[Cite as *Flippen v. Gannett Co., Inc.*, 2012-Ohio-3508.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Thomas S. Flippen	Court of Appeals No. E-11-082
Appellant	Trial Court No. 2006-CV-944
v.	
Gannett Co., Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: August 3, 2012

* * * * *

Mark A. Stuckey, for appellant.

Richard D. Panza and Rachelle Kuznicki Zidar, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Plaintiff-appellant, Thomas Flippen, appeals the September 10, 2011 judgment of the Erie County Court of Common Pleas, which denied his motion for a new trial following a jury verdict in favor of defendants-appellees, Gannett Co., Inc., et al., in a defamation action. Because the court did not abuse its discretion in denying the motion, we affirm.

{¶ 2} The relevant facts are as follows. On August 22, 2006, the Mansfield News Journal falsely reported that appellant was indicted on four counts of unlawful sexual conduct with a minor. Appellant had actually been charged with three counts of felony nonsupport of dependents.

{¶ 3} On November 29, 2006, appellant commenced the instant action against appellees which included Gannett Co., the owner of the Mansfield News Journal, and two newspaper employees. On July 2, 2007, Huron County Child Support Enforcement Agency ("CSEA") filed a motion to intervene in the action asserting an interest, based upon appellant's child support arrearages, in any monetary award he might receive. The court granted the motion, in part, allowing CSEA an interest in any proceeds from a settlement or jury award.

{¶ 4} On August 14, 2007, appellees filed a motion for summary judgment. Appellant opposed the motion and, on November 19, 2007, the trial court denied the motion. On September 23, 2008, the case proceeded to a jury trial. The jury delivered a verdict in favor of appellees. On October 7, 2008, the magistrate who presided at trial issued his written decision confirming the jury verdict.

{¶ 5} On October 14, 2008, appellant filed a notice of objection to the magistrate's decision and requested additional time to fully brief the objections following the preparation of the trial transcript. On January 9, 2009, appellant filed his memorandum of law which also included a request for a new trial. Appellant argued that the statement as to the amount he owed in back child support made by appellees' counsel during

opening argument was prejudicial and influenced the jury. Appellant further argued that the court erred by failing to provide a curative instruction based on the prejudicial statement. Appellant further claimed that the jury was improperly influenced by Gannett Co.'s dismissal from the case and that the jury's verdict was against the weight of the evidence. Appellees opposed the motion.

{¶ 6} On September 10, 2011, the trial court denied the objections/motion for a new trial. The court first noted that, although not delineated by appellant, the motion appeared to be made under Civ.R. 59(A)(1),(2) and/or (4). The court essentially found that appellant's lack of evidence and self-serving statements did not meet the requirements to support the granting of a new trial. This appeal followed.

{¶ 7} Appellant now raises the following assignment of error for our review:

> 1. Whether the trial court erred in not granting plaintiff's motion for a new trial. Whether the trial court erred when it failed to take curative action to the misconduct by defense counsel in mentioning a dollar amount of child support arrearage in opening argument.

{¶ 8} We first note that an appellate court reviews a court's ruling on a motion for a new trial under an abuse of discretion standard. *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201, ¶ 35; *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 649 N.E.2d 1219 (1995). That is, we will not reverse the court's decision unless it is arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 9} Civ.R. 59(A) provides the following grounds for a new trial:

(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

{¶ 10} Appellant's assignment of error is based upon a statement made by appellees' counsel during opening statements. The statement and the ensuing discussion are as follows:

[APPELLEES' COUNSEL]: You will learn that in addition, [appellant] has DUI's, he has domestic violence convictions. At present he owes tens of thousands of dollars.

[APPELLANT'S COUNSEL]: Objection, Your Honor.

THE COURT: Approach.

THEREUPON, the following sidebar took place.

* * *.

[APPELLANT'S COUNSEL]: I've got a Certified copy and you can see it's a Certified copy debts. I thought we were trying to keep the amount out.

[APPELLEES' COUNSEL]: I didn't say the amount.

[APPELLANT'S COUNSEL]: No, but, I mean, the fact that he hasn't paid child support for five years, I think that that's relevant. I think he should stay away from the amount.

[APPELLEES' COUNSEL]: All right, all right.

* * *

[APPELLANT'S COUNSEL]: * * * [W]e all agreed, and most recently at this case management conference, August 1st, we reiterated that, and for you to mention a dollar amount now known after these two discussions, I don't know how you're going to repair that.

[APPELLEES' COUNSEL]: Repair what?

[APPELLANT'S COUNSEL]: The truth.

THE COURT: I'm going to sustain the objection with respect to an amount and (inaudible) to figures. It obviously is relevant to his reputation.

[APPELLANT'S COUNSEL]: Sure.

THE COURT: And that, but – and to talk about a reference or even a ballpark figure I don't think is appropriate.

[APPELLANT'S COUNSEL]: Okay.

THE COURT: And, in fact, we specifically talked about a figure not coming in because you didn't want your client to be prejudiced, (inaudible), to the jury which is rendered that kind of an amount because your client if they were going to consider damages.

[APPELLEES' COUNSEL]: Your Honor, I got it. I won't –

THE COURT: Okay.

[APPELLEES' COUNSEL]: --say anything more.

[APPELLANT'S COUNSEL]: I think you should explain to the jury why they're not going to hear a dollar amount.

[THE COURT]: I don't want to go that – (inaudible).

{¶ 11} In his sole assignment of error, appellant contends that the above statement was so prejudicial that it denied him a fair trial. Appellant argues that under Civ.R. 59(A)(1), the court erred when it failed to give a curative instruction, and under Civ.R. 59(A)(2), defense counsel engaged in misconduct. Conversely, appellees contend that no prejudice resulted from the statement because appellant's own counsel questioned him regarding the child support arrearages (though a specific amount was not discussed) and various other legal entanglements. Appellees further argue that, initially, they were concerned about testimony regarding the amount of child support owed. The concern was that the jury would be inclined to grant a verdict in favor of appellant and award him damages in that sum.

{¶ 12} The decision whether to give a curative instruction to the jury is within the discretion of the trial court. *State v. Alexander*, 10th Dist. No. 06AP-647, 2007-Ohio-4177, ¶ 36. In this case, after sustaining the objection the court opted not to issue a curative instruction. We cannot say that this was in error. The court admonished appellees' counsel and counsel did not raise the issue again. Further, reviewing the lengthy testimony regarding appellant's sketchy work history, lack of contact with his children, encounters with the law, and years of not paying child support, it is hard to

conceive how appellees' counsel's isolated comment prejudiced the outcome of the trial where damage to appellant's reputation was directly at issue.

{¶ 13} We further agree that appellant failed to demonstrate a right to a new trial based upon appellees' counsel's misconduct. Civ.R. 59(A)(2). In the judgment denying appellant's motion for a new trial, the court first noted that the statement was isolated. Once admonished by the court, counsel refrained from further objectionable comments. The court further determined that based on the evidence presented during trial, it was evident that appellant was years behind in child-support payments and that he owed a substantial sum.

{¶ 14} Based on the foregoing, we find that the trial court did not abuse its discretion when it denied appellant's motion for a new trial. Appellant's assignment of error is not well-taken.

{¶ 15} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.
CONCUR.

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JUDGE