**[Cite as *Helfrich v. Madison*, 2009-Ohio-5140.]**

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | : | JUDGES: |
| JAMES HELFRICH | : | Sheila G. Farmer, P.J. |
| | : | John W. Wise, J. |
| Plaintiff-Appellant | : | Julie A. Edwards, J. |
| | : | |
| -vs- | : | Case No. 08-CA-150 |
| | : | |
| | : | |
| TIMOTHY G. MADISON, et al., | : | O P I N I O N |

Defendants-Appellees

| | |
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| CHARACTER OF PROCEEDING: | Civil Appeal from Licking County Court of Common Pleas Case No. 07-CV-00394 |
| JUDGMENT: | Vacated and Remanded |
| DATE OF JUDGMENT ENTRY: | September 28, 2009 |

APPEARANCES:

| For Plaintiff-Appellant | For Defendants-Appellees |
|---|---|
| JAMES HELFRICH<br>P.O. Box 921<br>Pataskala, Ohio 43062 | TIMOTHY G. MADISON<br>KRISTIN ROSAN<br>DARCY A. BURDETTE<br>1031 East Broad Street<br>Columbus, Ohio 43205 |

*Edwards, J.*

**{¶1}** Appellant, James Helfrich, appeals a judgment of the Licking County Common Pleas Court finding him to be a vexatious litigator. Appellees are Timothy Madison, Madison & Rosan L.L.P., Carol Strickland, David Garner and N.R.T. Columbus Inc. D.B.A. Coldwell Banker King Thompson Realty.

STATEMENT OF FACTS AND CASE

**{¶2}** Appellant filed the instant action on March 16, 2007, for abuse of process, tortious interference with a business relationship and fraud. Appellees counterclaimed alleging that appellant was a vexatious litigator as defined by R.C. 2323.52(A)(2).

**{¶3}** Appellees moved for summary judgment on their counterclaim. The court granted summary judgment and declared appellant to be a vexatious litigator.

**{¶4}** The court found that the instant case arose out of a dispute during a previous suit filed by appellant. In its conclusions of law, the court stated that in February of 2004, appellant filed suit in Licking County Municipal Court against appellees Strickland, Garner and Coldwell Banker over the sale of property to appellant. Appellant dismissed the municipal court case and brought suit for the same claims in Licking County Common Pleas Court (Case No. 05 CV 00120) in January of 2005, "inexplicably seeking $27,000.00 in damages." Judgment Entry, November 25, 2008, page 2. The court stated that appellees were granted summary judgment when appellant failed to present any evidence of damages. In that case, appellant sought to amend to join the defendants' counsel, Timothy Madison, as a defendant. The motion was denied, and appellant brought the instant action (Case No. 07-CV-00394) including claims against Madison.

**{¶5}** The court noted that appellees had cited numerous instances of vexatious conduct in the instant case and in Case No. 05 CV 00120, as well as numerous instances of "similarly frivolous and malicious behavior" in cases filed by appellant against other defendants. The court held that the many instances of appellant's behavior in this case and in 05CV00120 were more than sufficient to constitute vexatious behavior. The court stated:

**{¶6}** "While plaintiff is entitled to criticize the justice system, he is not entitled to abuse process, waste the Court's time, and use repeated frivolous filings to do so. Plaintiff mistakenly believes his First Amendment rights include using civil actions as a vehicle to express his disenchantment with the legal processes. The evidence submitted by defendant shows habitual and persistent conduct on the part of plaintiff that consists of impugning defendants, opposing counsel, judges, and the judicial system. Plaintiff even continues this conduct in his memorandum contra defendants' motion for summary judgment, maligning defendants Strickland and Madison and raising issues that this Court and the Supreme Court have already ruled upon. This conduct rises to the level of harassment and is a strain on the Court's time and patience."

