[Cite as *Estate of Davis v. Spriggs*, 2010-Ohio-5740.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ESTATE OF THOMAS G. DAVIS, et al.

Plaintiff-Appellee

-vs-

CLAUDIA SPRIGGS

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 10CAF010004

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 05DRB030087
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 19, 2010

APPEARANCES:

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Wise, J.

{¶1} This is an appeal by Defendant-Appellant Claudia Spriggs from the December 17, 2009, Judgment Entry of the Delaware County Common Pleas Court overruling her objections to the Magistrate's Decision.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts are as follows:

{¶3} Claudia Spriggs and Thomas G. Davis were married on January 9, 1999, and divorced on May 25, 2005.

{¶4} During their marriage, Spriggs allowed Davis to take intimate photographs of her using a digital camera. According to Spriggs, she agreed only to the taking of digital pictures and not to digital video recordings. (Spriggs Depo. at 47-49, 50, 54, 56-57).

{¶5} As part of the separation agreement contained in the Divorce Decree, the parties agreed that they "will not distribute, disseminate, copy, duplicate, or in any other way disclose to anyone any photographs, or electronic images of the other party which either accumulated, collected, gathered, intercepted, obtained or otherwise come into possession of, whether by legal or other means or methods." The Decree provided for sanctions in the form of "attorney fees, expert fees, costs to repair and resolve the problem, and any additional costs or expenses related to sanction awarded by the Court in a Motion for Contempt."

{¶6} In July, 2005, Spriggs received a number of e-mails to both her personal and work accounts containing vulgar content and links to a members-only, adult content website which contained intimate photographs of her. She subsequently learned that

more photographs were posted to the website in August and September, 2005, and video was posted on a related website. Spriggs also discovered pictures of Davis' current girlfriend on these websites.

{¶7} Spriggs contacted these websites in an attempt to have the images removed but was told that the images could only be removed by the person who posted them. When she inquired as to the identity of the person who posted the images, she was informed that such would only be provided at the request of law enforcement.

{¶8} Spriggs initiated a "Jane Doe v. John Doe" lawsuit in the Franklin County Court of Common Pleas through which she issued subpoenas to Verizon Wireless, Yahoo, AOL and the owner of the company which ran the adult websites. This lawsuit was dismissed by the court.

{¶9} On October 4, 2005, Spriggs also filed a contempt action in the Delaware County Court of Common Pleas in Case No. 05-DRB-03-087, which is the subject of the instant appeal, claiming that Davis violated the terms of the May 25, 2005, by posting the above referenced pictures to the adult websites,

{¶10} On February 24, 2006, Davis filed a separate lawsuit in the Delaware County Court of Common Pleas based on Spriggs' actions in the *Doe* lawsuit. Spriggs filed a counterclaim in this case asserting claims for invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, civil conspiracy, libel per se and spoliation.[1]

{¶11} On January 23, 2006, Spriggs served Davis with First Set of Interrogatories and First Set of Requests for Production of Documents, seeking in part

[1] This action is the subject of a separate appeal before this Court. See *Thomas G. Davis v. Claudia L. Spriggs*, Delaware App. No. 09 CAE 09 0082.

production of credit card statements and computers. On May 19, 2006, Davis filed objections and responses to Spriggs' First Set of Interrogatories and First Set of Request for Production of Documents. On June 28, 2006, Spriggs filed a Motion to Compel Davis to provide further responses to Interrogatories and Request for Production of Documents, including credit card statements and computers.

{¶12} On March 6, 2006, Spriggs filed an Emergency Motion to Compel Plaintiff's Computers and Discovery Responses. On March 31, 2006, after opposing Spriggs' motion, Davis filed his own Motion for Emergency Order related to production of computers and, on April 14, 2006, Davis filed a Motion for an Order Concerning Discovery of Computer Matters. On June 28, 2006, the Magistrate granted Spriggs' Motion to Compel and issued an Entry compelling Davis to produce "… all of his computers and laptops that he has used or had access to from 2003 to present …" within 10 days. The court stated that it would "assess costs associated with the forensic imaging at the conclusion of the trial of this matter."

{¶13} On July 12, 2006, Spriggs filed a Motion for Sanctions regarding Davis' failure to comply with Court's Discovery Order.

{¶14} On February 21, 2007, Judge Whitney signed an Entry ordering both parties to produce "all his/her computers or laptops … from 2003 to present …" Spriggs complied with Order. Davis failed to comply.

{¶15} On May 1, 2007, Spriggs filed a Motion for Sanctions to Establish Designated Facts due to Davis' failure to obey Judge's Order of February 21, 2007. No opposition was filed to this motion.

{¶16} On May 15, 2007, Appellee produced what he claimed were all of his computers.

{¶17} On May 17, 2007, a combined Status Conference was held with both the trial judge and magistrate attending, and sitting together at the bench, at which counsel for Appellee informed the court that Appellee had produced all of his computers for cloning and forensic imaging.

{¶18} On May 24, 2007, the trial court signed a Judgment Entry requiring the Parties to exchange mirror images of their computers to each other's expert. The trial court also signed an Entry ordering Plaintiff to produce his credit card statements.

{¶19} On July 10, 2007, Spriggs filed a Motion for Sanctions against Davis and his Attorneys for Failure to Obey Judge's Order based on spoliation of evidence, arguing that Appellee had used multiple data shredding applications on his computers and other tasks designed to purposely destroy data and/or prevent preservation of data prior to turning them over for discovery.

{¶20} On July 26, 2007, Davis filed a response requesting an extension of time to conduct discovery to prepare a response; however no response was ever filed. The Magistrate continued the Contempt Hearing, and indicated this motion would be addressed in February, 2008. After testimony at the Contempt Hearing, Spriggs filed a Memorandum in Support of Motion for Sanctions for Spoliation of Evidence to supplement the facts and arguments put forth in the original motion.

{¶21} On September 12, 2007, Davis filed a Stipulated Judgment Entry, permitting Spriggs "to view all of the computer files contained on the mirror images of Plaintiff Thomas G. Davis."

{¶22} On February 27 through March 6, 2008, the Contempt Hearing was held.

{¶23} On March 10, 2008, the Magistrate's Decision was filed. In said decision, the Magistrate held, inter alia, that Thomas Davis was not "in contempt of court for distributing, disseminating, copying, or duplicating any photographs or electronic images of [Appellant] after May 25, 2005, the date of the divorce."[2]

{¶24} On April 23, 2008, Appellant filed Objections to the Magistrate's Decision based on the Magistrate's failure to rule on her motions. Appellee also filed Objections to the Magistrate's Decision.

{¶25} On December 17, 2009, the trial judge entered a Judgment Entry, overruling Appellant Spriggs' Objections and sustaining Appellee's objections. The trial court also modified the Magistrate's Decision. In said Judgment Entry, the trial court reviewed the filing of each of Appellant's motions for sanctions and the disposition thereof, finding that each motion had been addressed or was now moot. The trial court further found that "[t]here was not clear and convincing evidence that [Appellee] distributed photographs of [Appellant]. However, it is noted that clearly [Appellant] violated the provision by showing the photographs to [Appellee's] mother as well as others." [3]

{¶26} Appellant now appeals, assigning the following errors for review:

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[2] The magistrate did, however, find Mr. Davis in contempt for failing to deliver certain personal property to Appellant and further ordered him to pay $2,000 for attorney fees for the expense of the motion in contempt for failing to deliver same.

[3] The trial court further found that Mr. Davis was not in contempt for failing to return certain personal items to Ms. Spriggs, finding that the these items were not awarded to her in the divorce decree. The trial court likewise found that Mr. Davis was not required to pay attorney fees in relation to same.

ASSIGNMENTS OF ERROR

{¶27} "I. THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S SPRIGGS' OBJECTIONS IN THE JUDGMENT ENTRY BY FINDING THAT THE FOLLOWING MOTIONS FILED BY SPRIGGS WERE EITHER MOOT OR HEARD AT THE CONTEMPT HEARING, AND THEREFORE ADOPTED AS THOUGH SET FORTH IN THE MAGISTRATE'S DECISION:

{¶28} "1) EMERGENCY MOTION TO COMPEL PLAINTIFF'S COMPUTERS.

{¶29} "2) SPRIGGS' MOTION TO COMPEL FURTHER RESPONSES.

{¶30} "3) MOTION FOR SANCTIONS DUE TO FAILURE TO COMPLY WITH COURT'S DISCOVERY ORDERS.

{¶31} "4) MOTION FOR SANCTIONS TO ESTABLISH FACTS AND FOR ATTORNEY FEES DUE TO FAILURE TO OBEY JUDGE'S ORDER OF FEBRUARY 21, 2007.

{¶32} "5) MOTION FOR SANCTIONS (DUE TO DISCOVERY OF SPOLIATION ON COMPUTERS) FOR FAILURE TO COMPLY WITH JUDGE'S ORDER.

{¶33} "6.) DEFENDANT'S OBJECTIONS TO MAGISTRATE'S ORDER OF APRIL 9, 2008, RELATING TO SPOLIATION ISSUES, ETC.

{¶34} "7.) JUDGMENT ENTRY OVERRULING SPRIGGS' OBJECTIONS, AND SUSTAINING DAVIS' OBJECTIONS.

{¶35} "II. THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT DID NOT FIND BY CLEAR AND CONVINCING EVIDENCE THAT APPELLEE WAS IN CONTEMPT OF COURT."

I.

{¶36} In her first assignment of error, Appellant argues that the trial court erred in overruling her objections to the Magistrate's Decision concerning the failure to rule upon certain motions. We disagree.

{¶37} Specifically, Appellant argues that the trial court erred in finding that her motions were either moot or had been heard at the contempt hearing; that her motions for sanctions and spoliation were heard at the contempt hearing; and, that she did not receive due process and a fair hearing.

{¶38} Civ.R. 53 governs magistrates. Subsection (D)(4)(d) states the following:

{¶39} "If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate."

{¶40} When ruling upon a party's objections, the trial court may "adopt, reject or modify the magistrate's decision ..." Civ.R. 53(E)(4)(b), in relevant part. When reviewing an appeal from the trial court's ruling on objections to a magistrate's decision, this Court must determine whether the trial court abused its discretion in reaching its decision. *Wade v. Wade* (1996), 113 Ohio App.3d 414, 419. An abuse of discretion is defined as "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio

St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

{¶41} Upon review, there is no indication in this case that the trial court failed to consider Appellant's objections. As stated above, the trial court, upon reviewing Appellant's objections to the Magistrate's Decision, found that each of Appellant's motions for sanctions had either been ruled upon or had been rendered moot. In said Entry, the trial court set forth the procedural history of the contempt action, listing the nature and date of filing of each of Appellant's motions, the date each was filed, and the Judgment Entries which addressed said motions. Included in these motions was Appellant's July 10, 2007, Motion Pursuant to Rule 37(B)(2)(a) for an Order Establishing Designated Facts Against Plaintiff, Thomas G. Davis, for his Failure to Obey the Judge's Order of February 21, 2007, alleging "willful and intentional spoliation of evidence". The trial court found that "[a]ll pending motions came on for evidentiary hearing" on February 27th, 28th, 29th and March 5th and 6th.

{¶42} Based on the foregoing, we find that the trial court did not err in finding that Appellant's motions had been heard and considered.

{¶43} Appellant further contends that she was denied due process and a fair hearing "due to frat-boy antics, locker room banter, and high school wisecracks." (Appellant's brief at 18).

{¶44} Appellant failed to raise this argument in her objections to the magistrate's decision. Such a failure constitutes a waiver of any alleged error resulting from the

magistrate's decision. *Proctor v. Proctor* (1988), 48 Ohio App.3d 55, 58, 548 N.E.2d 287. This result is in accordance with the general rule that an appellate court will not consider any error that the party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such an error could have been corrected or avoided by the trial court. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 24 O.O.3d 316, 436 N.E.2d 1001.

{¶45} Furthermore, the proper forum for these types of allegations is the disciplinary counsel, not the appellate court.

{¶46} Appellant's first assignment of error is overruled.

II.

{¶47} In her second assignment of error, Appellant argues that the trial court erred in not finding Appellee in contempt. We disagree.

