

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

WANDA BEVINGTON, GUARDIAN OF PAULA STAYTON, INCOMPETENT,	:	APPEAL NO. C-070405 TRIAL NO. 2006005494
	:	
Plaintiff-Appellee,	:	<i>JUDGMENT ENTRY.</i>
	:	
vs.	:	
	:	
LINDA THOMAS,	:	
	:	
Defendant-Appellant.	:	

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

Defendant-appellant Linda Thomas appeals from the judgment of the Hamilton County probate court overruling her objections and adopting a magistrate's decision determining that Thomas had engaged in frivolous conduct, under R.C. 2323.51, and that she was a vexatious litigator under R.C. 2323.52. The court ordered that Thomas, but not her counsel, was prohibited from initiating or continuing legal proceedings without leave of court, and that Thomas was to pay \$6,228 in attorney fees to plaintiff-appellee Wanda Bevington, the guardian of the person of Paula Stayton, Thomas's sister.

Stayton, now deceased, suffered from mental retardation, bipolar disorder, diabetes, and dementia. She was declared incompetent, and the probate court appointed Bevington as her guardian in the case numbered 2005000906. Starting in 2006,

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

Thomas, a resident of Florida, made repeated court filings requesting, inter alia, that the probate court appoint her as Stayton's guardian,² that the court recognize her as her sister's "advocate" with authority to control Stayton's medical care, and that the court investigate mistreatment of her sister by healthcare providers. A number of the filings were made by Thomas acting pro se. Many of these filings did not request any specific court action but were filed to seek additional inquiry by the court into Stayton's care. Court investigators found no evidence of abuse of Stayton. The record reflects that numerous hearings were devoted to the resolution of these filings.

Bevington finally brought suit in this case to halt the vexatious litigation. Following a February 23, 2007, hearing, the magistrate issued a written decision in which he found that there was no good-faith basis to extend Ohio law to permit Thomas to serve as a guardian or to subvert the guardian's authority to regulate medical care by being named an "advocate." The magistrate also found that Thomas's repeated allegations of abuse were groundless and were filed to harass Bevington.

Thomas filed a written objection to the magistrate's decision. The probate court conducted a hearing, permitted Thomas to introduce two new exhibits in support of her objections, heard argument, and then overruled the objections and adopted the magistrate's decision.

In three assignments of error, Thomas now contends that the probate court erred in finding that she was a vexatious litigator who had engaged in frivolous conduct. She also contends that the court erred in awarding attorney fees and in restricting her ability to file additional documents with the court.

² See R.C. 2109.21 (guardian must be a resident of Ohio).

As this court held in *Gearheart v. Cooper*,³ “R.C. 2323.51 allows the trial court to award fees to any party adversely affected by frivolous conduct. The statute defines frivolous conduct as conduct by a party to a civil action that (1) serves merely to harass or maliciously injure another party to the action or is for another improper purpose, such as causing unnecessary delay or a needless increase in the cost of litigation; (2) is not warranted under existing law and cannot be supported by a good-faith argument for a modification or establishment of new law; (3) consists of allegations or other factual contentions that have no evidentiary support; or (4) consists of denials or factual contentions that are not warranted by the evidence. * * * With respect to purely legal questions, an appellate court employs a de novo standard of review. On the other hand, an appellate court should not disturb a trial court’s findings of fact if the record contains competent, credible evidence to support the findings. Finally, an appellate court reviews under an abuse-of-discretion standard a trial court’s decision to award attorney fees on the basis that frivolous conduct has adversely affected a party.”

We review the probate court’s factual findings regarding vexatious conduct and its conclusions of law that Thomas was a vexatious litigator under a similar standard of deference to the court’s factual findings and de novo review for legal error.⁴

With one exception, Thomas has focused her challenge on the factual determinations made by the magistrate or the probate court. She claims that her actions did not serve merely to harass or to maliciously injure the guardian, and that the guardian had not demonstrated that she had incurred some of the attorney fees as a direct result of defending against the allegedly frivolous conduct.

³ 1st Dist. Nos. C-050532 and C-060170, 2007-Ohio-25, at ¶25-27.

⁴ See *Borger v. McErlane*, 1st Dist. No. C-010262, 2001-Ohio-4030.

In support of her arguments that the probate court misconstrued the facts of this case, Thomas refers to portions of the transcript of the February 23, 2007, vexatious-litigation hearing before the magistrate, as well as to transcripts of the 2006 hearings conducted in the guardianship action. But Thomas failed to comply with Civ.R. 53(D)(3)(b)(iii) by filing a copy of any of these transcripts with the probate court before it ruled on her objections. Objections to a magistrate's factual findings must be supported by a transcript of all the evidence submitted to the magistrate relevant to these findings.⁵

While Thomas did cause a transcript of the vexatious-litigation hearing to be filed in the probate court on August 7, 2007, that transcript was not filed until three months after the objections hearing before the probate court. Transcripts from the guardianship action were not filed until six months after the objections hearing. Thomas, as the objecting party, failed to file these transcripts in a timely manner in the probate court.⁶ Accordingly, these transcripts are "not properly a part of the record on review" before this court.⁷

Our review of Thomas's assignments of error is, therefore, narrowly limited. In the absence of properly filed transcripts, the probate court had to presume the regularity of the magistrate's factual findings, and the same holds true in this court.⁸ And we review the proceedings below only to ensure that the probate court had properly "undertake[n] an independent review * * * to ascertain that the magistrate * * * appropriately applied the law" to the facts.⁹

⁵ See Civ.R. 53(D)(3)(b)(iii).

⁶ See *id.*

⁷ *In re Spenser*, 1st Dist. No. C-070321, 2008-Ohio-2844, at ¶11; see, also, App.R. 9 and *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500, paragraph one of the syllabus ("A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.").

⁸ See *In re Spenser* at ¶11

⁹ Civ.R. 53(D)(4)(d).

Here, the probate court's conclusions, based upon the facts found by the magistrate, that Thomas had engaged in frivolous conduct and was a vexatious litigator were supported by competent, credible evidence. We will not disturb those conclusions.

At oral argument in this appeal, Thomas contended that the probate court lacked authority to award attorney fees to Bevington because R.C. 2323.51(B)(1) limits the award of attorney fees to parties adversely affected by frivolous conduct. We disagree. Pursuant to Civ.R. 17 and R.C. 2111.01(A) and 2117.17, a guardian stands in the place of her ward for purposes of litigation. The guardian is a proper party under R.C. 2323.51. We hold that the probate court's award of attorney fees was supported by a sound reasoning process and was not an abuse of its discretion.

Assignments of error one, two, and three are overruled.

Therefore, the judgment of the probate court is affirmed.

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., HILDEBRANDT and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 24, 2008
per order of the Court _____.

Presiding Judge