**{¶7}** The court declared appellant to be a vexatious litigator as defined in R.C. 2323.52(A). The court held that unless appellant has leave of court, he is prohibited from instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court, and from continuing any legal proceedings that he had instituted in any of these courts prior to the entry of the order. Appellant assigns twelve errors on appeal:

**{¶8}** "I. THE TRIAL COURT ERRED IN ITS JUDGMENT ENTRY BECAUSE APPELLEES NEVER MET THEIR BURDEN OF CIVIL RULE 56(C). FURTHERMORE, THE TRIAL COURT'S REMEDY SERVED NO JUDICIAL PURPOSE.

**{¶9}** "II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO RESPOND TO NEWLY INTRODUCED ARGUMENTS AND EVIDENCE IN APPELLEES' REPLY MEMORANDUM MOTION FOR SUMMARY JUDGMENT.

**{¶10}** "III. THE TRIAL COURT ERRED WHEN IT RULED A NOTICE OF FRAUD SUPPORTED VEXATIOUS LITIGATION.

**{¶11}** "IV. THE TRIAL COURT ERRED WHEN IT FOUND SUR REPLIES SUPPORTED VEXATIOUS CONDUCT.

**{¶12}** "V. THE TRIAL COURT ERRED WHEN IT CONSIDERED APPELLANT TO BE A VEXATIOUS LITIGATOR FOR REQUESTING APPELLEES' TAX RECORDS.

**{¶13}** "VI. THE TRIAL COURT ERRED WHEN IT CONSIDERED A CONTESTED INCOMPLETE AND UNAUTHENTICATED DOCUMENT AS AN ACT OF COERCION.

**{¶14}** "VII. THE TRIAL COURT ERRED WHEN IT CONSIDERED CORRESPONDENCE BETWEEN APPELLANT AND THE SUPREME COURT.

**{¶15}** "VIII. THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT GUILTY OF VEXATIOUS LITIGATION WHEN IT SUBPOENAED TWO (2) COURT EMPLOYEES TO TESTIFY.

**{¶16}** "IX. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT DISCOVERY RIGHTS AND APPLIED CIVIL RULES UNFAIRLY.

**{¶17}** "X. APPELLANT'S CONDUCT NEVER REACHED THE STANDARD FOR VEXATIOUS LITIGATION.

**{¶18}** "XI. THE TRIAL COURT ERRED WHEN IT DID NOT ALLOW FOR DISCOVERY BEFORE IT RULED ON A MOTION FOR SUMMARY JUDGMENT.

**{¶19}** "XII. THE TRIAL COURT ERRED WHEN IT FOUND FAULT WITH APPELLANT RESPONDING TO APPELLEES' MOTION FOR SUMMARY JUDGMENT."

**{¶20}** Before addressing the assignments of error raised in appellant's brief, we first consider appellees' claim that the order appealed from is not a final, appealable order because it disposes of only a part of the action and does not include language pursuant to Civ. R. 54(B) that there is no just cause for delay.

**{¶21}** Civ. R. 54(B) provides that in the absence of a determination that there is no just reason for delay, an order that adjudicates fewer than all the claims does not terminate the action as to any of the claims.

**{¶22}** However, R.C. 2505.02, the statute governing final appealable orders, provides that an order granting or denying a provisional remedy is a final order:

**{¶23}** "(A)(3) Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

**{¶24}** "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

**{¶25}** "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

**{¶26}** "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

**{¶27}** "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

**{¶28}** The Seventh District Court of Appeals found an order unconditionally denying admission to practice by a nonresident attorney to be appealable under this section of the statute in *Swearingen v. Waste Technologies Industries* (1999), 134 Ohio App. 3d 702, 731 N.E.2d 1229. The court first concluded that the order met the definition of provisional remedy found in R.C. 2505.02(A)(3) because the proceedings that resulted from the motion for admission of the attorney pro hac vice were ancillary in nature, as they were clearly auxiliary to the underlying suit. Id. at 712.

**{¶29}** Having determined that a provisional remedy is at issue, the court determined that both requirements of R.C. 2505.02(B)(4) were met. Subsection (a) was met because the trial court's decision made a final determination as to the motion and prevented a judgment in favor of appellants as to the motion. Id. at 713. The underlying action would have continued and appellants would have been forced to proceed without the aid of counsel as requested. Id. Further, subsection (b) was met

because no meaningful or effective remedy can be provided on a later appeal. Id. The court relied on an Ohio Supreme Court case which held that an order disqualifying counsel could not be effectively reviewed after judgment because it would require a party to meet an "insurmountable burden" of demonstrating that the handling of his case by different counsel would have produced a different result. Id., citing *Russell v. Mercy Hosp*. (1984), 15 Ohio St.3d 37, 40, 472 N.E.2d 695, 697.