{¶48} Ohio courts have defined contempt of court as "conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815, paragraph one of the syllabus. Our standard of review regarding a finding of contempt is limited to a determination of whether the trial court abused its discretion. *Wadian v. Wadian,* Stark App.No. 2007CA00125, 2008-Ohio-5009, ¶ 12, citing *In re Mittas* (Aug. 6, 1994), Stark App.No. 1994 CA 00053.

{¶49} An appellate court's standard of review of a trial court's contempt finding is abuse of discretion. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 573 N.E.2d 62. In order to find an abuse of discretion, we must determine the trial court's

decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶50} The burden of proof in a civil contempt action is proof by clear and convincing evidence. *Jarvis v. Bright,* Richland App. No. 07CA72, 2008-Ohio-2974 at ¶ 19, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 416 N.E.2d 610. The determination of "clear and convincing evidence" is within the discretion of the trier of fact.

{¶51} We further note the trier of fact is in a far better position to observe the witnesses' demeanor and weigh their credibility. See, e.g., *Taralla v. Taralla,* Tuscarawas App.No. 2005 AP 02 0018, 2005-Ohio-6767, ¶ 31, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶52} Upon review, we do not find an abuse of discretion on the part of the trial court. The trial court held a hearing on the motion for contempt and heard testimony and evidence for five days in this matter. The trial court had before it evidence from both parties' experts as what was found on the parties' computers, and what programs had been run, if any, to destroy or eliminate any damaging evidence. Evidence was also presented as to when the photographs at issue in this case were uploaded onto the adult websites.

{¶53} The trial court then reviewed the allegations set forth in Appellant's Amended Motion for Contempt along with the relevant sections of the parties' Separation Agreement, finding that "there was not clear and convincing evidence that [Appellee] distributed the photographs of [Appellant].

{¶54} Based on the evidence presented, the trial court found that there was no evidence that any photographs or videos were posted on any of the subject websites after the date of the divorce decree.

{¶55} Additionally, evidence was presented as to the use of the Evidence Eliminator program on Appellee's computers. Testimony was presented that it would not be unusual for someone in Appellee's line of work, who has sensitive information on his computer, to use this type of program on a regular basis. Testimony was also presented that the program was set in a default mode which would cause the program to run automatically upon startup of the computer. The trial court therefore could have found a rational basis for the existence of the Evidence Eliminator program on Appellee's computers and further find that Appellee did not use such program with the purpose to intentionally destroy evidence.

{¶56} Upon review of the record and the trial court's Judgment Entry, we do not find the trial court abused its discretion in finding that there was not clear and convincing evidence that Appellee had violated the divorce decree and that therefore he was not in contempt of court in this matter.

{¶57} Appellant's second assignment of error is overruled.

{¶58} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., concurs.

Hoffman, J., concurs in part and dissents in part.

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JUDGES

JWW/d 1021

Hoffman, J., concurring in part and dissenting in part

{¶59} I concur in the majority's decision to overrule Appellant's second assignment of error. I further concur in the majority's decision to overrule Appellant's first assignment of error, except as it relates to Appellant's motions for sanctions due to Appellee's repeated failure to timely comply with the trial court's orders to produce his computers and, specifically, for sanctions due to spoliation. Although some of the motions listed by Appellant in her first assignment may have been heard and addressed by the magistrate, I disagree with the trial court those mentioned above were rendered moot by the ruling Appellee was not in contempt.

{¶60} In its discussion of Appellant's second assignment of error, the majority refers to testimony which it finds could have allowed the trial court to find a rational basis for the existence of the Evidence Eliminator on Appellee's computer (Majority Opinion at para. 55). While I do not disagree, the trial court's determination some of Appellant's motions were moot suggests the trial court never made such a determination, let alone when the Evidence Eliminator was placed on Appellee's computers and Appellee's purpose, in whole or part, for doing so.

{¶61} Given the fact Appellee repeatedly ignored and/or delayed complying with numerous court orders for production of his computer and the undisputed fact information was deleted during the delay, I would reverse the trial court's finding these motions were moot and remand the case to the trial court for further consideration.

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HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ESTATE OF THOMAS G. DAVIS, et al.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CLAUDIA SPRIGGS	:	
Defendant-Appellant	:	Case No. 10CAF010004

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES