[Cite as *Ferron v. Video Professor, Inc.*, 2010-Ohio-3585.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN W. FERRON, et al.

Plaintiffs-Appellants

-vs-

VIDEO PROFESSOR, INC.

Defendant-Appellee

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 10 CAE 01 0008

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 06 CVH 09-922
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 4, 2010

APPEARANCES:

For Plaintiffs-Appellants

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Wise, J.

{¶1} Appellants John W. Ferron and Lisa A. Wafer appeal the January 15, 2010, decision of the Delaware County Court of Common Pleas imposing sanctions against Appellants in the amount of $119,414.87, pursuant to R.C. §2323.51 and Civ.R. 11.

{¶2} Defendant-Appellee is Video Professor, Inc.

STATEMENT OF THE FACTS AND CASE

{¶3} The relevant facts are as follows:

{¶4} 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.

{¶5} 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.

{¶6} 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.

{¶7} 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 letters 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 with 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.

{¶8} 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.

{¶9} 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.

{¶10} 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.

{¶11} 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.

{¶12} 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]

{¶13} 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.

{¶14} 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

[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).

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.

{¶15} 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.

{¶16} Plaintiff John W. Ferron, Lisa A. Wafer and Ferron and Associates, LPA, appealed the trial court's August 12, 2008, decision to this Court. See *Ferron v. Video Professor, Inc.*, Delaware App. No. 08-CAE-09-0055, 2009-Ohio-3133. In that appeal, Appellant Ferron raised nine assignments of error and Wafer and Ferron & Assoc. raised thirteen assignments of error. By Opinion dated June 25, 2009, this Court affirmed the trial court's finding that Ferron and his attorney engaged in frivolous conduct in requesting statutory damages for the alleged CSPA violations and further upheld an award of sanctions against them. This Court did, however, find that a couple of Ferron's claims were not frivolous and further found that the trial court had failed to explain how it calculated its award. This Court therefore reversed in part and remanded this matter back to the trial court with instructions to re-calculate an award of sanctions that was directly related to the claim for statutory damages found to be frivolously brought under R.C. §2323.51.

{¶17} On remand, by Judgment Entry filed December 21, 2009, the trial court ordered the parties to "submit written Findings of Fact, supported by legal argument,

detailing the calculation of attorneys' fees for time spent on frivolous conduct, as previously determined by the Fifth District Court of Appeals. These calculations shall be based solely upon the evidence previously presented to this Court."

{¶18} On January 11, 2010, Appellee Video Professor filed its 15 page Findings of Fact, with a list of time entries attached as an exhibit, which included the date, description of services, hours spent and name of the attorney.

{¶19} By Judgment Entry filed January 15, 2010, the trial court found that the two primary events in the litigation necessitated by Appellants' frivolous claim for statutory damages were Appellee's motion for summary judgment and motions for sanctions. Using this as a stepping off point, the trial court found that Appellee had incurred $16,305.44 in attorneys' fees and expenses related to the drafting of the summary judgment motion and reply brief, and further calculated that Appellee had incurred $103,109.43 pursuing motions for sanctions, for a total of $119,414.87 in sanctions.

{¶20} Appellants now appeal, raising the following assignments of error for review:

ASSIGNMENTS OF ERROR

{¶21} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY ERRONEOUSLY FINDING THAT APPELLEE'S MOTION FOR SUMMARY JUDGMENT WAS NECESSITATED BY APPELLANTS' FRIVOLOUS CONDUCT.

{¶22} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY ERRONEOUSLY FINDING THAT APPELLEE'S MOTION FOR SANCTIONS WAS NECESSITATED BY APPELLANTS' FRIVOLOUS CONDUCT.

{¶23} "III. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY ERRONEOUSLY FINDING THAT APPELLEE INCURRED $16,305.44 IN ATTORNEY'S FEES AND COSTS RELATED TO APPELLEE'S DRAFTING OF ITS MOTION FOR SUMMARY JUDGMENT.

{¶24} "IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY ERRONEOUSLY FINDING THAT DEFENDANT INCURRED $103,109.43 IN ATTORNEY'S FEES AND COSTS RELATED TO APPELLEE'S MOTION FOR SANCTIONS.

{¶25} "V. THE TRIAL COURT ERRED TO APPELLANTS' PREJUDICE BY ERRONEOUSLY AWARDING ATTORNEY'S FEES TO APPELLEE DESPITE APPELLEE'S FAILURE TO ESTABLISH THAT ITS ATTORNEY'S FEES WERE REASONABLE.

{¶26} "VI. THE TRIAL COURT ERRED TO APPELLANTS' PREJUDICE BY ERRONEOUSLY AWARDING ATTORNEY'S FEES TO APPELLEE DESPITE APPELLEE'S FAILURE TO ESTABLISH THAT ITS ATTORNEY'S FEES WERE INCURRED DUE TO APPELLANTS' FRIVOLOUS CONDUCT."

I., II.

