Supreme Court of Ohio Clerk of Court - Filed July 30, 2019 - Case No. 2019-0902

IN THE SUPREME COURT OF OHIO

SCOTT N. OEHLER Plaintiff-Appellee, vs. PAT MCADAMS, et al. Defendants-Appellees, And DANIEL S. WHITE Appellant.	)	CASE NO. 2019-0902 Court of Appeals Case No. 28903 *On Appeal from The Summit County Court of Appeals, Ninth Appellate District*

MEMORANDUM CONTRA TO JURISDICTION OF DEFENDANT-APPELLEES PAT AND REBECCA MCADAMS

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Attorney Daniel White ("Appellant") contends that this matter is a significant case for review by this Court. This Court will certify cases meeting one of two conditions: a substantial constitutional question, or a case of public or great general interest. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381. This case falls into neither category.

The assignments of error set forth by Appellant are fact driven and specific to this case. The cases that Appellant claims to be in conflict are similarly fact driven and fact specific.

The appellate court found that sufficient evidence was presented to uphold the trial court's findings of frivolous conduct by the Appellant. Further, the appellate court found that the Appellant had waived any arguments on appeal as to the damages awarded by the trial court.

This case does not present facts that would aid in the development or review of the substantive case law on the issues of finding frivolous conduct pursuant to R.C. 2323.51 or on claims pursuant to R.C. 5302.30, concerning fraudulent representations on Residential Property Disclosure forms. The lower courts' findings on these issues followed well-established precedent.

The evidence presented was adequately reviewed by the lower courts and, because of the factual nature of these issues, would not yield any substantive law. In addition, the lower court decisions would not act to chill civil litigation, due to the specific factual nature of both the underlying case and the conduct by Appellant. Therefore, this case neither presents a substantial constitutional question or presents an issue of any general or public interest.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee Scott Oehler ("the Buyer") purchased the subject property knowing that the Defendants-Appellees Pat and Rebecca McAdams ("the Appellees") had purchased the

home, owned it for only a short time, were doing repairs on the property and were not occupying the property. (*Oehler Deposition "Oehler Dep." at 97*). The Buyer also purchased the home "as is" and had a home inspection and appraisal done on the property, both of which indicated the basement was dry with no signs of water intrusion. (*Oehler Dep. at 17, 23*).

The Appellees owned the property for eight (8) months, from September to April, and had made various repairs, including replacing a downspout pipe and performing some grading. (*See Affidavit of Pat McAdams attached to Defendants' Motion for Summary Judgment*). The Appellees disclosed one issue with water on the Property Disclosure Statement concerning the veneer of the property and they disclosed what they did to address such issue. (*See Exhibit D to Defendants' Motion for Summary Judgment*).

After a few months of owning the home wherein he experienced no water intrusion, the Buyer experienced a flooding event in the basement due to heavy rains in June 2015. (*Oehler Dep. at 26*). After such flooding subsided after a day or two, the Buyer did not experience any further flooding for a period of six (6) months, until he had Ohio State Waterproofing ("OSW") install a water-proofing system in the basement. (*Oehler Dep. at 36, 110-111*).

The Buyer chose OSW to address his water issues, despite the fact that OSW was the most expensive estimate he received. (*Oehler Dep. at 47, 118*). Contemporaneous with the installation of the water-proofing system, and before any lawsuit had been filed, the foreman from OSW generated the "expert report" that the Buyer, through Appellant, disclosed when they filed this suit. *(See Oehler responses to interrogatories, Ex. 12 to Oehler Dep.).* This report listed certain conditions the foreman allegedly saw at the property and claimed that in his opinion such conditions did not happen overnight and took a number of years to develop. *Id.* The Buyer, through Appellant, filed the complaint in this matter alleging fraudulent disclosure, fraudulent inducement and mutual mistake of fact. *(See Complaint*). The Appellees then issued discovery

requests to the Buyer asking what evidence he had to support his claims. *(See Oehler responses to interrogatories, Ex. 12 to Oehler Dep.).* The Buyer responded that he was relying on the fact that the Appellees had painted the basement and the expert report from OSW. (*Oehler Dep. at 97).*

The Buyer's expert, Mr. Humphrey from OSW, testified that he had not observed the property before installing the water-proofing system. *(Humphrey Deposition "Humphrey Dep." at 12, 29*). As a result, he could not state that the conditions he found meant that the Appellees had any water issues when they owned the property or that they knew about or concealed such water issues. *(Humphrey Dep. at 18*.)

