affirmatively demonstrate that he incurred additional attorney fees as a direct and identifiable result of defending the frivolous conduct in particular. *Id.* R.C. 2323.51(B)(3) disallows an award in excess of fees reasonably incurred and necessitated by the frivolous conduct. Further, the statute specifically authorizes admission into evidence of an itemized list or other evidence of legal services necessitated by the alleged frivolous conduct. R.C. 2323.51(B)(5)." Id. at *10-11.

{¶105}The Sixth District Court of Appeals in *Grine v. Sylvania Schools Bd. of Educ*., Lucas App. No. L-06-1314, 2008-Ohio-1562, recently discussed considerations the trial court should utilize in determining whether the attorney fees are reasonable:

{¶106}"The Ohio Rules of Prof. Conduct 1.5 sets forth considerations that the trial court should utilize in making a determination of whether attorney fees are

reasonable. Sup.R. 71. Those factors include: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent."

{¶107} On appeal, the trial court's ruling on an award of attorney fees will not be reversed absent an abuse of discretion.

B. The Trial Court's Determination of Sanctions

{¶108} In Ferron's fifth, sixth, and seventh Assignments of Error, and Wafer's ninth, tenth, and eleventh Assignments of Error, Appellants both argue the trial court first erred in imposing sanctions and secondly erred in finding the attorney fees were reasonable. We find that based upon our findings above, the trial court did not abuse its discretion in finding sanctions to be appropriate. However, we find the imposition of the sanctions is based only on a finding that Ferron's claim for statutory damages was frivolously brought. We further find that the claims brought under declaratory judgment and Ferron's request for permanent injunction did not violate R.C. 2323.51. Our findings impact the trial court's determination of attorney fees. Accordingly, Ferron's fifth and seventh Assignments of Error and Wafer's ninth and eleventh Assignments are overruled in part and sustained in part.

{¶109}We also find the trial court did not abuse its discretion in finding Video Professor was obligated to pay the attorney fees in the defense of this action. Ferron's sixth Assignment of Error and Wafer's tenth Assignment of Error are overruled.

{¶110}The final question then is whether the party seeking attorney fees pursuant to R.C. 2323.51 affirmatively demonstrated that it incurred additional attorney fees as a direct and identifiable result of defending the frivolous conduct in particular. We find the trial court's determination of attorney fees in its judgment entry does not allow us to answer this question or to determine whether the trial court abused its discretion in awarding Video Professor $135,340.00 in attorney fees. While the trial court's judgment entry is very detailed, it fails to determine with any specificity how it arrived at the lowered figure based upon the attorney fee records presented at the evidentiary hearing. We do not say that Video Professor is not entitled to an award of attorney fees, but we do find that the attorney fees must be directly related to actions necessitated by the frivolous conduct. The trial court's judgment entry does not allow us to make that determination. We remand the matter to the trial court with instructions to state with specificity what portion of the attorney fees are directly related to the claim for statutory damages found to be frivolously brought under R.C. 2323.51.

C. Award of Attorney Fees for Fees Incurred at Sanctions Hearing

{¶111}Ferron argues in his eighth Assignment of Error and Wafer argues in her twelfth Assignment of Error that the trial court erred in denying their Motion to Strike the second supplemental affidavit of Joseph Elliot, counsel for Video Professor. The second supplemental affidavit and its attachments reflected fees and expenses incurred

because of prosecuting the motions for sanctions. In the trial court's August 12, 2008 judgment entry, the trial court denied Appellants' Motion to Strike.

{¶112}We overrule Appellants' Assignments of Error because the Ohio Supreme Court has held that it is not an abuse of discretion for a trial court to award attorney fees incurred in the prosecution of a motion for sanctions. *Ron Scheiderer & Assoc. v. City of London*, 81 Ohio St.3d 94, 1998-Ohio-453, 689 N.E.2d 552, syllabus. We find those attorney fees would logically include fees incurred at the actual hearing on the motion for sanctions. It was not error for the trial court to consider the supplemental affidavit in its determination of attorney fees.

D. Sanctions against Ferron and Associates, LPA

{¶113}Wafer argues in her second and ninth Assignments of Error that the trial court erred in imposing sanctions against the law firm of Ferron and Associates, LPA. In its award of attorney fees, the trial court sanctioned Ferron, Wafer, and Ferron and Associates, LPA, jointly and severally. Video Professor moved for sanctions against Ferron and Wafer. Video Professor did not name Ferron and Associates, LPA, in either of its motion for sanctions.

{¶114}We stated above that a court cannot impose Civ.R. 11 sanctions against a law firm. We must next determine whether under R.C. 2323.51(B)(4), an award of attorney fees may be made against the law firm employing the individual attorney. R.C. 2323.51(B)(4) states that an award may be made against a party, the party's counsel of record, or both. Some courts do not differentiate between the law firm and the individual attorney employed by the law firm as the "counsel of record." See *Lewis v.*

Celina Financial Corp. (1995), 101 Ohio App.3d 464, 655 N.E.2d 1333; *Riley v. Langer* (1994), 95 Ohio App.3d 151, 642 N.E.2d 1 (reversed on other grounds).

{¶115} In this case, we find that Video Professor did not name Ferron and Associates, LPA in its motions for sanctions. Ferron and Wafer are attorneys associated with Ferron and Associates, LPA, but we find the law firm itself was not notified that it might be liable for sanctions. Wafer's ninth Assignment of Error is sustained.

CIV.R. 52 FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ferron IX. / Wafer XIII.

{¶116} Appellants argue in their final Assignments of Error the trial court erred in denying their request under Civ.R. 52 for separate written findings of fact and conclusions of law pertaining to the trial court's August 12, 2008 judgment entry. We disagree.

{¶117} As we previously held in *Marsh v. Deems*, Richland App. No. 07 CA 91, 2008-Ohio-3430, Civ.R. 52 does not apply to R.C. 2323.51 motions. A trial court is not required to issue findings of facts and conclusions of law with its denial of a motion for sanctions for frivolous conduct. Id. at ¶ 19. While we remand this case with instructions to the trial court to re-determine its award, the whole of the trial court's August 12, 2008 judgment entry provided ample findings of fact and conclusions of law to satisfy Civ.R. 52.

{¶118} Ferron's ninth Assignment of Error and Wafer's thirteenth Assignment of Error are overruled.

DISPOSITION

{¶119} Accordingly, the judgment of the Delaware County Court of Common Pleas Court is affirmed in part; and reversed and remanded in part, with instructions to the trial court to re-calculate an award that is directly related to the claim for statutory damages found to be frivolously brought under R.C. 2323.51.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

PAD:kgb

[Cite as *Ferron v. Video Professor, Inc.* , 2009-Ohio-3133.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JOHN W. FERRON, et al.	:	
	:	
Plaintiffs-Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
VIDEO PROFESSOR, INC.	:	
	:	
	:	Case No. 09-CAE-09-0055
Defendant-Appellee	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed in part, and reversed and remanded in part. Costs to be split between Appellants and Appellee.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE