

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY

DAVID HELMS,	:	CASE NO. 2007 CV 8020
	:	
Plaintiff,	:	(A. J. Wagner)
-vs-	:	(Magistrate Cowdry)
	:	
TINA MUSGROVE,	:	DECISION, ORDER, AND ENTRY
	:	OVERRULING DEFENDANT'S
Defendant.	:	OBJECTIONS TO THE
	:	MAGISTRATE'S DECISION
	:	
	:	DECISION, ORDER, AND ENTRY
	:	OVERRULING DEFENDANT'S
	:	MOTION TO SET ASIDE
	:	MAGISTRATE'S ORDER
	:	

This matter is before the Court upon Defendant's Objections to Magistrate's Decision filed June 29, 2010. The Magistrate's Decision was filed June 16, 2010. Also on June 29, 2010, Defendant filed a Motion to Set Aside the Magistrate's Order. On August 20, 2010, this Court granted Defendant's Motion to Supplement her Objections. On September 20, 2010, Defendant filed her supplement objections. This matter is now properly before the Court.

I. FACTS

The Court has reviewed the facts as written by the Magistrate in the Magistrate's Decision. The Court also reviewed all filings in this case and viewed the DVDs of the hearings before the Magistrate. Based on the foregoing review, the Court finds the facts as set forth by the Magistrate in the Magistrate's Decision to be an accurate rendition of this case. Accordingly, the Court hereby approves and adopts as its own the Fact portion of the Magistrate's Decision.

II. OBJECTIONS

Defendant raises twenty-three assignments of error in her original objections. First, the Magistrate acted outside the scope of the authority delegated to magistrates by the Ohio Rules of Civil Procedure, in granting Plaintiff Summary Judgment against Defendant's Counterclaim for relief in this case, in the Pretrial Order issued March 25, 2010. Second, the Magistrate erred in granting Summary Judgment to Plaintiff against Defendant's Counterclaim, where the former Magistrate Kristi Wuebben (in her pre-trial order dated October 28, 2009) denied Plaintiff's Motion to Strike Counterclaim allegedly failing to state a claim on which relief could be granted. Third, the Magistrate erred in dismissing Defendant's Jury Demand as untimely filed, due to the fact that a Jury Trial had already been scheduled in this case, by way of Magistrate Wuebben's October, 2009 Pre-Trial Order. Fourth, the Magistrate erred in denying Defendant's Motion to Compel Discovery, pursuant to Civ. R. 37(2) after Defendant demonstrated good faith effort to obtain the information. Fifth, the magistrate erred in finding the "Helms proved by a preponderance of the evidence the Musgrove engaged in conduct the in this Magistrate's opinion serves only to maliciously injure Helms." Sixth, the Magistrate erred in finding that "in the case at bar, Musgrove has filed numerous motions that in this Magistrate's opinion were filed solely for purposes of delay." Seventh, the Magistrate erred in finding that "Musgrove has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in the divorce case..." Eighth, the Magistrate erred in finding that "Musgrove has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in...three petitions alleging domestic violence..." The ninth assignment of error listed by Defendant is exactly the same as the eight assignment of error and as such will not be restated here. The Defendant lists the next three assignments of errors all as the ninth assignment of error. For purposes of cohesion the Court will continue to number the assignments in correct numerical order. Tenth, the Magistrate erred in finding that "Musgrove has habitually, persistently, and without reasonable grounds engaged in vexatious conduct...in the case at bar." Eleventh, the Magistrate erred in finding that Musgrove is a vexatious litigator in accordance with R.C.