{¶27} In Appellants' first and second assignments of error, Appellants contend that the trial court erred finding that Appellee's motion for summary judgment and motions for sanctions were necessitated by Appellants' frivolous conduct. We disagree.

{¶28} In *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 673 N.E.2d 628, the court found that "no single standard of review applies in R.C. §2323.51 cases, and the inquiry necessarily must be one of mixed questions of law and fact. 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, 673 N.E.2d 628. 'When an inquiry is purely a question of law, clearly an appellate court need not defer to the judgment of the trial court. *Id.* However, we do find some degree of deference appropriate in reviewing a trial court's factual determinations; accordingly, we will not disturb a trial court's findings of fact where the record contains competent, credible evidence to support such findings. *Id.* This standard of review of factual determinations is akin to that employed in a review of the manifest weight of the evidence in civil cases generally, as approved in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.' *Id.* at 51-52, 376 N.E.2d 578.

{¶29} "Where a trial court has found the existence of frivolous conduct, the decision whether or not to assess a penalty lies within the sound discretion of the trial court." *Id.* at 52, 376 N.E.2d 578, 110 Ohio App.3d 46, 673 N.E.2d 628. Abuse of discretion requires more than simply an error of law or judgment, implying instead that the court's attitude is unreasonable, arbitrary or unconscionable. *Tracy v. Merrell-Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152, 569 N.E.2d 875. Furthermore, R.C. 2323.51 employs an objective standard in determining whether sanctions may be imposed against either counsel or a party for frivolous conduct. *Stone v. House of Day Funeral Serv., Inc.* (2000), 140 Ohio App.3d 713, 748 N.E.2d 1200."

{¶30} In its Judgment Entry, the trial court found:

{¶31} "the two primary events in this litigation, Defendant's motion for summary judgment and Defendant's motions for sanctions, were necessitated by the Plaintiff's frivolous claim for statutory damages. The Defendant sought summary judgment on the

basis that the Plaintiff could not obtain damages from Defendant Video Professor's alleged Consumer Sales Practices Act violations because the Plaintiff had already rescinded his transaction with Defendant.

{¶32} "The Defendant's motions for sanctions argued that the Plaintiff's claim for damages under the Consumer Sales Practices Act was frivolous and not supported by existing law, in light of the fact that before this case was filed, Ferron had elected to rescind his contract with Video Professor and had received a full refund."

{¶33} An appellate court applies an abuse-of-discretion standard with respect to a trial court's decision to award attorney fees on the basis that frivolous conduct has adversely affected a party. *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 52, 673 N.E.2d 628.

{¶34} This Court has reviewed the Motion for Summary Judgment and Motions for Sanctions filed by Appellee in the case below and find that these motions were based on Appellants' claims for statutory damages. We further find that these claims have already been determined to be frivolous in the previous appeal.

{¶35} We find no abuse of discretion in the trial court determination that the legal fees incurred in the filing and preparation of the Motion for Summary Judgment and Motions for Sanctions filed by Appellee were necessitated by Appellants' frivolous conduct in pursuing its claims for statutory damages

{¶36} Appellant's first and second assignments of error are overruled.

III., IV., V.

{¶37} In their third, fourth and fifth assignments of error, Appellants argue that the trial court erred in the amount it awarded in attorney fees and further that Appellees failed to establish that such fees were reasonable. We disagree.

{¶38} The trial court found that Appellees had incurred attorney fees in the amount of $16,305.44 pursuing its motion for summary judgment and another $103,109.43 in pursuing motions for sanctions in this case. In reaching these amounts, the trial court had before it the affidavit of counsel and copies of the invoices submitted into evidence, along with a tabulation of relevant time entries pertaining to the preparation and filing of such motions. The tabulation exhibit listed the date, name of the attorney, services provided, total hours spent, and estimated hours spent in furtherance of the actual motion. A summary attached to Appellee's Findings of Fact further broke down the number of hours spent by each attorney and their corresponding hourly rate, and utilizing a typical lodestar formula, calculated the total fees incurred.

{¶39} Upon review, we find no indication that the court failed to apply the appropriate law in its fee determination. *Chari v. Vore* (2001), 91 Ohio St.3d 323, 325, 744 N.E.2d 763 (presumption of regularity attaches to all court proceedings).

{¶40} Based on the above, we find that based on the evidence of fees incurred in connection with the action, such fees were reasonable and the trial court did not abuse its discretion in awarding an amount equal to Appellee's fees and expenses.

{¶41} Appellants' third, fourth and fifth assignments of error are overruled.

VI.

{¶42} In their sixth assignment of error, Appellants argue that the trial court erred in awarding attorney fees because Appellees failed to establish that such fees were incurred due to Appellants' frivolous conduct.

{¶43} Based on disposition of the above assignments of error, we find this assignment of error cumulative.

{¶44} Appellants' sixth assignment of error is overruled.

{¶45} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 0708

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.	:	
Defendant-Appellee	:	Case No. 10 CAE 01 0008

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES