[Cite as *Rindfleisch v. AFT, Inc.*, 2005-Ohio-191.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
Nos. 84551, 84897, 84917

PETER RINDFLEISCH	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
AFT, INC., et al.	:	OPINION
Defendants-Appellants	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		JANUARY 20, 2005
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court
	:	Case No. CV-286262
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellee:

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PATRICIA A. BLACKMON, A.J.:

{¶ 1} AFT, Inc. and two individuals (collectively "AFT") appeal from the trial court's judgment that denied AFT's motion to vacate judgment and that granted Peter Rindfleisch's motion to revive dormant judgment. AFT filed another appeal under a separate case number to challenge the trial court's order that granted attorney's fees. And, instead of filing a cross-appeal, Rindfleisch filed his own appeal from the award of attorney's fees arguing that sanctions should have been imposed against AFT's counsel personally. These three appeals have been consolidated for review.

I. FACTS

{¶ 2} On March 14, 1995, Rindfleisch filed suit on a $200,000 cognovit note issued by AFT, Inc. and the two individuals. Judgment was rendered jointly and severally against the makers. On October 1, 1996, one of the individuals filed a motion to vacate arguing that because he was not a maker of the note the trial court lacked jurisdiction to enter judgment against him. The trial court denied the 1996 motion to vacate and we affirmed.[1]

{¶ 3} A second motion to vacate was filed by AFT on February 19, 2004, in response to Rindfleisch's motion to revive dormant

[1]See, generally, *Rindfleisch v. AFT, Inc.* (Oct. 30, 1997), Cuyahoga App. No. 71820 ("*Rindfleisch I*").

judgment. Because AFT's motion to vacate judgment was filed after the trial court set a hearing to determine Rindfleisch's motion to revive dormant judgment, the hearing on Rindfleisch's motion was canceled. Without rescheduling the hearing, the trial court granted Rindfleisch's motion and denied AFT's motion. The trial court did, however, hold a hearing on Rindlfleisch's subsequent motion for attorney's fees, and awarded Rindfleisch $2,200 in attorney's fees against AFT. The trial court did not grant Rindfleisch's request to personally sanction AFT's counsel.

{¶ 4} AFT asserts in two assignments of error that the trial court erred in granting Rindfleisch's motion to revive judgment without a hearing and erred in denying AFT's motion to vacate. AFT argues that the 1995 judgment was void because the cognovit note was made payable to multiple individuals, but suit was brought solely by Rindfleisch, and judgment was entered in his favor only. AFT additionally asserts in a third assignment of error that the trial court erred in awarding attorney's fees. After the three appeals were consolidated, Rindfleisch asserted in a cross-assignment of error that, in addition to ordering AFT to pay attorney's fees, the trial court should have imposed personal sanctions against AFT's counsel. We affirm.

JUDGMENT ON THE COGNOVIT NOTE

{¶ 5} AFT challenges in the following assignments of error the judgment that denied its motion to vacate and that granted

Rindfleisch's motion to revive dormant judgment:

> **"I. The trial court committed reversible error in denying Appellants' Motion to Vacate Void Judgment.**
> **II. The trial court committed reversible error by failing to hold a hearing on Appellee's Motion to Revive Dormant Judgment and by failing to address Appellants' claim of payment."**

{¶ 6} AFT claims the trial court erred in denying the motion to vacate judgment because the cognovit note was made payable to multiple parties and the trial court was without jurisdiction to enter judgment solely in favor of Rindfleisch. This claim is barred by res judicata. The doctrine of res judicata consists of two related concepts: claim preclusion and issue preclusion.[2] Claim preclusion holds that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.[3] Issue preclusion holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.[4]

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[2]*Holzemer v. Urbanski*, 86 Ohio St.3d 129, 133, 1999-Ohio-91, 712 N.E.2d 713; *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226.

[3]*Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435, 692 N.E.2d 140.

[4]Id.

{¶ 7} AFT claims that because the trial court lacked subject matter jurisdiction, the judgment on the cognovit note was void ab initio.[5] And, AFT claims that because the judgment was void, it could be attacked collaterally in the second motion to vacate.[6] We agree that claim preclusion cannot bar AFT from challenging the trial court's subject matter jurisdiction to enter judgment on the cognovit note. But issue preclusion does prevent AFT from re-litigating the previous determination that the trial court did in fact have jurisdiction to enter judgment on the cognovit note.

{¶ 8} If a court's jurisdiction has not been previously determined, then it may be attacked in a collateral action. But, "once a jurisdictional issue has been fully litigated and determined by a court that has authority to pass upon the issue, said determination is res judicata and can only be attacked directly by appeal."[7] The jurisdictional determination becomes binding in collateral actions between the same parties or their privies even if the determination is erroneous on the facts and the

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[5]See *Pauer v. Langaa*, Cuyahoga App. No. 83232, 2004-Ohio-2019, at ¶12("A judgment entered by a court that lacks subject matter jurisdiction is void ab initio.").

[6]See Id. (stating that a judgment void for lack of subject matter jurisdiction may be attacked collaterally).

[7]*Citicasters Co. v. Stop 26-Riverbend, Inc.*, 147 Ohio App.3d 531, 2002-Ohio-2284, 771 N.E.2d 317, at ¶33 (internal quotation marks and citation omitted); see, also, Restatement of the Law 2d, Judgments (1982), Section 12, Comment c.

law.[8] The issue of the trial court's jurisdiction was directly at issue previously in this case, and was passed upon and determined by both the trial court and this court.[9]

{¶ 9} In *Rindfleisch I*, we affirmed the trial court's determination that it had jurisdiction to enter judgment on the cognovit note. The appeal was brought by Peter Vanucci, individually, one of the signatories to the note, and who is a party to this appeal. Vanucci argued in *Rindfleisch I* that the trial court lacked jurisdiction to enter judgment against him on the cognovit note because he was not a maker of the note. We ruled that he was a maker and ruled that the trial court correctly determined it had jurisdiction, which meant the judgment was not void. Although Vanucci and his privies[10] now claim that judgment is void because there were multiple payees, it is still an argument that the judgment is void based on lack of jurisdiction. This argument is barred by issue preclusion.

{¶ 10} Irrespective of the fact that issue preclusion prevents AFT from relitigating the effect of the trial court's judgment on the cognovit note, AFT's claim that Rindfleisch did not have the

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[8] *Claxon v. Simon* (1963), 174 Ohio St. 333, 337, 189 N.E.2d 62.

[9] See, generally, *Rindfleisch I.*

[10] See *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, at ¶8 (stating that for purposes of res judicata, a mutuality of interest, including an identity of desired result, may create privity).

authority to enforce the note fails on the merits in any event. R.C. 1303.08(D) states in full:

> **"If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively."**

{¶ 11} The cognovit note here is made payable to "Peter Rindfleisch et al." AFT claims this language makes the note enforceable only by all of the payees. But this argument ignores the last sentence of R.C. 1303.08(D). The "Peter Rindfleisch et al" language is ambiguous as to whether the note is made payable to two or more persons alternatively or whether it is made payable to persons collectively. Thus, under the statute, the cognovit note is presumed payable in the alternative and is enforceable by any of the payees, including Rindfleisch individually. AFT's first assignment of error is overruled.

{¶ 12} AFT's second assignment of error claims the trial court erred by ruling on Rindfleisch's motion to revive dormant judgment without holding a hearing. We have previously held that R.C. 2325.17 requires a judgment debtor be granted an opportunity to show cause why the judgment should not be revived, which can only

be done at a hearing before the court.[11] The show cause hearing may be summary in nature and may amount to a non-oral hearing to allow the judgment debtor to submit evidentiary materials.[12]

{¶ 13} AFT filed a brief in opposition to Rindfleisch's motion to revive dormant judgment. Thus, AFT was given the opportunity to show why the judgment should not have been revived; AFT submitted evidentiary materials to support its arguments. This type of non-oral hearing meets the fundamental requirements of due process.[13] AFT's second assignment of error is overruled.

ATTORNEY'S FEES AND SANCTIONS

{¶ 14} AFT asserts the following assignment of error with respect to attorney's fees:

> **"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE'S MOTION FOR SANCTIONS AGAINST APPELLANTS."**

{¶ 15} Rindfleisch also asserts an assignment of error with respect to attorney's fees, which states as follows:

> **"THE TRIAL COURT ERRED IN FAILING TO SANCTION DEFENDANTS' COUNSEL, ALONG WITH DEFENDANT, IN AWARDING PLAINTIFF'S ATTORNEY'S FEES".**

{¶ 16} We review an award of attorney's fees under an abuse of

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[11]*State v. Jackson* (Nov. 2, 2000), Cuyahoga App. No. 77557, quoting *Leroy Jenkins Evangelistic Assn., Inc. v. Equities Diversified, Inc.* (1989), 64 Ohio App.3d 82, 88, 580 N.E.2d 812.

[12]See Id.(recognizing that a non-oral hearing would suffice under R.C. 2325.17, but reversing because the trial court was without jurisdiction at the time it scheduled the hearing).

