IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

THOMAS E. PAYNE,	:	CASE NO. 98-697
Plaintiff,	:	(Judge Dennis J. Langer)
-vs-	:	DECISION, ORDER & ENTRY ADOPTING MAGISTRATE'S DECISION; JUDGMENT FOR DEFENDANT ON COUNTER-CLAIM; DESIGNATION OF THOMAS E. PAYNE AS A "VEXATIOUS LITIGATOR.
D.A.D.E., INC., dba DAYTON AUTO AUCTION,	:	
Defendant.	:	

On October 29, 1998, pursuant to Civil Rule 53, this Court filed an *Order of Referral to Magistrate for a Hearing on December 3, 1998, at 2:00 P.M.* The subjects of the hearing were the "Defendant's request for attorney fees and costs pursuant to O.R.C. Section 2323.51 [subsequently withdrawn] and for an order prohibiting Plaintiff Thomas Payne from instituting further legal proceedings without leave of Court pursuant to O.R.C. Section 2923.52. . ." *Id.* O.R.C. Section 2923.52 is Ohio's "vexatious litigator" statute.

On January 7, 1999, Magistrate O'Connell filed his Decision in which he ruled, "1) that judgment be entered in favor of Defendant, D.A.D.E., Inc., dba Dayton Auto Auction, and against Plaintiff, Thomas E. Payne, on Defendant's counterclaim finding that Plaintiff is a vexatious litigator and that Plaintiff is prohibited from instituting legal proceedings in the Common Pleas Court of Montgomery County, Ohio, without first obtaining the leave of the

Common Pleas Court of Montgomery County, Ohio to proceed; and, 2) that Plaintiff pay the costs of this action." *Magistrate's Decision* at 18.

Subsequent to the Magistrate's Decision, the parties filed the following:

- *Plaintiff's Objection to Magistrate's Decision Filed January 7, 1999* (Jan. 15, 1999)
- Plaintiff's *Motion for Evidentiary Hearing Under Civil Rule 12* (Jan. 15, 1999)
- Defendant's *Motion to Strike Plaintiff's Objections to Magistrate's Decision* (Feb. 4, 1999)
- *Defendant's Response to Plaintiff's Objection to Magistrate's Decision* (Feb. 11, 1999)
- *Defendant's Memo Contra Motion for Evidentiary Hearing* (Feb. 12, 1999)
- *Plaintiff's Response to Defendant's Response to Plaintiff's Objection to Magistrate's Decision* (Feb. 22, 1999)
- *Plaintiff's Objection to Defendant's Response to Defendant's Response to Plaintiff's Objection to Magistrate's Decision* (Feb. 22, 1999)
- *Motion: Plaintiff's Response to Defendant's Memo Contra Motion for Evidentiary Hearing* (Feb. 22, 1999)

As a preliminary matter, this Court overrules Defendant's *Motion to Strike Plaintiff's Objections to Magistrate's Decision*. Any failure of the Plaintiff to provide defense counsel a copy of the *Plaintiff's Objections* in a timely manner did not result in any prejudice to the Defendant. The Defendant did file, and this Court has fully considered, *Defendant's Response to Plaintiff's Objection to Magistrate's Decision* (Feb. 11, 1999). To strike a plaintiff's objections from the record, as the Defendant requests, is a draconian remedy that should be avoided, given the preference of the law that cases be resolved upon their merits.

In a similar vein, this Court overrules *Plaintiff's Objection to Defendant's Response to*

Defendant's Response to Plaintiff's Objection to Magistrate's Decision (Feb. 22, 1999). The Plaintiff objects to the Defendant's failure to provide a full citation of *Central Ohio Transmit Authority v. Timson* (Dec. 24, 1998), Franklin App. No. 98AP-509, unreported. Inasmuch as the Plaintiff located the case, and attached it to his *Plaintiff's Objection to Defendant's Response to Defendant's Response to Plaintiff's Objection to Magistrate's Decision*, the Plaintiff suffered no prejudice.