Further, Mr. Humphrey testified that he was being paid his "daily rate" by OSW to testify at the deposition and that he had testified several times for Appellant, as had other foremen at OSW he knew. *(Humphrey Dep. at 8-9).* However, Appellant, during his sanctions hearing, testified that he had not paid them. (*Sanctions hearing before McCarty ["Sanctions Tr."] at 45).* Appellant could offer no explanation as to why OSW gratuitously provided such reports and paid for their foreman to perform as expert witnesses. *Id.*

Appellant did not take any depositions or timely serve written discovery requests. (*Sanctions Tr. at 37*).

Appellant has litigated numerous "wet basement" cases and often used foremen from OSW as his expert witnesses; in fact, many of those cases involved the same language as in Mr. Humphrey's report. Appellant testified that he was referred numerous cases from OSW and that he had used OSW as expert witnesses. (*Sanctions Tr. at 38-39, 43-44, 47*).

The trial court granted the Appellees' Motion for Summary Judgment on February 28, 2017. The trial court found that the Buyer could point to no evidence that any water infiltration occurred prior to the sale of the property other than what was disclosed on the property

disclosure statement. (*Trial Court Order February 28, 2017*). The trial court further found that the Buyer failed to establish any defects related to water or mold actually existed prior to the sale and prior to the June flooding incident that caused the damage at issue. *Id*. Finally, the trial court found that the Buyer had presented no evidence that the Appellees were aware of any prior instances of water infiltration or damage, much less that the Appellees concealed such defects or intentionally misled the Buyer. *Id.* The Buyer did not appeal the trial court's order.

The trial court held a hearing on the Appellees' Motion for Sanctions and the Appellant and the Buyer testified. (*Sanctions Tr. at 7, 57*). On August 11, 2017, the trial court granted the Appellees' Motion for Sanctions finding that Appellant had engaged in frivolous conduct when he initiated and maintained this litigation against the Appellees. (*Order 4-5).*

The trial court found that the defects and substantial repairs that the Buyer and Appellant referenced in their response to the Motion for Sanctions were unrelated to the allegations in the complaint, the flooding, or the damage caused by the water infiltration, and the repairs and defects were not required disclosures. (*Order at p. 4).* The trial court further found that Appellant had not sufficiently addressed the manner in which he receives referrals from OSW customers to dispel the evidence of collaboration. (*Order at p. 4*). In addition, the trial court found that Appellant had not demonstrated that he has had favorable verdicts in filing wet basement cases with similar facts and evidentiary support to this action. (*Order at p. 4*). Finally, the trial court noted that Appellant did not satisfactorily explain his failure to complete deposition discovery in this matter. (*Order at p. 4).*

At the hearing on the amount of attorney fees and expenses to award, the Appellees' expert, Attorney Mark Bernhlohr, testified as to the reasonableness of the attorney fees and expenses. (*Transcript before Magistrate at 18).* Appellant presented no expert testimony regarding the fees and/or expenses of the Appellees.

The Magistrate awarded Appellees $37,185.89, consisting of attorney fees and expenses occurred in litigating the instant case and issued her Magistrate's Decision on October 30, 2017. (*Magistrate Decision at p. 5).* Appellant filed no objections to this Decision. The trial court adopted such Decision on December 8, 2017, finding no error of law or defect evident on the face of the Magistrate's Decision. (*Order at p. 2*). Appellant filed no motion pursuant to Civ.R. 53 (D)(5) to request permission to file objections due to his alleged failure to be served with the Magistrate's Decision.

Appellant filed a notice of appeal with the Ninth District Court of Appeals, which affirmed the judgment of the trial court on May 24, 2019. The appellate court found that under the specific circumstances of this case, the trial court's factual findings, taken as a whole, supported the trial court's determination that Appellant engaged in frivolous conduct by initiating and maintaining this action. The appellate court also found that Appellant had failed to preserve for appellate review his objections to the Magistrate's Decision and the alleged failure of service of the Magistrate's Decision. Appellant filed his Memorandum in Support of Jurisdiction with the Court on July 2, 2019. The Appellees' Memorandum Contra to Jurisdiction timely follows.

ARGUMENT IN RESPONSE TO PROPOSITION OF LAW NO. I.

Repairs are not required to be disclosed on the residential property disclosure form unless such repairs were completed in response to any known water intrusion problem, pursuant to R.C. 5302.30 and Ohio Adm.Code 1301:506-10.

In his Proposition of Law No. I., the Appellant implausibly argues that the appellate court decision undermines R.C. 5302.30. Appellant essentially seeks to relitigate the summary judgment motion granted by the trial court. However, neither the summary judgment, nor R.C. 5302.30 was directly at issue in the appeal, which related only to the award of sanctions. Appellant directs this court to no actual language in the lower court's opinion that diminishes, or

even construes R.C. 5302.30. The statue is mentioned only once "Additionally, none of the defects and or repairs referenced by the McAdamses in [sic] are required disclosures on the residential property disclosure form since the form only requires a seller to disclose repairs completed in response to any known water intrusion problem. See R.C. 5302.30 and Ohio Adm.Code 1301:5-6-10." (*Oehler v. McAdams*, 9th Dist. Summit No. 28903, 2019-Ohio-1976 at ¶21.) The foregoing statement is simply an accurate representation of the text of the disclosure form: "Do you know of any previous or current water leakage, water accumulation, excess moisture or other defects to the property, including but not limited to any area below grade, basement or crawl space?...If "Yes", please describe and indicate any repairs completed:". Appellant's issues in this matter stem from his refusal to acknowledge the distinction between repairs required to be disclosed because they relate to knowledge of water intrusion, and repairs made for other purposes.

The entire basis of Appellant's Proposition of Law No. I. is that the Appellees improperly failed to disclose water intrusion issues on the Residential Property Disclosure form because:1) the Appellees had installed a downspout pipe, performed some grading at the property, added gravel and painted the basement; and 2) the foreman of OSW found mold and mildew and moisture under the basement floor and cracks in the basement floor. To succeed on a claim for fraudulent disclosure, it is not enough merely to show that actions were taken by the seller that might relate to the defect in question. See *Montgomery v. Vargo*, 2016-Ohio-809, 60 N.E.3d 709, 713-714 (8th Dist.), citing *Tankersley v. Lohrey*, 12th Dist. Butler No. CA98-10-206, 1999 WL 296752, *3 (May 10, 1999). There must be evidence that the seller actually had knowledge of the defect in question. *Id.* At 714. According to the Residential Property Disclosure form itself, repairs are only required to be listed if the seller first discloses knowledge of the condition in question.

The *Montgomery* court dealt specifically with the issues of repairs being insufficient evidence of fraud. In that case, the seller had renovated an area of the home that later, after the buyer had purchased the home, was shown to have problems with the roof. The court found that the seller's renovation of that area was not evidence that the roof defect was present at the time of the renovation or that the seller was aware of the defect. This is similar to the case at bar, as the Appellees' actions in installing a downspout pipe and performing some grading around the property are not evidence that they knew of any water intrusion or that such actions were taken to remedy any alleged water intrusion.

Appellant then cites a series of cases that he claims have "identical" or "virtually identical" facts to the case at bar. No one is proposing that genuine cases of fraudulent disclosure do not exist; however, all of the cases are extremely fact specific. No case cited by the Appellant has exactly the same fact pattern as the one at bar: seller who had not lived in the home and only owned it for a short time; buyer's home inspection that found no signs of water intrusion issues; water intrusion issue only occurred after a one-time heavy rainfall; and no evidence that painting concealed any signs of water intrusion.

Appellant first cites *Greig v. Wallick*, 5th Dist. Tuscarawas No. 2010AP090036, 2012-Ohio-77, claiming that this was a "case just like this". The facts in *Greig*, however, are very different. The seller in *Greig* had owned and lived in the residence for about twenty-five (25) years and had put drywall in the basement that covered a bowed basement wall, which was bowed due to water issues. Evidence was presented that the cracks in the wall had multiple layers of caulk, indicating it was an ongoing issue. In the case at bar, the Appellees owned the property for only eight (8) months, never lived in the property, and there were no defects discovered that the seller had tried to conceal. Accordingly, *Greig* is clearly distinguishable from the instant case.

Appellant also cites *Juan v. Harmon* 1st Dist. Hamilton No. C-980587 (March 5, 1999), *Meadows v. Otto*, 5th Dist. Stark No. 2006CA00138, 2007-Ohio-4031 and *Derosa v. Bishop*, Ashtabula C.P. No. 2008-CV-824 as being on point. In all three cases, there was actual evidence that water intrusion had occurred while the sellers owned the home. Again, in the instant case, there is no evidence that any water intrusion issues occurred during the short time the Appellees owned the property.

Appellant next cites *DiNapoli v. Lewandownski*, 9th Dist. Summit No. 18897, 1998 WL 668004 (Sept. 30, 1998) as being on point. The court of appeals in this matter specifically found *DiNapoli* "procedurally and factually distinguishable". (*Opinion at p. 11).* The seller in *DiNapoli* built the home and lived in it for about twenty-five (25) years, and the water intrusion experienced by the buyers was ongoing. In this case, the Appellees owned the property for less than a year and the water intrusion problem was caused by a one-time heavy rainfall event. The appellate court was correct in finding *DiNapoli* distinguishable.

Appellant then cites *Nichols v. Petroff*, 5th Dist. Stark No. 2004CA00271, 2005-Ohio-481 as the sellers there painted the basement walls and floors in close proximity to the time of the sale of the property. The *Nichols* court, however, did not find that the painting alone was sufficient evidence of fraud. In that case, the sellers admitted that a water heater had broken in the basement; however, the mold that the buyer discovered was incompatible with such explanation. In the case at bar, there was no evidence that any water event had taken place in the property's basement in the eight (8) months while the Appellees owned the property.

Appellant also cites *Oliver v. Bray*, Cuyahoga C.P. No. 33131 (December 26, 1997) and *Southworth v. Weigand*, 8th Dist. Cuyahoga No. 80561, 2009-Ohio-4285 as similar cases. In both cases, however, the sellers had lived in the property, and the properties experienced water intrusion every time it rained. Here, the Appellees only owned the property for eight (8) months,

never lived there, and the Buyer only experienced water intrusion after a one-time heavy rainfall event.

Appellant also claims in *Southworth* that the complaint in that case was virtually identical to the one filed in the instant case. A review of the complaint in this matter shows that there are very few details stated, which demonstrates that this is Appellant's form complaint, so it is no surprise if the complaints are similar in the two cases. The facts in *Southworth*, however, are not similar to this case.

Appellant then cites two more cases decided in the Cuyahoga County Common Pleas Court. These decisions, however, are not available to review, so there is no way to verify that these cases are accurately described by Appellant.

Finally, Appellant cites to *Ferguson v. Cadle*, 5th Dist. No. 2008 CA 0077, 2009-Ohio-4285, claiming again that this was a similar case. In *Ferguson*, there was evidence of prior water intrusion that occurred while the seller owned the property and of repairs that were directly related to water intrusion that had occurred. In the instant case, there is no evidence of water intrusion that occurred while the Appellees owned the property and no evidence that repairs were made in direct response to any such intrusion.

Under Ohio law, repairs are not required to be disclosed on the Residential Property Disclosure forms unless there is knowledge of a problem that led to such repairs. The appellate court's passing and accurate mention of R.C. 5302.30 simply acknowledges this fact. The findings of the lower courts that Appellant brought this case in violation of R.C. 2323.51 does not make it "virtually impossible, under any set of facts" for a claimant to bring a fraudulent disclosure lawsuit, due to the very specific facts of the instant case, and the very limited discussion within the lower court's opinion.

