[Cite as *Caghan v. Caghan*, 2015-Ohio-1787.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PAUL CAGHAN

Plaintiff-Appellant

-vs-

JEFFREY CAGHAN, et al.

Defendants-Appellees

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

Case No. 2014 CA 00094

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 2013 CV 02148

JUDGMENT: Affirmed in Part; Reversed in Part

DATE OF JUDGMENT ENTRY: May 11, 2015

APPEARANCES:

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Wise, J.

{¶1} Plaintiff-Appellant Paul Caghan appeals the October 25, 2013, decision of the Stark County Common Pleas Court granting summary judgment and judgment on the pleadings in favor of Appellees, the February 13, 2014, Judgment Entry finding Plaintiff-Appellant to be a vexatious litigator, and the May 20, 2014, finding in favor of Appellee's on their motion for frivolous conduct sanctions and awarding attorney fees.

{¶2} Appellees are Neil Genshaft, Fresh Mark, Inc. (f.k.a. Superior's Brand Meats, Inc.), Sugardale Foods Incorporated, Sugardale Foods, Inc., Superior Computer Services, Inc. (f.k.a. Sugardale Foods, Inc.), Superior Provisions Co. (f.k.a. Superior's Brand Meats, Inc.), and Superior's Brand Meats, Inc. (n.k.a. Fresh Mark, Inc.) (the "Genshaft Defendants", Jeffrey Caghan, Ann Cyncynatus and Country Lane Foods (the "Caghan Defendants"), CCS Realty Co., Cloverleaf Cold Storage Co. (Iowa), Cloverleaf Cold Storage Co. (Ohio), K-F Real Estate Co. (the "CCS Realty Defendants) and Susan Caghan, Linda Crescimano and Prime ProData, Inc. (the "Prime Defendants").

STATEMENT OF THE FACTS AND CASE

{¶3} On August 14, 2013, Plaintiff-Appellant Paul Caghan filed a complaint alleging fraud and breach of fiduciary duty against his siblings, Jeffrey Caghan, Susan Caghan and Lisa Crescimano as well as numerous corporate entities, including Prime ProData Inc., which Plaintiff-Appellant alleged were either owned, controlled or managed by the individual defendants.[1]

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[1] Appellant originally filed an identical action against the same defendants in Illinois Circuit Court on September 30, 2010, but the Complaint was dismissed for lack of personal jurisdiction. See *Caghan v. Caghan*, Ill. App. No. 1-11-1508, 2012 WL 6955683 (Sept. 13, 2012).

{¶4} In his Complaint, Plaintiff-Appellant alleged, inter alia, the existence of a fraud conspiracy wherein Appellees made false statements and fraudulently concealed assets with regard to Country Lane Foods, Inc.'s assets, including the "real estate, fixtures, equipment, production lines, accounts receivable, goods and services contracts, profits, income, dividends and stock" in which he "had a material financial interest" by diverting the assets to the various corporate defendants named in the Complaint. Plaintiff-Appellant further alleged that Susan Caghan and Jeffery Caghan made false statements to him intended to make him believe that the business was in financial ruin. He further alleged that Susan Caghan and Jeffery Caghan "arranged the phony foreclosure of Country Lane Foods, Inc.'s manufacturing plant and freezer warehouse…to defraud plaintiff." Plaintiff-Appellant alleges that the mismanagement of Country Lane Foods, Inc. and the purported concealment and misrepresentation of Plaintiff-Appellant's shares in the Trust of their deceased mother (the Elaine Caghan Trust) and the Estate of their deceased father, Allen E. Caghan, was designed to deprive him of his interest in Country Lane Foods, Inc.

{¶5} Plaintiff-Appellant alleged that on April 14, 1999, his sister, Susan, made an oral misrepresentation when she visited Plaintiff-Appellant at his Chicago home and informed him that "[t]he business just dried up after Dad died. Jeff ran the business into the ground. There's nothing left. The bank is threatening to foreclose on the plant to pay Dad's old debts." Plaintiff-Appellant alleged that Jeffrey made a similar misrepresentation on November 24, 2001, in Canton, Ohio, when he said: "I guess I just mishandled the business. I feel like I let the family down. Things are really bad now." The complaint further alleged that although his siblings' unlawful conduct happened

years prior to the filing of the complaint, Plaintiff-Appellant had “no reasonable opportunity to discover the defendants’ fraud until on or after February 15, 2010, when he discovered that the foreclosure of Country Lane’s real estate was phony and the company was still operating.”

{¶6} As a result of his siblings' fraudulent actions, Plaintiff-Appellant alleged that he suffered “substantial damages in the form of economic and pecuniary losses, lost dividends, capital expenditures, capital contributions, equity, business opportunities, contracts, distributions, returns, interest appreciation, compensatory damages and special damages, and those losses will continue in the future.”

{¶7} On August 22, 2013, the Genshaft Defendants submitted an Answer denying liability, asserting numerous affirmative defenses, and raising counterclaims for "abuse of process" and "vexatious litigator." At the same time, they filed a Motion for Summary Judgment, asserting that they were entitled to judgment as a matter of law on the grounds that (1) Plaintiff-Appellant’s former bankruptcy filing implicated the doctrine of judicial estoppel, (2) the four-year statute of limitations imposed by R.C. §2305.09 was violated, and (3) all claims were barred by *re judicata* as a result of earlier probate proceedings.

{¶8} On August 23, 2013, the Genshaft Defendants also submitted a Supplemental Memorandum reasserting that the fraud claims were time barred and disputing that the discovery rule could be applied.

{¶9} On August 27, 2013, the Genshaft Defendants filed a Second Supplemental Memorandum raising the statute of limitations defense in greater detail

and further describing the lawsuit as an "outrageously frivolous action" and charging Plaintiff-Appellant with being a "vexatious litigator".

{¶10} On September 16, 2013, the Caghan Defendants submitted their Answer denying liability. The Caghan Defendants also contemporaneously moved for summary judgment.

{¶11} Separate Answers were also filed by Defendants Linda Crescimano, Prime ProData, and Susan Caghan.

{¶12} The Defendants also filed counterclaims against Appellant, seeking to have him declared a vexatious litigator and seeking damages for his frivolous filing of the Complaint.

{¶13} On September 17, 2013, the Prime Defendants submitted a Motion for Judgment on the Pleadings, arguing that an immediate termination on Counts One and Two was justified on the basis of (1) judicial estoppel, (2) statute of limitations violations, and (3) *res judicata.*

{¶14} On September 17, 2013, the Genshaft Defendants filed their own Motion for Judgment on the Pleadings, adopting by reference the positions that had been asserted by the Prime Defendants.

{¶15} On September 17, 2013, the CCS Realty Defendants submitted their own Answer and Counterclaims for Abuse of Process and Vexatious Litigator and a motion for summary judgment, which adopted the Genshaft Motion by reference.

{¶16} On September 18, 2013, Plaintiff-Appellant filed a Motion pursuant to Civ.R. 56(F) seeking a period of thirty days in which to depose Defendants Neil

Genshaft and Susan Caghan and otherwise conduct the discovery he argued was necessary to oppose the application for summary judgment.

{¶17} On September 20, 2013, the Genshaft Defendants opposed Plaintiff-Appellant's motion in a Memorandum Contra and Motion to Strike, arguing *inter alia* that no discovery should be permitted as requested by Plaintiff-Appellant.

{¶18} On September 23, 2013, Plaintiff-Appellant filed an Amended Complaint. The Amended Complaint did not include the second and third counts of fraud/breach of fiduciary duties and promissory estoppel. Plaintiff-Appellant also submitted a second Motion seeking discovery under Civ.R. 56(F).

{¶19} Plaintiff-Appellant alleges that all of the conduct that provided the basis for his Amended complaint occurred "from on or about June 1, 1998 to the present", although he alleged the same conduct occurred "from on or about October 1979 to the present" in both his original Complaint and in the Complaint filed in the Illinois action.

{¶20} Plaintiff-Appellant also made substantially the same fraud allegation against Defendants-Appellees Jeffery Caghan and Susan Caghan in 1990 during the pendency of the Allen E. Caghan Estate in the Stark County Probate Court Case No. 134484. Said Estate was opened October 12, 1988, and closed August 20, 1996.

{¶21} In an Entry dated September 30, 2013, the trial court denied Plaintiff-Appellant leave to conduct discovery to oppose the pending motions for summary judgment.

{¶22} Plaintiff-Appellant was permitted to file the First Amended Complaint and the parties were permitted to submit supplemental briefs by October 11, 2013.