STANDARD FOR REVIEWING MAGISTRATE'S DECISION

In *Brown v. Brown*, the Second Appellate District outlined the role of the trial judge in reviewing objections to a magistrate's report:

> In reviewing referee's report, [the] trial court, as ultimate finder of fact, must make its own factual determinations through independent analysis of issues and should not adopt finds of a referee unless [the] trial court fully agrees with them. . . . [The] court's role is to determine whether the referee has properly determined factual issues and appropriately applied law, and, when [the] referee has failed to do so, the trial court must substitute its judgment for that of the referee.

(December 20, 1995), Montgomery App. No. 15054, unreported, at 118 (citing *Inman v. Inman*, (Ohio App. 1995), 101 Ohio App. 3d 115, 118).

The Ohio Supreme Court has also recognized the trial court's duty to conduct an independent review: "A trial judge who fails to undertake a thorough independent review of the referee's report violates the letter and spirit of Civ. R. 53." *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6. The magistrate's findings of facts, conclusions of law, and additional rulings are "all subject to the independent review of the trial judge." *Id.* at 6; *Dayton v. Whiting* (App. 2 Dist. 1996), 110 Ohio App.3d 115, 118. Moreover, "such a de novo determination is based upon the

referee's findings of fact unless a transcript of evidence is filed." *Farmer v. Commercial Data Center, Inc.* (App. 2 Dist. 1996), 1996 WL 111829, unreported, at *4.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Constitutionality of Vexatious Litigator Statute

The Plaintiff contends that "Magistrate O'Connell's Report and Recommendation are unconstitutional and has violated Plaintiff's civil rights, constitutional rights, rights under Article 1, Section 16 of the Ohio Constitution, First and Fourteenth Amendments to the United States Constitution." *Plaintiff's Response to Defendant's Response to Plaintiff's Objection to Magistrate's Decision* (Feb. 22, 1999) at 2. These constitutional arguments were addressed by the First District Court of Appeals in *Deters v. Briggs* (Dec. 31, 1998), Hamilton App. No. C-971033, unreported:

> Appellant contends R.C. 2323.52 violates Section 16, Article I of the Ohio Constitution, which states, in pertinent part: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."
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> Section 16, Article I of the Ohio Constitution protects the right to seek redress in Ohio's courts when one is injured by another. *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466, 639 N.E.2d 425. So-called "access-to-the- courts" provisions are found in many state constitutions and have their roots in the Magna Carta. See *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 290, 503 N.E.2d 717 (J. Douglas concurring). A right or action existing at common law at the time the Constitution was adopted is constitutionally protected by the access-to-courts provision from subsequent legislative action which abrogates or impairs that right without affording a reasonable substitute. *Id.* at 291-292, 503 N.E.2d 717 (J. Douglas concurring.)
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> In determining the constitutionality of a legislative enactment, this court adheres to the principle that all such enactments enjoy a presumption of constitutional validity. *Id.* at 274, 503 N.E.2d 717. We note that the "due course of law" provision in Section 16, Article I is the equivalent of the "due process of law" provision in the Fourteenth

Amendment to the United States Constitution. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 422-423, 633 N.E.2d 504, citing *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 544, 38 N.E.2d 70. A legislative enactment will be deemed valid on due process grounds if it bears a real and substantial relation to the public health, safety, morals or general welfare and if it is not unreasonable or arbitrary. *Mominee* at 274, 503 N.E.2d 717.

The purpose of the vexatious litigator statute is clear. It seeks to prevent abuse of the system by those persons who persistently and habitually file lawsuits without reasonable grounds and/or otherwise engage in frivolous conduct in the trial courts of this state. Such conduct clogs the court dockets, results in increased costs, and oftentimes is a waste of judicial resources--resources that are supported by the taxpayers of this state. The unreasonable burden placed upon courts by such baseless litigation prevents the speedy consideration of proper litigation.

The vexatious litigator statute bears a real and substantial relation to the general public welfare because its provisions allow for the preclusion of groundless suits filed by those who have a history of vexatious conduct. In addition, the statute is not unreasonable or arbitrary. It applies only to persons who have habitually, persistently and without reasonable grounds engaged in conduct that serves merely to harass or maliciously injure another party, 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/or is imposed solely for delay.

As for the specific constitutional provision at issue herein, Section 16, Article I, the Supreme Court of Ohio has stated that when the Ohio Constitution speaks of remedy and injury to person, property or reputation, it requires an opportunity granted at a meaningful time and a meaningful manner. *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 62, 609 N.E.2d 140, citing *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 60, 514 N.E.2d 709. As indicated above, legislation that abolishes or severely impairs common law remedies is invalid unless a reasonable substitute is provided. *Mominee* at 292, 503 N.E.2d 717 (J. Douglas concurring). R.C. 2323.52(D)(1) and (F) provide such a substitute and also provide vexatious litigators an opportunity in a meaningful time and a meaningful manner. A vexatious litigator is not precluded from bringing suit or proceeding in a legal action; rather, he or she must first obtain leave of court upon a finding that the proposed suit or action is not an abuse of process, and there are reasonable grounds for the suit or action.

A similar statute has been upheld in California upon similar grounds as we hold here. In 1963, California adopted a vexatious litigant statute (Stats.1963, ch. 1471, sec.1). *Taliaferro v. Hoogs* (1965), 46 Cal.Rptr. 147, 148, 236 Cal.App.2d 521. The statute provided for the furnishing of security by one found to be a vexatious litigant to assure payment of the defendant's reasonable expenses. Title 3A, sec. 391-391.6, Code Civ.Proc. In 1990, the statute was amended to include a new provision whereby the court, in addition to requiring a vexatious litigant furnish security, could enter a prefiling order prohibiting a vexatious litigant from filing any new litigation without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Cal.Code Civ.Proc. 391.7. In *Wolfgram v. Wells Fargo Bank* (1997), 61 Cal.Rptr.2d 694, 53 Cal.App. 4th 43, a California appellate court addressed the constitutionality of the new provision. The California Constitution includes a clause that states: " 'The people have the right to * * * petition government for redress of grievances * * *.' " (Emphasis omitted.) *Wolfgram* 61 Cal.Rptr. at 700, quoting Cal. Const., art. 1, sec. 3. Such right to petition encompasses the right to sue. *Wolfgram* at 700. The court noted that notwithstanding the protected nature of the right to sue, some suits may be undertaken with hostile intent and disguised as petitions for redress. *Id.* at 701. Imposing liability for such action does not interfere with the right to petition because the action was not taken in exercise of such right. *Id.*

The court went on to note that the right to petition has never been absolute and that such does not confer the right to clog the court system and impair everyone else's right to seek justice. *Id.* at 703. The court compared meritless suits filed by vexatious litigants to unworthy suits that ordinarily are disposed of by means of a demurrer, judgment on the pleadings or summary judgment and pointed out that baseless litigation was not immunized by the First Amendment right to petition. Id. at 703-704, quoting *Bill Johnson's Restaurants, Inc. v. NLRB* (1983), 461 U.S. 731, 743, 103 S.Ct. 2161, 2170, 76 L.Ed.2d 277.

The analysis above applies, in essence, to the case at bar and in the context of Section 16, Article I of the Ohio Constitution. A person is only declared a vexatious litigator when he or she is shown to have habitually, persistently and without reasonable grounds engaged in conduct that, because it is baseless, is not protected under the right-to-remedy/access-to-courts clause. In addition, a vexatious litigator is provided a reasonable substitute in that he or she may file for leave to proceed pursuant to R.C. 2323.52(F).

Given the above, we find that the bulk of the vexatious litigator statute is constitutional under Section 16, Article I of the

Ohio Constitution. However, the statute does include a provision that is troublesome. R.C. 2323.52(G) states: "During the period of time that the order entered under division (D)(1) of this section is in force, no appeal by the person who is the subject of that order shall lie from a decision of the court of common pleas under division (F) of this section that denies that person leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court."

In *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 84, 523 N.E.2d 851, the Supreme Court of Ohio stated that while the United States Supreme Court has long held that a right to appeal is not found in the Constitution, where a state provides a process of appellate review, the procedures used must comply with constitutional dictates of due process and equal protection. Id., citing *McKane v. Durston* (1894), 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867; *Griffin v. Illinois* (1956), 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891. Ohio has adopted appellate rules that make every litigant entitled to an appeal as of right by filing a notice of appeal within the time allowed. *Atkinson* at 84-85, 523 N.E.2d 851, citing App.R. 3(A); see, also, *Moldovan v. Cuyahoga Cty. Welfare Dept.* (1986), 25 Ohio St.3d 293, 294, 496 N.E.2d 466.

In *Moldovan* at 295, 496 N.E.2d 466, the Supreme Court cited Section 16, Article I of the Ohio Constitution and stated it was well- established that every injured party shall have remedy by due course of law and shall have justice administered without denial or delay. Hence, the rights protected in Section 16, Article I extend to the right to appeal. The court in *Moldovan* stated that the opportunity to file a timely appeal is rendered meaningless when reasonable notice of an appealable order is not given. *Id.* In *Moldovan*, the failure to give reasonable notice of a final, appealable order was found to be a denial of the right to legal redress of injuries created by Section 16, Article I of the Ohio Constitution. Surely, the blanket prohibition of a right to appeal found in R.C. 2323.52(G) denies the right created in Section 16, Article I.

As discussed above, the requirement in R.C. 2323.52(F) that the court determine the proposed action is not an abuse of process and that there are reasonable grounds for such action before a vexatious litigator may pursue such action is akin to a demurrer or a motion on the pleadings. Indeed, at oral argument in this case, counsel for appellee likened such requirement to having to withstand a motion to dismiss. However, there is a right to appeal from the granting of a motion to dismiss. See *State ex rel. Larson v. Cleveland Pub. Safety*

Director (1996), 74 Ohio St.3d 464, 659 N.E.2d 1260 (appellant therein appealed as of right to Supreme Court from the Court of Appeals' granting of a motion to dismiss filed in a mandamus action).

Here, R.C. 2323.52(G) completely precludes any appeal from a court's denial of a vexatious litigator's application for leave to proceed with a case. This violates the right-to-remedy by due course of law provision in Section 16, Article I of the Ohio Constitution. Accordingly, we find R.C. 2323.52(G) is unconstitutional and strike this section from the statute.

In summary, we find R.C. 2323.52(G) is unconstitutional and strike it from the statute. The remaining sections of the statute discussed previously are constitutional. Accordingly, we sustain appellant's first assignment of error, in part, for the reason that R.C. 2323.52(G) is unconstitutional. Appellant's first assignment of error is overruled, in part, on the basis that the other provisions of R.C. 2323.52 discussed in this opinion are constitutional.

Briggs does not make a facial challenge to R.C. 2323.52. Without citation to any legal authority, he claims that the trial court erred "in misconstruing R.C. 2323.52 law." We interpret this as a general challenge to the trial court's judgment based on the First Amendment. The First Amendment, however, does not convey an absolute right to engage in expressive conduct; rather, the right varies with the forum in which it occurs. *Internatl. Soc. For Krishna Consciousness, Inc. v. Lee* (1992), 505 U.S. 672, 692, 112 S.Ct. 2711, 2714, 120 L.Ed.2d 541; *Cincinnati v. Thompson* (1994) 96 Ohio App.3d 7, 16-17, 643 N.E.2d 1157, 1163.

[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. * * * [W]e think it is clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. O'Brien* (1968), 391 U.S. 367, 376-377, 88 S.Ct. 1673, 1678-1679, 20 L.Ed.2d 672; see, also, *Barnes v. Glen Theatre, Inc.* (1991), 501 U.S. 560, 567, 111 S.Ct. 2456, 2461, 115 L.Ed.2d 504 (citing O'Brien).

With regard to forma pauperis actions, we note that in *In re McDonald* (1989), 489 U.S. 180, 184-185, 109 S.Ct. 993, 996, 103 L.Ed.2d 158, the United States Supreme Court refused to waive the filing fee for a pro se petitioner who filed seventy-two petitions for

> extraordinary writs in thirteen years. The court observed that the processing of frivolous requests for extraordinary writs is a burden on the institution's limited resources. We agree, furthermore, with the decisions of the Eighth and Eleventh Appellate Districts which hold that, because frivolous conduct has no place in the judicial system, courts have inherent authority to provide relief against frivolous filings and abuses. *State ex rel. Richard v. Cuyahoga Cty. Bd. of Commrs.* (1995), 100 Ohio App.3d 592, 596-597, 654 N.E.2d 443, 446; *Kondrat v. Byron* (1989), 63 Ohio App.3d 495, 497-498, 579 N.E.2d 287, 288-289.
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> Accordingly, because it furthers an important governmental interest in a reasonable manner, we hold that the restriction on First Amendment activity imposed by R.C. 2323.52 is constitutionally permissible. Furthermore, the trial court's order, limiting Briggs's access to the courts under R.C. 2323.52, does not violate Section 16, Article I of the Ohio Constitution for the same reasons stated in *State ex rel. Richard v. Cuyahoga Cty. Bd. of Commrs.*, supra, at 600, 654 N.E.2d at 448.

Id. This Court finds the reasoning and holding of *Deters v. Briggs*, supra, to be persuasive. This Court finds that R.C. §2323.52(G) violates the right-to-remedy by due course of law provision in Section 16, Article I of the Ohio Constitution. However, this Court finds that the remaining subsections of R.C. §2323.52 are constitutional; they do not violate Article 1, Section 16 of the Ohio Constitution; and they do not violate the First and Fourteenth Amendments to the United States Constitution.

Plaintiff's Objection to Magistrate's Decision Overruled

In its entirety, the *Plaintiff's Objection to Magistrate's Decision Filed January 7, 1999* is as follows: "Now comes the Plaintiff, Thomas E. Payne, Pro Se, and hereby objects to each and every part of the decision on each page of the Magistrate's Decision Filed January 7, 1999, including pages one through eighteen." *Id.*

Civil Rule 53(E)(3)(b) mandates that "Objections shall be specific and state with particularity the grounds of objection." In applying this rule, the Second District Court of Appeals in *Steward v. Steward* (Aug. 8, 1997), Miami App. No. 96-CA-50, unreported, held that an objection that the magistrate's decision was "contrary to law and against the manifest weight of the evidence" was neither specific nor particular, as Civ.R. 53(E)(3)(b) requires. Similarly, in the case at bar, this Court finds that the Objection of the Plaintiff, Thomas E. Payne, is broad, not specific or particular, and does not state the grounds of objection. Such a general objection is insufficient to preserve an issue for judicial consideration. *See Kilgore v. Kilgore* (App. 1 Dist. 1982), 5 Ohio App. 3d 137; *Harbin v. Chris T.V.* (June 22, 1990), Lake App. No. 89-L-14-101, unreported, at *1; *Peppercorn v. Figer* (March 22, 1991), Lake App. No. 90-L-14-067, unreported, at *1; 1995 Staff Notes to Civil Rule 53.

Even if this Court were to consider Plaintiff's Objection, this Court would not sustain the Objection. Although Plaintiff filed an objection to the Magistrate's January 7 Decision, no transcript of the hearing before the Magistrate was filed with the Court or requested by any party. The Magistrate's findings of facts and conclusions of law are subject to the independent review of this Court, *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6; *Dayton v. Whiting* (App. 2 Dist. 1996), 110 Ohio App.3d 115, 118, but that determination will be based upon the Magistrate's findings of fact where no transcript of evidence is filed. *Farmer v. Commercial Data Center, Inc.* (App. 2 Dist. 1996), 1996 WL 111829, unreported, at *4.

The Plaintiff contends that "Magistrate O'Connell's report and recommendation is not based upon any evidence whatsoever." *Plaintiff's Response to Defendant's Response to Plaintiff's Objection to Magistrate's Decision* at 1. However, it is clear that the *Magistrate's*

Decision is predicated upon the official records pertaining to numerous suits filed in the Montgomery County Common Pleas Courts in which Mr. Payne is a party. Copies of such official records or reports or entries therein are "self-authenticated evidence" under Ohio Evidence Rule 902(4). The Plaintiff also complains that the "Defendant never shared any of said evidence with Plaintiff prior to the hearing . . ." *Id.* at 1. Assuming that to be the case, this Court is not persuaded that the Plaintiff was prejudiced by that failure of discovery. Since the Plaintiff was a party to the suits cited by the Magistrate, he had prior knowledge of the facts and circumstances surrounding those cases.

Plaintiff's *Motion for Evidentiary Hearing Under Civil Rule 12* (Jan. 15, 1999) requests a hearing pertaining to "Defendant's Attorney offered settlement of this case to the Plaintiff." This Court is not persuaded that such issue has any bearing upon the validity of the *Magistrate's Decision.* In any event, as ordered by this Court, the Magistrate conducted a hearing on Dec. 3, 1998. The Plaintiff then had the opportunity to offer all relevant evidence. Plaintiff's *Motion for Evidentiary Hearing Under Civil Rule 12* is overruled.

This Court has conducted a thorough independent review of Magistrate O'Connell's findings of facts and conclusions of law. This Court agrees with Magistrate O'Connell that the Plaintiff has engaged in vexatious conduct in several cases over period of approximately three years:

- In "case number 8"(case number 96-1201), Plaintiff filed a "motion for a judgment notwithstanding the verdict" when the appropriate means for appealing the Magistrate's Decision in that case was by objection under Civil Rule 53. Without a valid basis to do so, Plaintiff then filed an inappropriate motion to strike an obviously permissible memorandum

of the opposing party contra to his motion for relief from judgment. Finally, Plaintiff filed a motion to separate witnesses for trial after the trial had concluded.

- In "case number 13", Plaintiff was sued and received an adverse decision from the Magistrate. Although he had already filed objections to the Magistrate's decision, he also inappropriately filed a motion to vacate the judgment, which was not warranted under existing procedural rules and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.
- In the case at bar, case no. 98 - 697 (referred to as "case number 19" by the Magistrate), the Plaintiff filed a suit against the Defendant D.A.D.E., Inc. that was not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. This suit was an attempt by Plaintiff to reverse the decision made in case no. 96-1201 ("case number 8"). Both cases involve essentially the same parties. In both cases, Plaintiff attempted to prevent Defendant from using the name "Dayton Auto Auction." Plaintiff lost his suit in case no. 96-1201. Nevertheless, in the case at bar, he sought to relitigate the same issue without any justifiable basis to do so. Furthermore, in the case at bar, case no. 98 - 697, Plaintiff filed a motion to dismiss under Rule 41 (A). That motion was overruled because there was a pending counterclaim. Plaintiff then attempted a second time to dismiss in state court, so he could remove the action to Federal court. He did not follow the proper procedure for removal to Federal court; and, his motion to dismiss was again overruled. Despite the Court's valid basis for overruling the motion to dismiss, the Plaintiff filed objections which this Court overruled. He objected a second and third time, and refiled the motion for dismissal under Rule 41.

After this Court overruled that motion, Plaintiff again objected. Plaintiff also objected twice to this Court's decision granting Defendant's motion for summary judgment. The Plaintiff's suit itself was inappropriate. His multiple objections to this Court's decisions and multiple motions for reconsideration were not warranted. The proper procedure would have been an appeal from this Court's final appealable order.

- After the case at bar, Plaintiff filed three additional cases ("case numbers are 20, 21, and 22") against Defendant or someone affiliated with Defendant, including Defendant's attorney. Plaintiff dismissed all three cases within a few months after they were filed, and after the Defendants expended time and money to obtain counsel, file answers and assert defenses.
- In "case no. 20" (98-1421), Plaintiff sued the Defendant's attorneys and the principal of Defendant, Jim Ping. He reiterated the same claims he made in "case number 19" - a case in which the court granted summary judgment to the Defendant on res judicata grounds - and alleged Defendants engaged in frivolous conduct in bringing suit to establish the right to the use of a particular trade name or names. Plaintiff dismissed this suit. Thus, "case number 20" was not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.
- "Case no. 21" was a claim by Plaintiff against an apparent employee of the Motor Vehicle Title Department of the Clerk of Courts office. Plaintiff filed a motion to remove Defendant's counsel, an assistant prosecuting attorney. The county prosecuting attorney is charged with the responsibility of representing a county employee in claims stemming from the employee's performance of his duties. The Defendant was a county employee and the

subject conduct occurred in the course and scope of his duties as a county employee. Plaintiff's attempt to have Defense Counsel removed was not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

R.C. §2323.52 provides for relief from or against vexatious litigators. R.C. §2323.52 (A)(2) states:

> 'Vexatious conduct' means 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 a 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.

R.C. §2323.52 (A)(3) states:

> '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 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. "Vexatious litigator' does not include a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio unless that person is representing or has represented self pro se in the civil action or actions.

This Court finds by a preponderance of the evidence that Plaintiff, Thomas E. Payne, has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in civil actions in the Montgomery County Court of Common Pleas. He has habitually, persistently, and

without reasonable grounds engaged in conduct that obviously serves merely to harass or maliciously injure another party to a civil action; and he has engaged in 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. This Court finds by a preponderance of the evidence that Plaintiff, Thomas E. Payne, is a vexatious litigator.

Judgement and Order of the Court

This Court fully adopts the Magistrate Decision. Judgment is hereby entered in favor of Defendant, D.A.D.E., Inc., dba Dayton Auto Auction, and against Plaintiff, Thomas E. Payne, on Defendant's counterclaim that Plaintiff is a vexatious litigator.

Pursuant to R.C. §2923.52(D)(1), Thomas E. Payne is henceforth prohibited from instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court without first obtaining the leave of this Common Pleas Court of Montgomery County, Ohio to proceed. Pursuant to R.C. §2923.52(F), leave for the institution of legal proceedings shall not be granted unless this Court is satisfied that the proceedings are not an abuse of process of the court in question and that there are reasonable grounds for the proceedings.

In accordance with R.C. §2923.52(H), the Clerk of the Montgomery Court of Common Pleas is ordered to send a certified copy of the order to the Supreme Court for publication in a manner that the Supreme Court determines is appropriate and that will facilitate the clerk of the court of claims and a clerk of a court of common pleas, municipal court, or county court in refusing to accept pleadings or other papers submitted for filing by Thomas E. Payne, a vexatious litigator, unless Mr. Payne obtained leave to proceed from this Court.

In accordance with R.C. §2923.52(I), whenever it appears by suggestion of the parties or otherwise that Thomas E. Payne has instituted legal proceedings without obtaining leave to proceed from this court of common pleas, the court in which the legal proceedings are pending shall dismiss the proceedings of Mr. Payne.

The Plaintiff is ordered to pay the costs of this action.

This is a final appealable order. There is no just cause for delay.

SO ORDERED:

Judge Dennis Langer

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

Thomas E. Payne, Plaintiff
1800 Troy Street
Dayton, Ohio 45404

Stephen E. Klein, Attorney for Defendant
282 Bohanan Drive
Vandalia, Ohio 45377

Magistrate Timothy O'Connell

Craig Zimmers, Clerk of Courts

I hereby certify this to be a true and correct copy.
Witness my hand and seal this 16th day of March 1999
, Clerk
Clerk of Common Pleas
Court of Montgomery County, Ohio
By J. McClinton
Deputy