

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

WILLOW CREEK HOMEOWNERS' ASSOCIATION,	:	APPEAL NO. C-061053 TRIAL NO. A-0403232
Plaintiff-Appellee,	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
AL GAMMARINO,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant, Al Gammarino, appeals the trial's court decision awarding attorney fees to plaintiff-appellee, Willow Creek Homeowners' Association. We affirm the trial court's judgment.

The record shows that Willow Creek had filed an action for damages and to quiet title on real property that had been involved in a foreclosure sale. Gammarino was the purported owner of an undivided one-half interest in the property. He had received \$5,000 in rent for a sign located on the property. After the foreclosure judgment was set aside,<sup>2</sup> Willow Creek amended its complaint and sought to recover the sign rents paid to

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> See, generally, *Goering v. Willow Creek Homeowners' Assn.*, 1st Dist. Nos. C-010214 and C-010219, 2002-Ohio-3285.

Gammarino. The trial court awarded Willow Creek \$5,000 in damages, plus costs and prejudgment interest. This court affirmed the trial court's judgment.<sup>3</sup>

After failing to obtain satisfaction of its judgment by other means, Willow Creek filed a complaint for foreclosure on its judgment lien. It attempted to serve Gammarino three times at 3700 East Galbraith Road, Cincinnati, Ohio. The third attempt was returned "unclaimed." It then attempted regular mail service, but the envelope was returned marked "Addressee Unknown."

Willow Creek's attorney had previously dealt with Gammarino at the East Galbraith Road address and knew his phone number. He also checked the telephone directory and found a single listing for Gammarino at that same address and phone number. The attorney called the number, and an individual confirmed that he had reached the Gammarino residence. He asked to speak to Gammarino, and when someone answered, the attorney recognized Gammarino's voice. He asked Gammarino if he was still at the East Galbraith Road address. Gammarino said that he was not, but refused to give a current address.

Willow Creek eventually served Gammarino by publication. Gammarino appeared pro se and filed an answer in which the signature block contained the address 3700 East Galbraith Road. Gammarino raised several affirmative defenses, including laches, waiver, and estoppel, and he asserted a counterclaim.

Gammarino subsequently failed to appear for a deposition, although Willow Creek had given him proper notice. Willow Creek filed a motion for sanctions based on that failure to appear. The court deferred the issue of sanctions and ordered Gammarino to appear at a future deposition.

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<sup>3</sup> *Willow Creek Homeowners' Assn. v. Gammarino* (Dec. 21, 2005), 1st Dist. Nos. C-040846 and C-050050.

At that deposition, Gammarino was generally uncooperative. He did testify that he had resided without interruption at the East Galbraith address for decades. He also stated that he did not know what laches, estoppel, and waiver were, or what their elements might be.

Willow Creek filed a second motion for sanctions under Civ.R. 11 and R.C. 2323.51 based upon Gammarino's "persistently frivolous and oppressive conduct throughout the case." After that motion was filed, Gammarino retained counsel to represent him.

A magistrate held several hearings on the issue. He found that Gammarino's "avoidance of service on the complaint, from the refusal of all written attempts of service to his willful telephonic misrepresentation, clearly violate[d] both the spirit and the intent of Crim.R. 11 and R.C. § 2323.51(A)(2)(a)(i). The baseless defenses Gammarino placed in his answer and counterclaim, which he later acknowledged, under oath, having an utter lack of understanding as to their nature and elemental components, clearly violated both Rule 11 and R.C. § 2323.51(A)(2)(a)(i), (ii), and (iii). The court already found that Gammarino's failure to appear for his December 1, 2004 deposition sanctionable pursuant to Civ.R. 37(D)."

The magistrate went on to award Willow Creek "all costs incurred for the prosecution of the captioned case *in toto*, save for the cost of filing the complaint and initial service of said complaint[.]" The magistrate then set the case for a hearing on the amount of damages.

Willow Creek's attorney filed an affidavit listing his hourly rate. The affidavit stated that the total fees owed by Willow Creek, apart from those related to the initial drafting and filing of the complaint, were \$25,265.54. Following a hearing, the magistrate found that all the fees Willow Creek had incurred were reasonable and awarded sanctions for the entire amount of \$25,265.24.

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Gammarino filed a “Motion to Set Aside the Magistrate’s Order,” which was essentially a set of objections to the magistrate’s decision. But he did not provide a transcript of the hearing on the amount of sanctions to support his objections. The trial court overruled the motion and adopted the magistrate’s report. This appeal followed.

In his sole assignment of error, Gammarino contends that the trial court abused its discretion in awarding over \$25,000 in attorney fees. He contends that the amount of fees was not reasonable, given that the case involved collection of only \$5,000. This assignment of error is not well taken.

R.C. 2323.51 grants courts the authority to award reasonable attorney fees incurred by a party adversely affected by frivolous conduct.<sup>4</sup> Similarly, Civ.R. 11 permits the court to award reasonable attorneys fees to an opposing party where an attorney or pro se litigant signs a pleading, motion, or other document while aware that the document lacks grounds to support it.<sup>5</sup> Finally, Civ.R. 37(D) allows for an award of reasonable attorney fees when a party fails to appear for a deposition.<sup>6</sup> The determination of the amount of fees to be awarded lies within the trial court’s discretion.<sup>7</sup>

Further, our review of this case is limited because Gammarino failed to provide a transcript of the hearing on the amount of fees with his objections to the magistrate’s report. Though the record contains a transcript, it was not filed until after the notice of appeal, and it was not before the trial court.

The party objecting to a magistrate’s decision on the basis that the decision is not supported by the evidence or is contrary to the weight of the evidence bears the burden to

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<sup>4</sup> *Ron Scheiderer & Assoc. v. London*, 81 Ohio St.3d 94, 1998-Ohio-453, 689 N.E.2d 552; *Bryan v. Brian*, 161 Ohio App.3d 454, 2005-Ohio-2739, 830 N.E.2d 1216.

<sup>5</sup> *Moss v. Bush*, 105 Ohio St.3d 458, 2005-Ohio-2419, 828 N.E.2d 994; *Riley v. Supervalu Holdings, Inc.*, 1st Dist. No. C-050156, 2005-Ohio-6998.

<sup>6</sup> *Information Leasing Corp. v. Chambers*, 152 Ohio App.3d 715, 2003-Ohio-2670, 789 N.E.2d 1155.

<sup>7</sup> *Riley*, supra; *Meyers v. Hot Bagels Factory, Inc.* (1999), 131 Ohio App.3d 82, 721 N.E.2d 1068.

submit a transcript of the evidence.<sup>8</sup> A trial court may adopt the magistrate's findings of fact without independently reviewing the evidence where the party objecting to the magistrate's decision has failed to provide a transcript.<sup>9</sup> In this instance, an appellate court must decide whether the trial court abused its discretion in applying the law to the facts.<sup>10</sup>

The magistrate found that Gammarino's actions throughout the case were frivolous and that all of Willow Creek's attorney fees, outside of the filing and preparing of the complaint, were reasonable and caused by his frivolous conduct.<sup>11</sup> Thus, the decision to award those fees was not so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion.<sup>12</sup>

Gammarino contends that incurring approximately \$25,000 in fees over a \$5,000 claim was inherently unreasonable. This claim is disingenuous given that his frivolous conduct was the cause of Willow Creek incurring the fees. He also contends that incurring \$25,000 in fees when his pro se defenses were obviously frivolous was also objectively unreasonable. Willow Creek's counsel had an ethical duty to defend his client's interests, and the record does not show that counsel's actions related to Gammarino's defenses and counterclaim were patently unreasonable.

When the trial court overruled Gammarino's objections to the magistrate's report, it stated that "the Court finds nothing incorrect in the magistrate's legal or factual analysis." We agree. Under the circumstances, we cannot hold that the trial court abused its discretion in ordering Gammarino to pay Willow Creek attorney fees of \$25,265.24.

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<sup>8</sup> *Stricker v. Stricker*, 1st Dist. No. C-060435, 2007-Ohio-3309.

<sup>9</sup> *Id.*; *In re Martin* (Aug. 11, 2000), 1st Dist. No. C-990517.

<sup>10</sup> *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 1995-Ohio-272, 654 N.E.3d 1254; *Stricker*, *supra*.

<sup>11</sup> See *Soler v. Evans, St. Clair & Kelsey*, 152 Ohio App.3d 781, 2003-Ohio-2582, 790 N.E.2d 365.

<sup>12</sup> *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140; *Berger v. Berger*, 1st Dist. No. C-030631, 2004-Ohio-5614.

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Consequently, we overrule Gammarino's assignment of error and affirm the trial court's judgment.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J., CUNNINGHAM and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 5, 2007  
per order of the Court \_\_\_\_\_.  
Presiding Judge