2323.52(A). Twelfth, the Magistrate erred in finding that Musgrove is a vexatious litigator in accordance with *Farley v. Farley*, 2003 Ohio 3185. Thirteenth, the Magistrate erred in finding that Musgrove is a vexatious litigator in accordance with *Borger v. McErlane*, 2001 Ohio 4030. Fourteenth, the Magistrate erred in finding that Musgrove is a vexatious litigator in accordance with *Ealy v. McLin*, 2007 Ohio 4080. Fifteenth, the Magistrate erred in finding that Musgrove is a vexatious litigator in accordance with *Lasson v. Coleman*, 2008 Ohio 4140. Sixteenth, the Magistrate's finding the Musgrove is a vexatious litigator is against the manifest weight of the evidence and testimony provided at trial. Seventeenth, the Magistrate's finding that Musgrove is a vexatious litigator is based on inconsistent and insufficient evidence; [and] deliberate misrepresentation by Plaintiff. Eighteenth, the delay in addressing the issues in this case, from September 2007 to the present has been extremely prejudicial to Defendant; [and] denied Defendant a fair trial. Nineteenth, the Magistrate erred by denying Defendant the one and only continuance she has requested since the beginning of this case, thereby denying Defendant a fair trial and violating her rights to due process and equal protection of the laws. Twentieth, the Magistrate erred in overruling Defendant's request to exclude evidence pertaining to criminal proceedings and other evidence irrelevant to the complaint as it was originally filed in 2007, thus violating Defendant's right to due process- causing unnecessary confusion and delay, through no fault of Defendant's. Twenty-first, the Magistrate erred in denying Defendant's two separate motions to dismiss, pursuant to the ripeness doctrine and due to the Court's delay in trying the case. Twenty-second, the Magistrate's issuance of a Final Pretrial Order less than a week prior to trial was unreasonable and adversely prejudiced Defendant, providing her substantially less than reasonable notice of the issues pertaining to trial preparation addressed within. Twenty-third, Defendant was never served with a copy of the Magistrate's Decision on Trial (As of June 26, 2010), in violation of Civ. R. 53(D)(3)(a)(iii) which requires the decision to be served upon the parties to the case or their attorneys of record, within three days of the date the decision was filed.

III. LAW AND ANALYSIS

A. STANDARD OF REVIEW

Where objections are filed to a magistrate's decision, the trial court has the duty to conduct an independent review of the magistrate's findings of fact and conclusions of law.¹ The trial court's role is to determine whether the magistrate has properly determined the factual issues and appropriately applied the law and, where the magistrate has failed to do so, the trial court must substitute its judgment for that of the magistrate.² The magistrate's decision should not be adopted unless the trial court independently reaches the same findings of fact and conclusions of law.³

B. VEXATIOUS LITIGATOR

Vexatious conduct is defined as "conduct of a party in a civil action that satisfies any of the following: (a) the conduct obviously serves merely to harass or maliciously injure another party to the civil action; (b) 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; (c) the conduct is imposed solely for delay."⁴ "Vexatious litigator means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions."⁵

¹ *Hart v. Munobe* (1993), 67 Ohio St.3d 3.

² *Coronet Ins. Co. v. Richards* (1991), 76 Ohio App.3d 578.

³ *DeSantis v. Soller* (1990), 70 Ohio App.3d 226.

⁴ R.C. 2323.52(A)(2).

⁵ R.C. 2323.52(A)(3).

In the present case, there is more than sufficient evidence to support the Magistrate's finding that Helms proved by a preponderance of evidence that Musgrove has engaged in conduct the served only to harass or maliciously injure Helms. Likewise, there is more than sufficient evidence to support the Magistrate's finding that Musgrove has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in the divorce case, three petitions alleging domestic violence and in the case at bar. Defendant's assignments of error five through seventeen are overruled for the above mentioned reasons.

C. DEFENDANT'S REMAINING ASSIGNMENTS OF ERROR

Defendant's first and second assignments of error are overruled. The Magistrate acted within the scope of authority provided by Civ. R. 53(D)(2)(a)(i) in ruling on Plaintiff's summary judgment motion.

Defendant's third assignment of error is overruled. Pursuant to Civ. R. 38(B) a jury demand must be made no later than fourteen days after the last pleading. Plaintiff's answered Defendant's Counterclaim on January 11, 2008. Defendant did not file a jury demand until January 19, 2010. Thus, Defendant's jury demand was untimely.

Defendant's fourth assignment of error is overruled. Defendant did not attach to her motion to compel a statement reciting the efforts made to resolve the discovery dispute as required by Civ. R. 37(D).

Defendant's eighteenth assignment of error is overruled. The Court notes that the great majority of the delay in this case was the result of Defendant's actions. Further, Defendant makes nothing more than a broad assertion that this delay was prejudicial to her and provides neither case nor statutory law in support of this assertion.

Defendant's nineteenth assignment of error is overruled. The requested continuance of the trail was not needed since the Defendant's witness was available to testify on the second day to the trail. Additionally, the Court notes that contrary to Defendant's contention that this was her 'one

and only request for a continuance since the beginning of this case', the Court has located three other motions for continuances or requests for extensions on the docket.

Defendant's assignment of error is overruled. Evidence of Plaintiff's acquittal in the criminal cases makes it more probable that Defendant's related civil cases were filed without reasonable grounds and is therefore relevant.

Defendant's twenty-first assignment of error is overruled. This Court in its November 25, 2009 Judgment Entry Adopting the Magistrate's Decision previously ruled on this issue.