{¶23} The Defendants-Appellees' Answers to the Amended Complaint then followed, and Defendants-Appellees' Supplemental Memoranda were submitted on October 10 and 11, 2013, reiterating their prior positions.

{¶24} In response, Plaintiff-Appellant filed motions to strike Defendants-Appellees' supplemental memoranda. Defendants responded by filing motions in opposition to Plaintiff-Appellant's motions to strike.

{¶25} On October 25, 2013, the trial court granted Defendants-Appellees' motions for summary judgment and judgment on the pleadings.

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

ASSIGNMENTS OF ERROR

{¶27} "I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY GRANTING JUDGMENT ON THE PLEADINGS AGAINST PLAINTIFF-APPELLANT UNDER AUTHORITY OF CIV.R. 12(C).

{¶28} "II. GIVEN THE GENUINE ISSUES OF MATERIAL FACT THAT HAD BEEN ESTABLISHED THROUGH PLAINTIFF-APPELLANTS' [sic] AFFIDAVITS AND SUPPORTING MATERIALS, SUMMARY JUDGMENT WAS ERRONEOUSLY GRANTED IN VIOLATION OF CIV.R. 56(C).

{¶29} "III. THE TRIAL JUDGE ABUSED HER DISCRETION, TO PLAINTIFF-APPELLANT'S CONSIDERABLE DETRIMENT, BY REFUSING TO PERMIT HIM TO CONDUCT DISCOVERY AS ALLOWED BY CIV.R. 56(F) TO OPPOSE THE PENDING MOTIONS FOR SUMMARY JUDGMENT.

{¶30} "IV. THE TRIAL JUDGE ERRED AS A MATTER OF LAW, AND OTHERWISE ABUSED HER DISCRETION, IN DETERMINING THAT PLAINTIFF-APPELLANT WAS A VEXATIOUS LITIGATOR UNDER R.C. 2323.52(A)(3).

{¶31} "V. THE TRIAL JUDGE COMMITTED ADDITIONAL LEGAL ERRORS, AND FURTHER ABUSED HER DISCRETION, BY IMPOSING SANCTIONS AGAINST PLAINTIFF-APPELLANT TOTALING $141,475.63 THROUGH CIV.R. 11 AND R.C. 2323.51."

I.

{¶32} In his First Assignment of Error, Appellant argues that the trial court erred in granting judgment on the pleadings to the Prime ProData Defendants. We disagree.

{¶33} Motions for judgment on the pleadings are governed by Civ.R. 12(C), which states: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." *State ex rel. Pirman v. Money,* 69 Ohio St.3d 591, 592, 635 N.E.2d 26 (1994); *Trinity Health Sys. v. MDX Corp.,* 180 Ohio App.3d 815, 2009–Ohio–417. Because a trial court may only consider the complaint, answer, and any documents attached to those pleadings when it rules on a Civ.R. 12(C) motion, it is very limited in its ability to review and discuss the facts of a case. *Trinity Health Sys.* at ¶17, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious,* 75 Ohio St.3d 565, 569, 664 N.E.2d 931 (1996); *Rothschild v. Humility of Mary Health Partners,* 163 Ohio App.3d 751, 2005–Ohio–5481, 840 N.E.2d 258, ¶ 6 (7th Dist.). A judgment on the pleadings dismissing a case is proper where the trial court "(1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt,

that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *Pontious* at 570, 664 N.E.2d 931.

{¶34} The purpose of a Civ.R. 12(C) motion for judgment on the pleadings is to resolve questions of law. *Whaley v. Franklin Cty. Bd. Of Commrs.,* 92 Ohio St.3d 574, 581, 2001–Ohio–1287, 752 N.E.2d 267; *Peterson v. Teodosio,* 34 Ohio St.2d 161, 297 N.E.2d 113, 117 (1973). In ruling on the motion, the trial court must consider only the statements contained in the pleadings. *Workman v. Franklin Cty.,* 10th Dist. Franklin No. 00AP–1449, 2001 WL 988005 (Aug. 28, 2001) (citations omitted).

{¶35} A judgment on the pleadings is warranted where the plaintiff has failed to allege the material facts necessary to establish that the plaintiff is entitled to judgment as a matter of law. *State ex rel. Pirman v. Money,* 69 Ohio St.3d 591, 592–93, 635 N.E.2d 26 (1994).