ARGUMENT IN RESPONSE TO PROPOSITION OF LAW NO. II.

A party forfeits any arguments regarding the judgment awarded against him or her by failing to properly object to the magistrate's decision in accordance with Civ.R. 53(D)(3), by failing to raise the issue of service of the magistrate's decision with the trial court and by failing to argue plain error on appeal.

Appellant complains in his Proposition of Law No. II about the evidence upon which the trial court awarded damages and the alleged failure of the clerk to serve him with the Magistrate's Decision. Appellant, however, has forfeited both of these arguments.

Appellant failed to object to the Magistrate's Decision in accordance with Civ.R. 53(D)(3), which means he has forfeited the right to assign those issues as error on appeal. *Adams v. Adams*, 9th Dist. Wayne No. 13CA022, 2014-Ohio-1327, ¶6. A party may still argue plain error on appeal, but Appellant even failed to do that in the appellate court, again forfeiting such arguments.

In addition, Appellant failed to raise with the trial court the alleged failure of the clerk to serve him with the Magistrate's Decision. Civ.R. 53(D)(5) specifically provides for an extension of time in the event that clerk fails to timely serve notice. Appellant could have sought an extension, even after the decision was adopted. Civ. R. 53(D)(3)(b)(i). As the issue was not raised with the trial court, a reviewing court cannot review the issue. *See Catalonotto v. Byrd*, 9th Dist. Summit No. 27824, 2016-Ohio-2815, ¶ 12.

Finally, even if Appellant had not forfeited his right to argue these issues, he cites to no authority whatsoever for his argument that the expert's alleged lack of personal knowledge about one of the attorneys in this case, by itself, was a reason to discount the expert's testimony that the fees incurred were reasonable for the work performed and the fees typically charged in that local market. The expert is required to review the work product of counsel, counsel's fees, and to determine if both were fair and reasonable. The expert does not need to know trial counsel, and it is arguably better if the expert does not know trial counsel. A sanctions hearing is not a contest

of personality or reputation. An expert in a sanctions hearing is to render an objective opinion regarding the work performed, as evidenced by the work product reviewed, and the reasonableness of fees charged, as evidenced by the amount of work product. That was done in this case.

Appellant also cites no authority for his assertion that the fees expended by a prevailing party in defending an action must be related to, or proportionate to, the amount sought by the Plaintiff. Appellant ignores the fact that, in addition to compensatory damages, the Plaintiff in this action sought punitive damages and attorney fees. In light of the remedy sought, the amount expended by the Appellees was not disproportionate to the amount in controversy.

ARGUMENT IN RESPONSE TO PROPOSITION OF LAW NO. III.

The appellate court correctly found that the trial court's findings of frivolous conduct by the Appellant in initiating and maintaining this action were supported by competent, credible evidence under the specific circumstances of this case.

Appellant claims that the appellate court's decision would chill civil litigation and overturn countless precedent concerning sanctions. Appellant, however, again fails to cite to any cases with facts similar enough to the facts in this case to show any danger of the court of appeals' decision chilling litigation or overturning any precedent.

Appellant first cites *Peto v. Ruschak*, 9th Dist. Summit No. 27614, 2015-Ohio-5538, in which the court found that sanctions were not proper when there was no basis to conclude that claims were not warranted under existing law or not made in good faith. Appellant claims that the fact that cases virtually identical to this one have been successful for years, support his conclusion that this case was warranted under existing law and made in good faith. As set forth in the Appellees' argument in response to Appellant's Proposition of Law No. I, however, none of the cases cited by Appellant (that could be verified) showed "virtually identical" facts.