Defendant's twenty-second assignment of error is overruled. Defendant makes nothing more than a broad assertion that this was prejudicial to her and provides neither case nor statutory law in support of this assertion. Further, Defendant had been on notice since the filing of the amended complaint about the issues that could come up during trial.

Defendant's twenty-third objection is assignment of error. Outside of Defendant's statements that she did not receive service, the Court has not been provided with evidence of this alleged service failure.

D. MOTION TO SET ASIDE MAGISTRATE'S ORDER

"Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed."⁶ The last docket order was filed by the Magistrate on May 6, 2010. Defendant's motion was filed on June 29, 2010. Here, more than ten days elapsed before Defendant filed her motion, therefore the motion is untimely.

⁶ Civ. R. 53(D)(2)(b).

IV. CONCLUSION

Upon review and consideration, the Defendant's Objections are **OVERRULED**. The Court hereby adopts the Magistrate's Decision in its entirety. Further, Defendant's Motion to Set Aside the Magistrate's Order is **OVERRULED**.

Accordingly:

1) Defendant Tina Musgrove is a vexatious litigator and it is hereby ordered that Tina Musgrove is prohibited from doing any of the following without first obtaining leave from the Common Pleas Court of Montgomery County, Ohio

(a) Instituting legal proceedings against David Lee Helms in the Court of Claims, in a Court of Common Pleas, Municipal, or County Court

(b) Continuing any legal proceedings that Tina Musgrove has instituted in the Court of Claims or in a Court of Common Pleas, Municipal Court, or County Court against David Lee Helms prior to the entry of this Decision and

(c) Making any application, other than an application for leave to proceed as provided by R.C. 2323.52(F)(1), in any legal proceedings instituted by vexatious litigator or another person in the Court of Claims or in a Court of Common Pleas, or County Court.

2) Pursuant to R.C. 2323.52(F)(1), it is hereby ordered that Tina Musgrove shall not institute any legal proceedings in a civil action against David Lee Helms, continue in the pending civil action against David Lee Helms, or make any other application, until she files with the Court a written request for leave to proceed. The written request must demonstrate to the satisfaction of this Court that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application.

3) Pursuant to R.C. 2323.52(F)(2), it is hereby ordered that Tina Musgrove shall not institute any legal proceedings in a court of appeals against David Lee Helms, shall not continue any legal

proceedings in a court of appeals against David Lee Helms, or make other application in a court of appeals in a case involving David Lee Helms, until she first files a written request for leave to proceed in the court appeals in which the legal proceedings would be instituted or pending. The written request must demonstrate to the satisfaction of this Court that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application.

4) For purposes of R.C. Section 2323.52 (E), the foregoing orders shall remain in force indefinitely.

5) For purposes of R.C. Section 2323.52 (H), it is hereby ordered that the Montgomery County Clerk of Courts forthwith send a certified copy of this Decision to the Supreme Court of Ohio for publication in a manner that the Supreme Court determines is appropriate and that will facilitate the Clerk of the Court of Claims, a Clerk of a Court of Appeals, a Clerk of a Court of Common Pleas, a Clerk of a Municipal Court, or a Clerk of a County Court in refusing to accept pleadings or other papers submitted for filing by Tina Musgrove who has been found to be a vexatious litigator under this section and who has failed to obtain leave to proceed under this section.

6) Pursuant to R.C. Section 2323.52(I), whenever it appears by suggestion of the parties or otherwise that Tina Musgrove, as a person found to be a vexatious litigator, has instituted, continued, or made an application in legal proceedings against David Helms without obtaining leave to proceed from the appropriate court of Common Pleas or Court of Appeals to do so, the court in which legal proceedings are pending shall dismiss the proceedings or application.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST REASON FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED

A. J. WAGNER, JUDGE

Copies of the above were sent to all parties listed below using the ECF system or by ordinary mail this date of filing

ANNE HARVEY
ATTORNEY AT LAW
2310 FAR HILLS AVE., SUITE 3
DAYTON, OH 45419
Attorney for Plaintiff

TINA MUSGROVE
219 S. DELMAR AVE.
DAYTON, OH 45403
Defendant, Pro Se

TINA M. LOONEY, BAILIFF
(937) 225-4409



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Title: DAVID HELMS vs TINA MUSGROVE
Case Number: 2007 CV 08020
Type: Decision

So Ordered

A.J. Wagner

Electronically signed by awagner on 2010-10-15 11:24:12 page 10 of 10

I hereby certify this to be a true
and correct copy.

Witness my hand and seal this 1
day of NOV 2010.

Shirley C. Bernal, Clerk

Clerk of Common Pleas
Court of Montgomery County, Ohio

By *Crash*
Deputy