[13]Id.

discretion standard.[14] An abuse of discretion connotes a decision that is unreasonable, arbitrary, or unconscionable.[15] AFT claims the trial court abused its discretion because the motion to vacate was warranted under existing law. In determining whether an attorney's or party's conduct violates Civ.R. 11, a judge should consider whether the attorney signing the document: (1) has read the pleading; (2) harbors good ground to support the pleading to the best of his or her knowledge, information, or belief; and (3) did not file the pleading for purposes of delay.[16] If any one of these requirements is not satisfied, the judge must next determine whether the violation by the attorney or party was "wilful" rather than merely negligent.[17] If the conduct was wilful, the judge may award to the opposing party expenses and attorney's fees and the judge has broad discretion to determine what, if any, sanctions to administer.[18] Here, there was no clear determination that sanctions were imposed under Civ.R. 11. The parties point to no evidence that AFT's counsel wilfully violated Civ.R. 11. Nevertheless, the trial court had authority to impose attorney's fees under the

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[14]*Mitchell v. Western Reserve Area Agency on Aging*, Cuyahoga App. Nos. 83837 & 83877, 2004-Ohio-4353, at ¶14.

[15]*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

[16]*Mitchell* at ¶18.

[17]Id.

[18]Id.

frivolous conduct statute.

{¶ 17} Ohio's frivolous conduct statute is codified in R.C. 2323.51. "Wilfulness" is not a prerequisite under this statute.[19] Analysis of a claim under this statute boils down to a determination of whether an action taken by a party or attorney to be sanctioned constitutes "frivolous conduct," and what amount, if any, of reasonable attorney's fees necessitated by the frivolous conduct is to be awarded to the aggrieved party.[20] R.C. 2323.51 defines frivolous conduct as:

> **"(a) Conduct of *** [a] party to a civil action *** or [the] party's counsel of record 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 existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law."**

{¶ 18} In filing the motion to vacate, AFT misinterpreted the state of xisting law. AFT argued that res judicata did not bar the motion because the trial court lacked subject matter jurisdiction, which rendered the judgment void. Although AFT is correct that claim preclusion did not bar the motion to vacate, issue preclusion did bar relitigation of the trial court's jurisdiction.

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[19] *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286, 291, 610 N.E.2d 1076.

[20] Id.

Misinterpreting the state of existing law can constitute frivolous conduct under R.C. 2323.51(A)(2)(a)(ii). Moreover, since a trial court has the benefit of observing the entire course of proceedings and will be most familiar with the parties and attorneys involved, a finding as to the commission of frivolous conduct is entitled to substantial deference upon review.[21] The trial court did not abuse its discretion in awarding attorney's fees. AFT's assignment of error on this issue is overruled.

{¶ 19} Rindfleisch claims the trial court should have ruled that AFT's counsel was personally liable for attorney's fees. Under R.C. 2323.51(B)(4), an award under Ohio's frivolous conduct statute may be made against the party, the party's counsel of record, or both.[22] In allowing the imposition of sanctions against the client, counsel, or both, Ohio's frivolous conduct statute "provides a mechanism for the court to place blame directly where fault lies."[23] When it is clear from the record that the frivolous conduct is advanced by counsel, as opposed to a frivolous position taken by the client, appellate courts have authority to modify judgments to shift the imposition of sanctions from the client to counsel.[24] In

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[21]Id. at 292.

[22]R.C. 2323.51(B)(4); *Ron Scheiderer & Associates v. City of London*, 81 Ohio St.3d 94, 1998-Ohio-453, 689 N.E.2d 552, syllabus.

[23]*Estep v. Global Holdings, Inc.* (1992), 79 Ohio App.3d 313, 317, 607 N.E.2d 109.

[24]Id.

this case, however, it is unclear who was advancing the frivolous conduct.[25] As a result, we are unable to find that the trial court abused its discretion in awarding attorney's fees solely against AFT. Rindfleisch's assignment of error is overruled.

IV. CONCLUSION

{¶ 20} We affirm the trial court's judgment denying AFT's motion to vacate and we affirm the trial court's judgment with respect to the award of attorney's fees.

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA A. BLACKMON
ADMINISTRATIVE JUDGE

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[25]Cf. *Cseplo v. Steinfels* (1996), 116 Ohio App.3d 384, 688 N.E.2d 292 (shifting the imposition of sanctions from client to counsel when it was clear from the record that counsel asserted frivolous claims in a third-party complaint that the client did not read nor approve).

COLLEEN CONWAY COONEY, J., And

JAMES D. SWEENEY, J.*, CONCUR

*Sitting by Assignment: Judge James D. Sweeney, retired, of the Eighth District Court of Appeals.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).