**{¶30}** We find the instant order to be a provisional remedy and, therefore, the order is final and appealable under R.C. 2505.02(B)(4). The vexatious litigator proceeding is ancillary to the underlying action filed by appellant. Therefore, it meets the definition of a provisional remedy under R.C. 2505.02(A)(3). Further, the order meets both requirements of R.C. 2505.02(B)(4). The trial court's decision is a final determination as to appellant's vexatious litigator status, not only in the instant action but in all actions in any state court. The order also meets the requirement in subsection (b) that no meaningful or effective remedy can be provided on later appeal. Appellant is prohibited from filing anything in the underlying action without seeking leave of court. R.C. 2323.52(G) provides that a vexatious litigator cannot appeal a decision of the court of common pleas that denies that person leave for the institution, continuance of, or making of an application in any legal proceeding in the court of claims, court of appeals, court of common pleas, municipal court or county court. Therefore, any order denying him leave to file a pleading in the underlying action or in any other action in a state court would not be subject to review on appeal. For these reasons, we find the instant order is a provisional remedy and a final, appealable order as defined by statute.[1]

[1] Although the opinion does not state the reasons, the Third District noted that in a previous journal entry they had determined that the trial court's vexatious litigator declaration was a final appealable order, even

**{¶31}** Having found the order appealed from to be final and appealable, we turn to appellant's assignments of error.

I

**{¶32}** In his first assignment of error, appellant argues that appellees did not meet their evidentiary burden on summary judgment pursuant to Civ. R. 56(C).

**{¶33}** A civil action to have a person declared a vexatious litigator proceeds as any other civil action, and the Rules of Civil Procedure apply to the action. R.C. 2323.52(C).

**{¶34}** An appellate court's review of summary judgment is conducted de novo. See, e.g., *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment was appropriate and need not defer to the trial court's decision. See *Brown v. Scioto Bd. of Commrs*. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153. Thus, in determining whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

**{¶35}** Civ. R. 56(C) provides, in relevant part, as follows:

**{¶36}** "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be

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without Civ. R. 54(B) certification. *Kinstle v. Union County Sheriff's Office*, Union App. No. 14-07-16, 2007-Ohio-6024, fn. 2.

considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

**{¶37}** Therefore, pursuant to that rule, a trial court may not award summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Vahila v. Hall*, 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164, 1997-Ohio-259.

**{¶38}** Summary judgment cannot be granted on a vexatious litigator claim under R.C. 2323.52 when the moving party has failed to submit proper documentation concerning the alleged prior actions between the parties. *Buoscio v. Macejko*, Mahoning App. No. 00-CA-00138, 2003-Ohio-689, ¶34.

**{¶39}** We first address the issue of what evidence was properly before the court on summary judgment. Because the court stated in its judgment that it relied on the "instances of plaintiff's conduct" in this case and in Case No. 05 CV 00120, we limit our review of the evidence to that submitted in relation to those two cases.

**{¶40}** The pleadings filed in the instant case were a part of the record in this case and the court could consider these pleadings in making a determination on summary judgment. However, the record in Case No. 05 CV 00120 is not a part of the record in this case, and the pleadings appellees relied on in that case must be properly before the court as admissible evidence before they may be considered by the court in ruling on the summary judgment motion. E.g., *Nationwide v. Kallberg*, Lorain App. No. 06CA008968, 2007-Ohio-2041, ¶ 20, 22.