Appellant cites *Heron Point Condo, Unit Owner's Ass'n v. E.R. Miller, Ltd.*, 9th Dist. Summit Nos. 25861, 25863 and 25998, 2012-Ohio-2171 for the proposition that sanctions are not proper when a party made good faith arguments about the case. Appellant claims that the evidence that Appellees failed to disclose the repairs they made was a good faith argument. However, as set forth above, evidence of repairs by the seller without evidence that the seller knew of the defect in question and that such repairs were related to the defect, is not a good faith argument. *See Montgomery, supra*, at 713-714.

Next, Appellant cites *Giusti v. Felton*, 9th Dist. Summit Nos. 26611 and 26695, 2014-Ohio-3115 for the proposition that if there is no evidence of malice or willfulness on the part of the party or the party's counsel, sanctions are inappropriate. Appellate claims that since there was no evidence of malice or willfulness in this case, the appellate court erred in upholding the finding of frivolous conduct. Appellant, however, misrepresents the holding in *Giusti*. The *Giusti* court quoted the entire R.C. 2323.51(A)(2)(a)(i), which states that frivolous conduct can also be found if there is "another improper purpose". Therefore, even if there is no evidence of malice or willfulness, if there is evidence of another improper purpose, sanctions can be warranted. Here, the appellate court found that there was competent, credible evidence that Appellant did not sufficiently address the manner in which he receives referrals from OSW to dispel the evidence of collaboration between he and OSW, which would constitute a finding of improper purpose under R.C. 232351.(A)(2)(a)(i).

Appellant then cites *Merino v. Salem Hunting Club*, 7th Dist. Columbiana No. 11 CO 2, 2012-Ohio-4553, and *Carsalina LLC v. Bennett*, 10th Dist. Franklin No. 14AP-74, 2014-Ohio-5665 for the proposition that if some and/or minimal evidentiary support is advanced for claims, then there is no frivolous conduct. Here, there was no evidence presented that the Appellees knew of any water intrusion issues on the property or that they failed to disclose any water

intrusion issues. The evidence that Appellant presented was found by the lower courts not to be evidence of knowledge of water intrusion issues by the seller.

Appellant then cites *Bell v. Nichols*, 10th Dist. Franklin No. 10AP-1036, 2013-Ohio-2559 for the proposition that the test for frivolous conduct should be whether any reasonable attorney would have brought the action in light of existing case law. In support of his argument, Appellant refers to Mr. Oehler's affidavit that referenced that Mr. Oehler had retained different counsel before Appellant in this matter. A review of that affidavit, however, does not state that Mr. Oehler's prior counsel, Mr. Scanlon, would have filed this suit. Indeed, the record only shows that Mr. Scanlon sent a letter to the Appellees. There is a certainly a large difference between sending a letter and filing suit, especially as the latter triggers certain duties and potential liabilities pursuant to Civ. R. 11 and R.C. 2323.51. Accordingly, Appellant has not shown that a reasonable attorney would have brought this matter.

Finally, Appellant cites to two common pleas court decisions that he claims are virtually identical to the one at bar. He never states how they are virtually identical and seems to only tout the fact that they both resulted in settlements. However, assuming, without conceding, that these two common pleas court decisions are indeed identical to the instant case, the fact that they resulted in settlements does not indicate that they were not frivolous. Parties enter into settlement agreements for a variety of reasons unrelated to the strength of the claims, so the amount of the settlement, or even the fact that there was a settlement at all, is not probative of whether frivolous conduct occurred.

Appellant has failed to show how the judgment of the appellate court that the trial court's findings of frivolous conduct was supported by competent, credible evidence under the specific facts of this case would chill civil litigation or overturn any precedent concerning frivolous conduct.

CONCLUSION

There is nothing about this case that makes it a case of great general or public interest. In light of the very specific facts of the actual underlying lawsuit and Appellant's conduct, the lower courts correctly found that frivolous conduct occurred and sanctions were appropriate. Such findings will not chill any future civil litigation. Therefore, for the reasons expressed above, this Court should decline to accept jurisdiction in this matter.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra to Jurisdiction was sent by electronic mail to Daniel S. White at lodsw@hotmail.com and by regular U.S. Mail to Scott N. Oehler, at 2714 Springfield Lake Drive, Akron, Ohio 44312, this 30th day of July, 2019.

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