[Cite as *Burnett v. Burnett,* 2011-Ohio-2839.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

IN RE: M.S.B., ALLEGED DEPENDENT/NEGLIGENT CHILD,	:	**O P I N I O N**
DAN BURNETT,	:	
Plaintiff-Appellee,	:	**CASE NO. 2010-A-0035**
- vs -	:	
DENISE BURNETT,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 08 JG 20.

Judgment: Reversed and remanded.

Scott R. Stefl, Harbor House Professional Building, 7844 Lakeshore Boulevard, Mentor, OH 44060 (For Plaintiff-Appellee).

Christine M. Tibaldi, 38109 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Denise Burnett, appeals the judgment of the Ashtabula County Court of Common Pleas, Juvenile Division, granting appellee, Dan Burnett's, motion for sanctions pursuant to R.C. 2323.51 and awarding attorney fees to appellee in the amount of $975. For the following reasons, we reverse and remand the judgment of the trial court.

{¶2} Appellant is the paternal grandmother and, subsequently, the adoptive parent of M.S.B., a minor. Appellee is the great uncle of M.S.B. and currently has custody of said minor. Custody and child support issues between the parties have been ongoing for nearly two years.

{¶3} As a result of M.S.B. being injured while in the custody of appellee, appellant filed an emergency motion for temporary custody and a dependency complaint, which was later withdrawn by appellant. Appellant's motion for custody was denied by the trial court, as appellant has suffered from psychological battles with depression.

{¶4} Thereafter, appellee filed a motion for attorney fees and sanctions against appellant. In his motion, appellee alleges that appellant has: (1) refused to submit to a psychological evaluation as directed by the trial court; (2) failed to pay child support as she has claimed that she is unable to work due to mental issues; (3) filed an affidavit with the trial court seeking M.S.B. to be a dependent child, stating that she was emotionally stable; (4) submitted two diametrically-opposed reports from different mental health professionals—one stating that she was emotionally stable and one indicating that she suffered from mental illness; and (5) refused to answer discovery. Appellee attached a fee statement from his attorney indicating that he had incurred attorney fees of $975 in relation to the aforementioned conduct of appellant.

{¶5} The trial court set appellee's motion for a hearing. The hearing took place in the judge's chambers, without the parties present. Thereafter, the trial court issued a judgment entry "sua sponte" finding that appellant "conducted herself in a manner that is

a per se violation of [R.C.] 2323.51." Further, the trial court awarded appellee attorney fees in the amount of $975.

{¶6} Appellant filed a timely notice of appeal and alleges the following assignments of error:

{¶7} "[1.] The trial court abused its discretion in awarding attorney's fees to Plaintiff-Appellee under R.C. 2323.51 without conducting a full evidentiary hearing and without the parties present.

{¶8} "[2.] The trial court erred by awarding the full amount of attorney's fees requested by Plaintiff-Appellee."

{¶9} As appellant's assigned errors are interrelated, we address them in a consolidated fashion. On appeal, appellant asserts the trial court erred in granting appellee's motion for sanctions pursuant to R.C. 2323.51 without first holding an evidentiary hearing on appellee's motion.

{¶10} "This court has held that there is more than one standard of review for cases involving sanctions under R.C. 2323.51 and Civ.R. 11.[1] *** The determination depends on the underlying reasons the trial court imposed sanctions. ""The question of what constitutes frivolous conduct may be either a factual determination, e.g. whether a party engages in conduct to harass or maliciously injure another party, or a legal determination, e.g., whether a claim is warranted under existing law."" *** Appellate courts use a de novo standard when reviewing legal conclusions but use the abuse of

1. We are aware that R.C. 2323.51 and Civ.R. 11 are two separate mechanisms utilized by a party for an award of sanctions for frivolous litigation. For purposes of the instant case, appellee has relied solely upon R.C. 2323.51.

discretion standard when reviewing factual determinations. ***" *Engintec Corp. v. Miller*, 11th Dist. No. 2008-T-0091, 2010-Ohio-3680, at ¶22.

{¶11} As appellee's motion for sanctions cites numerous examples of appellant's conduct which he claims were intended to harass or maliciously injure appellee, this court will review the trial court's findings under an abuse of discretion standard. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶12} R.C. 2323.51(A)(2)(a) defines "frivolous conduct" as:

{¶13} "Conduct of [a] *** party to a civil action *** that satisfies any of the following:

{¶14} "(i) It obviously serves merely to harass or maliciously injure another party to the civil action *** or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

{¶15} "(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

{¶16} "(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

{¶17} "(iv) The conduct consists of denials of factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief."

{¶18} R.C. 2323.51(B)(1) provides that "any party adversely affected by frivolous conduct may file a motion for an award of *** attorney's fees *** incurred in connection with the civil action ***."

{¶19} R.C. 2323.51(B)(2) also provides that if such a motion is filed, an award of attorney fees may be made "but only after the court does all of the following:

{¶20} "(a) Sets a date for a hearing to be conducted in accordance with division (B)(2)(c) of this section, to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;

{¶21} "(b) Gives notice of the date of the hearing described in division (B)(2)(a) of this section to each party or counsel of record who allegedly engaged in frivolous conduct and to each party allegedly adversely affected by frivolous conduct;

{¶22} "(c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division, allows the parties and counsel of record involved to present any relevant evidence at the hearing, including evidence of the type described in division (B)(5) of this section, determines that the conduct in question was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made."

{¶23} The statute clearly outlines a two-step analysis to be employed: first, the trial court must determine whether the conduct of a party constitutes "frivolous conduct" as defined by R.C. 2323.51 (A)(2)(a)(i)-(iv); and, second, the trial court must determine the amount, if any, of attorney fees to be awarded to the injured party. The trial court,

however, must first hold a hearing on the aggrieved party's motion if it determines attorney fees are warranted.

{¶24} Here, it is undisputed that the parties were given proper notice of the hearing on appellee's motion. It is also undisputed that said hearing took place in the judge's chambers outside of the presence of the parties and was not recorded.

{¶25} Appellee maintains that appellant's counsel waived her right to a hearing as her counsel sat "mute" at the hearing and failed to request either that the parties be present or that the proceedings be recorded. In his brief, appellee has failed to provide this court with any evidence of appellant's counsel waiving her right to a hearing. We decline to find any merit in appellee's *ipse dixit* proclamations.

{¶26} We find the trial court erred in finding appellant's conduct to be frivolous and awarding attorney fees in the amount of $975 without first engaging in a hearing allowing "both the parties and counsel involved to present any relevant evidence[.]" R.C. 2323.51(B)(2)(c). See, also, *Cic v. Nozik* (July 20, 2001), 11th Dist. No. 2000-L-117, 2001 Ohio App. LEXIS 3291, *4 ("a trial court must conduct a hearing *** and may not rely exclusively on what has or has not been submitted with the motion itself"); *Nozik v. Sanson* (June 8, 1995), 8th Dist. No. 68269, 1995 Ohio App. LEXIS 2391, *5-*6 (holding that "both Civ.R. 11 and R.C. 2323.51 require the trial court to conduct an evidentiary hearing at which the parties and counsel must be given the opportunity to present any evidence relevant to the issues raised before imposing sanctions"); *Young v. Russ*, 11th Dist. No. 2003-L-206, 2005-Ohio-3397, at ¶70 ("[t]he trial court erred in granting the motion and awarding attorney fees to appellee *** pursuant to R.C. 2323.51 without first conducting a hearing").

{¶27} Further, appellee maintains that since the trial court issued its judgment entry sua sponte, the procedural requirements of R.C. 2323.51 are "irrelevant." This argument is not well-taken. The plain language of the statute provides that even if an award is made on the "court's own initiative," the trial court must hold a hearing in compliance with R.C. 2323.51(B)(2)(a)-(c).

{¶28} For the foregoing reasons, the judgment of the Ashtabula County Court of Common Pleas, Juvenile Division, is hereby reversed and remanded for proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.