**{¶41}** Appellees submitted their original motion for summary judgment with Exhibits A through EE attached. Many of these exhibits purport to be related to Case No. 05 CV 00120. Exhibits B and C were motions bearing the case number 05 CV 00120, but not file-stamped. Exhibit D is a letter from appellant to appellee Madison which appears to make a settlement demand in Case No. 05 CV 00120. Exhibit I is a copy of the complaint filed in the case, file stamped January 27, 2005. Exhibits J through V are all pleadings bearing the case number, but none of the copies show a file stamp from the clerk of courts. Exhibit W is a judgment entry on a motion to supplement filed by appellant, file-stamped August 8, 2008, with handwritten notations on it. Exhibit X is appellant's second amended complaint in the case, file-stamped September 22, 2005.

**{¶42}** Civ. R. 56(E) governs the type of evidence permitted on summary judgment:

**{¶43}** "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the

affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. . . ”

**{¶44}** After appellant objected to the trial court that the evidence attached to the motion was not properly before the court, appellees filed a motion alleging that the court may take judicial notice of the pleadings filed in cases in the Common Pleas Court. Appellees further attached the affidavit of Kristin Rosan, a member of the firm of Madison & Rosan, LLP, which was a defendant in the case, and co-counsel for appellees Garner, Strickland and Coldwell Banker King Thompson in the instant action and in 05 CV 00120. The affidavit provides in pertinent part:

**{¶45}** “6. The facts outlined in the Counterclaim and Defendants’ Motion for Summary Judgment relate to the cases filed by Plaintiff in this court and other courts across central Ohio and are available as public records. I personally reviewed the documents and the statements made therein and therefore have personal knowledge as to their contents. The documents attached as exhibits to Defendants’ Motion for Summary Judgment, and attached hereto and incorporated herein as Exhibits A-EE, are true and accurate copies of pleadings and/or letters sent or filed by Plaintiff in this court and other courts.

**{¶46}** “7. All facts outlined in Section II, Part A of the Motion for Summary Judgment are true and based upon my personal knowledge of the Plaintiff’s actions and filings in either the above-styled case, Licking County Common Pleas Case No. 05 CV 120, or Licking County Municipal Court Case No. 04-CVF-00225. The corresponding documents attached as exhibits to Defendants’ Motion for Summary Judgment and

incorporated herein, are true and accurate copies of pleadings and/or letters sent or filed by Plaintiff in this court or the Licking County Municipal Court.

**{¶47}** "8. All the facts outlined in Section II, Part B of the Motion for Summary Judgment are based upon my personal review of public records filed by Plaintiff in the other cases he has filed in courts throughout Ohio. These facts are true and accurate quotes to the best of my personal knowledge based upon my personal review of the pleadings and documents. The corresponding documents attached as exhibits to Defendants' Motion for Summary Judgment, and incorporated herein, are true and accurate copies of pleadings and/or letters sent or filed by Plaintiff in this court and other courts.

**{¶48}** "9. All documents attached to the Motion are true and accurate copies (except parts that are redacted) of either letters sent to me by Plaintiff or copies of pleadings filed by Plaintiff."

**{¶49}** We note that the court did not state that it was taking judicial notice of any of the pleadings in Case No. 05 CV 00120. Further, the court could not take judicial notice of such pleadings. This Court has stated in dicta that we agreed with the proposition that the trial court can take judicial notice of prior lawsuits filed in its own court. *Lansing v. Hybud Equipment Co*., Stark App. No. 2002CA00112, 2002-Ohio-5869, ¶16. A trial court can take judicial notice of the court's docket. *State v. Washington* (August 27, 1987, Cuyahoga App. Nos. 52676, 52677, 52678 at 15. However, a court does not have the authority to take judicial notice of the proceedings in another case, including its own judgment entries. Eg., *State v. LaFever*, Belmont App. No. 02 BE 71, 2003-Ohio-6545, ¶27; *State v. Blaine*, Highland App. No. 03CA9,

2004-Ohio-1241, ¶17; *Diversified Mortgage Investors, Inc. v. Athens Cty. Bd. of Revision* (1982), 7 Ohio App.3d 157, 454 N.E.2d 1330; *NorthPoint Properties, Inc. v. Petticord*, 179 Ohio App.3d 342, 2008-Ohio-5996, ¶16. The rationale for this holding is that if a trial court takes notice of a prior proceeding, the appellate court cannot review whether the trial court correctly interpreted the prior case because the record of the prior case is not before the appellate court. Eg. *Blaine*, supra, ¶17; *LaFever*, supra, ¶27; *Buoscio*, supra, ¶34.

**{¶50}** In *Joyce v. Godale*, Geauga App. No. 2006-G-2692, 2007-Ohio-473, the appellee relied on the affidavit of the prosecuting attorney in support of his motion for summary judgment on a vexatious litigator claim. In her affidavit, the attorney represented that she had been involved as counsel in three cases in common pleas court and five before the court of appeals involving appellant. She averred that her personal examination of the case filings revealed twenty-three separate instances in which appellant made certain arguments. Attached to her affidavit were docket sheets from five actions involving appellant, as well as a judgment entry finding appellant in contempt of court. The Court of Appeals held that her affidavit was insufficient under Civ. R. 56(E) because none of the papers relied upon by her in making the affidavit, including the docket sheets, were sworn or certified. Id. at ¶22. Without proper Civ. R. 56 evidence in the record, the court held that there was no basis for the trial court to grant summary judgment. Id.

**{¶51}** The instant case is slightly different from *Joyce* in that Ms. Rosan averred that the documents were true and accurate copies of the originals. However, most of the documents purporting to be pleadings do not facially demonstrate a file-stamp from

the clerk of courts and none of the documents are certified by the custodian as true and accurate copies of the originals. A parties' attorney is not competent to authenticate public records. *Central Ohio Neurological Surgeons, Inc., v. Rose* (September 11, 1997), Franklin App. No. 96APE11-1611, unreported, at page 3.

**{¶52}** In addition, a generic certification of a group of documents, even when given by the proper custodian of said documents, is insufficient to properly authenticate the documents. *State v. Strausser*, Mahoning App. No. 03 MA 70, 2004-Ohio-1729, ¶18. The purpose behind the certification requirement is to assure that the document is a true and accurate copy of the original, and this goal is defeated when the certification fails to specifically identify the document in question because it presents the appearance that the step of actually comparing the copy with the original has been omitted. Id., citing *Aurora v. Lesky* (1992), 79 Ohio App.3d 568, 571, 607 N.E.2d 908. Thus, there are no indicia of reliability that the custodian actually compared the copy with the original in order to assure that it is what it purports to be. Id.

**{¶53}** The affidavit, by which appellees attempted to authenticate the Exhibits attached to their motion, contains a similar generic certification, not only of the pleadings, but also of the letters sent to various parties. We further note that in paragraph 9 of the affidavit, Ms. Rosan avers that the documents are true and accurate copies "except parts that are redacted." Such a representation contradicts her earlier representations that the documents are all true and accurate copies of pleadings based on her personal review of the filings in the cases. We further note that she does not represent that she personally compared each document to the original on file with the clerk of courts, but only that she reviewed the documents filed in appellant's cases and

has personal knowledge of their contents. Thus, even if she were competent to certify the documents, the affidavit falls short of a proper authentication of the documents as pleadings filed in Case No. 05 CV 00120.

**{¶54}** Because the court relied on improper evidentiary material from Case No. 05 CV 00120 in granting summary judgment, the first assignment of error is sustained.

**{¶55}** Assignments of error two through twelve all relate to the court's summary judgment. They are rendered moot by our ruling on assignment of error one.

**{¶56}** The summary judgment of the Licking County Common Pleas Court is vacated. This cause is remanded to that court for further proceedings according to law.

By: Edwards, J.

Farmer, P.J. and

Wise, J. concur

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JUDGES

JAE/r0811

**[Cite as *Helfrich v. Madison*, 2009-Ohio-5140.]**

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| JAMES HELFRICH<br><br>Plaintiff-Appellant | : | |
| -vs- | : | JUDGMENT ENTRY |
| TIMOTHY G. MADISON, et al.,<br><br>Defendants-Appellees | : | CASE NO. 08-CA-150 |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is vacated, and this matter is remanded to the trial court for further proceedings. Costs assessed to appellees.

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JUDGES