{¶36} Here, the Prime ProData Appellees were granted judgment on the pleadings pursuant to Civ.R 12(C). Therefore Appellant is "entitled to have all the material allegations of the complaint, together with all reasonable inferences drawn therefrom, construed in his favor." *Whaley* at 581, 752 N.E.2d 267.

{¶37} When reviewing a trial court's judgment on the pleadings, the appellate court engages in a de novo standard of review without deference to the trial court's determination. *Drozeck v. Lawyers Title Ins. Corp.,* 140 Ohio App.3d 816, 820.

Judicial Estoppel

{¶38} The trial court found Appellant's claims herein were barred by the doctrine of judicial estoppel. The doctrine of judicial estoppel "forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same

party in a prior proceeding." *Greer–Burger v. Temesi,* 116 Ohio St.3d 324, 2007–Ohio–6442, 879 N.E.2d 174, at paragraph 25 (Citations omitted). "The doctrine applies only when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court." *Id.* As noted by the court in *Greer–Burger* at paragraph 25:

> Courts have applied this doctrine when inconsistent claims were made in bankruptcy proceedings that predated a civil action. Cf. *Wallace v. Johnston Coca–Cola Bottling Group, Inc.* (Mar. 26, 2007), S.D.Ohio No. 1:06–cv–875, 2007 WL 927929, 4 (plaintiff barred from proceeding with discrimination claim for failure to disclose the claims to the United States Bankruptcy Court); *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter, L.P.A.,* 148 Ohio App.3d 440, 2002–Ohio–3328, 773 N.E.2d 1081, ¶ 38 (where client had twice successfully asserted its position that financing statements were not misleading, once before bankruptcy court and again before federal district court, plaintiff was precluded from asserting statements were misleading in legal malpractice action); 331 *Guidoumbouzianii v. Johnson* (Mar. 26, 1997), 1st Dist. No. C–960597, 1997 WL 133363, 1 (position that party did not have contingent real-estate claim to schedule in bankruptcy proceeding precludes party from asserting that claim in later judicial proceeding); *Bruck Mfg. Co. v. Mason* (1992), 84 Ohio App.3d 398, 401, 616 N.E.2d 1168 (failure to state litigation as asset in bankruptcy proceedings prevents debtor from asserting claim for money in later proceeding).

{¶39} *See also*: *Davidson v. M. Conley Co.* 5th Dist., Stark County, Case No. 2008CA00031, 2008-Ohio-5886; *Brown v. Nationwide Property & Cas. Ins. Co.*, 5th Dist., Stark County, Case No. 2014CA00037, 2014-Ohio-5057;

{¶40} Appellant stated in his Complaint that, at the latest, he was aware of such claims in February, 2010, and in fact filed a lawsuit in September, 2010, raising such claims. This was well before the filing of his March 19, 2013, Bankruptcy Petition wherein he failed to list the claim. Appellant's knowledge of such claim is further evidenced by the filing of the Complaint in the instant action less than a week after the close of his Bankruptcy case. By pursuing this claim which was not disclosed as an

asset in the bankruptcy, Appellant took a contrary position, under oath, which was accepted by the court.

{¶41} Based on the reasoning set forth in *Greer-Burger, supra*, we find Appellant was judicially estopped from pursuing the instant claim based on his failure to list same on his Voluntary Petition in the U.S. Bankruptcy Court.

<u>Statute Of Limitations</u>

{¶42} In addition to Appellant's claim being barred by the doctrine of judicial estoppel, we also find same to be barred by the statute of limitations.

{¶43} A judgment on the pleadings may also be proper when the statute of limitations has run. *McGlothin v. Schad,* 194 Ohio App.3d 669, 2011-Ohio-3011, 957 N.E.2d 810 (12th Dist.). In determining the proper statute of limitations for a cause of action, the court must review the complaint to determine the essential character of the claim: "[I]n determining which limitation period will apply, courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial." *Love v. Port Clinton,* 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988); *see also, Doe v. First United Methodist Church,* 68 Ohio St.3d 531, 629 N.E.2d 402 (1994)

{¶44} In the instant case, Appellant's Complaint contains only one count, sounding in fraud, or breach of fiduciary duty as argued by the Prime ProData Appellees.

{¶45} The statute of limitations for both a fraud action or a breach of fiduciary duty action is four years as set forth in R.C. §2305.09.

{¶46} R.C. §2305.09 also contains a discovery rule for certain torts, including fraud. The General Assembly's failure to extend this discovery rule to all torts covered by R.C. §2305.09 indicates that the General Assembly did not intend the discovery rule to apply to those claims. *Investors REIT One v. Jacobs,* 46 Ohio St.3d 176, 181 (1989). R.C. §2305.09(D) determines the statute of limitations for claims for breach of fiduciary duty. *Wells* at ¶ 26. Because R.C. §2305.09 does not name claims for breach of fiduciary duty as claims that accrue only upon discovery, the discovery rule does not toll the statute of limitations for those claims. *Marks v. Reliable Title Agency,* 7th Dist. No. 11 MA 22, 2012–Ohio–3006, ¶ 14; *Dodd v. KeyBank,* 8th Dist. No. 85949, 2006–Ohio–93, ¶ 25; *Holloway v. Holloway Sportswear, Inc.,* 3d Dist. No. 17–98–20 (June 7, 2001); *Jim Brown Chevrolet, Inc. v. S.R. Snodgrass, A.C.,* 141 Ohio App.3d 583, 587 (11th Dist.2001); *Binsack v. Hipp,* 6th Dist. No. H–97–029 (June 5, 1998); *Herbert v. Banc One Brokerage Corp.,* 93 Ohio App.3d 271, 273–75 (1st. Dist.1994). “A claim for breach of fiduciary duty accrues when the claimant's interest is impaired by such a breach, rather than when the breach is discovered.” *Wells* at ¶ 29; *accord Union Savings Bank v. Lawyers Title Ins. Corp.,* 191 Ohio App.3d 540, 2010–Ohio–6396, ¶ 28 (“[A] claim for breach of fiduciary duty accrues when the act or omission constituting the breach actually occurs and the discovery rule does not apply to such claims”).

{¶47} A review of the Complaint reviews that all of the fraudulent conduct which Appellant alleges took place well outside of the four-year limitation period, fatal for a claim for breach of fiduciary duty.

{¶48} Even applying the discovery rule, if the claim is characterized as fraud instead of breach of fiduciary duty, this Court finds that Appellant certainly had

knowledge of the facts in November, 2008, when his then attorney made a written inquiry to Appellee Genshaft concerning the same matter as set forth in Appellant's Complaint filed in September, 2010, in Illinois. It could also be argued that Appellant at least had constructive knowledge of these claims as early as 1990, during the administration of the Caghan Estate and ensuing litigation, when Appellant raised claims alleging that Susan Caghan and Jeffrey Caghan had engaged in self-dealing and other wrongdoing with regard to the assets of Country Lane Foods, Inc.

{¶49} Based on the foregoing, this Court finds that the trial court did not err in finding that Appellant's Complaint was barred by the applicable statute of limitations.

{¶50} Appellants' First Assignment of Error is overruled.

II.

{¶51} In his Second Assignment of Error, Appellant argues that the trial court erred in granting summary judgment. We disagree.

Standard of Review as to Motions for Summary Judgment

{¶52} We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

{¶53} Summary judgment shall be rendered forthwith if the pleading, 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.* * * A summary judgment shall not be rendered unless it appears from such 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, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶54} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶55} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt,* 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶56} In this case, Appellant argues that Appellees failed to provide appropriate Civ.R. 56(C) evidence in support of their motions for summary judgment. Appellant further argues that the trial court incorrectly took judicial notice of “unidentified public records”.

{¶57} Upon review, we find that Appellant failed to respond or otherwise oppose or rebut the motions for summary judgment filed by Appellees, instead choosing to file only motions to strike the supplemental memoranda filed by Appellees as directed by the trial court.

{¶58} Further, we find that the trial court's consideration of the public documents in this case was not error.

{¶59} Evid.R. 201, **Judicial notice of adjudicative facts** provides:

> **(A) Scope of rule**
> This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.
> **(B) Kinds of facts**
> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> **(C) When discretionary**
> A court may take judicial notice, whether requested or not.
> **(D) When mandatory**
> A court shall take judicial notice if requested by a party and supplied with the necessary information.
> **(E) Opportunity to be heard**
> A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

{¶60} "Although this court's ability to take judicial notice is not unbridled, we may take judicial notice of findings and judgments as rendered in other Ohio cases." *State ex rel. Kolkowski v. Bd. of Commrs. of Lake Cty.,* 11th Dist. No. 2008-L-138, 2009-Ohio-2532, at ¶38. "[J]udicial notice" may be taken of "public court records available on the internet." *Id*. *NorthPoint Properties, Inc. v. Petticord*, 179 Ohio App.3d 342, 350-351.

{¶61} We review decisions by a trial court regarding judicial notice under an abuse of discretion standard. *See Molitor v. Gaddis* (Aug. 25, 1999), Morrow App. No. CA 875, 1999 WL 770688.

{¶62} Both the trial court and this Court can take judicial notice of court filings which are readily accessible from the internet. *In re Helfrich,* 5th Dist. Licking No.

13CA20, 2014–Ohio–1933, ¶ 35, citing *State ex rel. Everhart v. McIntosh,* 115 Ohio St.3d 195, 2007–Ohio–4798, 974 N.E.2d 516, ¶ 8, 10 (court can take judicial notice of judicial opinions and public records accessible from the internet).

{¶63} Upon review, we find Appellant failed to request an opportunity to be heard on the propriety of taking judicial notice in this case pursuant to Evid.R. 201(E). Consequently, Appellant "waived or forfeited any challenge to the judicially-noticed facts." *State v. Howard,* 12th Dist. No. CA2009–11–144, 2010–Ohio–2303, ¶ 23.

{¶64} Upon review, we therefore find no abuse of discretion in the trial court's decision in this instance. Appellant's Second Assignment of Error overruled.

III.

{¶65} In his Third Assignment of Error, Appellant argues that the trial court erred in refusing to allow him to conduct discovery pursuant to Civ.R. 56(F). We disagree.

{¶66} Civ.R. 56(F) provides that, "[s]hould it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had."

{¶67} Civ.R. 56(F) permits a party to request additional time to obtain through discovery the facts necessary to adequately oppose a motion for summary judgment. *Carolina Tobacco Co. v. Petro,* 10th Dist. No. 04AP–1125, 2006–Ohio–1205. The party moving for a continuance pursuant to Civ.R. 56(F) " 'bears the burden of establishing why the party cannot present sufficient facts to justify its opposition to a motion for summary judgment without a continuance.' " *Foxfire Village Condominium Unit Owners'*

Assn. v. Meyer, 10th Dist. No. 13AP–986, 2014–Ohio–3339, ¶ 13, quoting *Ford Motor Credit Co. v. Ryan,* 189 Ohio App.3d 560, 2010–Ohio–4601, ¶ 100 (10th Dist.). " 'The moving party cannot meet this burden with mere allegations; rather, the moving party must aver in an affidavit a particularized factual basis that explains why further discovery is necessary.' " *Foxfire* at ¶ 13, quoting *Ford* at ¶ 100.

{¶68} A trial court's decision on discovery matters is reviewed under an abuse of discretion standard. *Mauzy v. Kelly Servs., Inc.,* 75 Ohio St.3d 578, 592, 1996–Ohio–265, 664 N.E.2d 1272. 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,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶69} In the case *sub judice*, we find that there was no factual dispute as to the legal issues in this case, and the trial court did not err in finding that Appellant's proposed discovery would not assist him in opposing the motions for summary judgment.

{¶70} Appellant's Third Assignment of Error is overruled.

IV.

{¶71} In his Fourth Assignment of Error, Appellant argues the trial court erred in finding Appellant to be a vexatious litigator pursuant to R.C. §2323.52(A)(3). We agree.

{¶72} R.C. §2323.52 Vexatious litigators

{¶73} (A) As used in this section:

{¶74} (1) "Conduct" has the same meaning as in section 2323.51 of the Revised Code.

{¶75} (2) "Vexatious conduct" means conduct of a party in a civil action that satisfies any of the following:

{¶76} (a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action.

{¶77} (b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

{¶78} (c) The conduct is imposed solely for delay.

{¶79} (3) "Vexatious litigator" means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions. "Vexatious litigator" does not include a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio unless that person is representing or has represented self pro se in the civil action or actions.

{¶80} The purpose of the vexatious litigator statute is clear. It seeks to prevent abuse of the system by those persons who persistently and habitually file lawsuits without reasonable grounds and/or otherwise engage in frivolous conduct in the trial courts of this state. Such conduct clogs the court dockets, results in increased costs, and oftentimes is a waste of judicial resources -- resources that are supported by the taxpayers of this state. The unreasonable burden placed upon courts by such baseless

litigation prevents the speedy consideration of proper litigation. *Mayer v. Bristow,* 91 Ohio St.3d 3, 13, 740 N.E.2d 656 (2000), quoting *Cent. Ohio Transit Auth. v. Timson,* 132 Ohio App.3d 41, 50, 724 N.E.2d 458 (10th Dist.1998).

{¶81} The statute was designed to curb "the untoward effects of vexatious litigation in depleting judicial resources and unnecessarily encroaching upon the judicial machinery needed by others for the vindication of legitimate rights." *Mayer* at 13, 740 N.E.2d 656. To this end, the vexatious-litigator statute " '[a]t its core * * * establishes a screening mechanism that serves to protect the courts and other would-be victims against frivolous and ill-conceived lawsuits filed by those who have historically engaged in prolific and vexatious conduct in civil proceedings.' " *Mayer* at 13, 740 N.E.2d 656.

{¶82} "[S]eparate, repetitive actions are not necessary for a vexatious litigator finding, and such finding can be based upon actions in a single case." *Roo v. Sain,* Franklin App. No. 04AP–881, 2005-Ohio-2436, 2005 WL 1177940, at ¶ 18, citing *Farley v. Farley,* Franklin App. No. 02AP–1046, 2003-Ohio-3185, at ¶ 48. A person may be declared a vexatious litigator as long as the person uses the courts to engage in vexatious conduct. *Borger v. McErlane* (Dec. 14, 2001), Hamilton App. No. C–010262, 2001 WL 1591338, at 3. "It is the nature of the conduct, not the number of actions, that determines whether a person is a vexatious litigator." *Id.* The purpose of the vexatious litigator statute is to prevent abuse of the system by those persons who persistently and habitually file lawsuits without reasonable grounds for doing so. *Mayer v. Bristow* (2000), 91 Ohio St.3d 3, 13, 740 N.E.2d 656. The statute is not designed to prevent vexatious litigators from proceedings on legitimate claims, but instead establishes a

screening mechanism under which the vexatious litigator can petition the court for a determination of whether the proposed claim is legitimate. *Id.* at 14, 740 N.E.2d 656.

{¶83} Given the purpose and design of the vexatious-litigator statute, it makes sense that "the consistent repetition of arguments and legal theories that have been rejected by the trial court numerous times can constitute vexatious litigation." *Farley v. Farley,* 10th Dist. Franklin No. 02AP-1046, 2003-Ohio-3185, ¶ 46.

{¶84} Here, in support of their argument that Appellant is a vexatious litigant, Appellees argue that the allegations in this case are similar to the allegations made in both the Illinois action and repeatedly over the course of eight years of litigation in the Probate Court actions, as well as the serial filings in the instant action.

{¶85} With regard to the filings in the instant case, Appellees contend that Appellant filed numerous motions and memoranda without any basis in the law. Appellees cite this Court to Appellant's actions in filing four, nearly identical Civ.R. 56(F) motions within a six-day period, seeking exactly the same relief.

{¶86} Initially, we find that Appellant's bankruptcy case, filed in the federal court system, cannot and will not be used in determining whether Appellant is a vexatious litigant. "[T]he vexatious litigation to which the statute has reference is aimed at proceedings 'in the court of claims, or in a court of common pleas, municipal court or county court' and does not apply to federal cases, cases between other parties or legislative and administrative proceedings." *Carr v. Riddle* (2000), 136 Ohio App.3d 700, 704, 737 N.E.2d 976, citing *Cent. Ohio Transit Auth. v. Timson* (1998), 132 Ohio App.3d 41, 724 N.E.2d 458 (federal cases cannot be used as evidence to support a finding that a person is a vexatious litigator).

{¶87} Appellant also filed two Complaints, the instant case and the previous action in the State of Illinois. We find that because the Illinois action was dismissed for lack of personal jurisdiction, that same cannot be considered for purposes of this analysis.

{¶88} That leaves us with Appellant's actions in the instant case. This Court has reviewed the lower court case and finds that while it is true that Appellant filed four separate Civ.R. 56(F) motions for discovery, each motion sought time for discovery to respond to each of the motions for summary judgment and/or motion for judgment on the pleadings filed by the four sets of Appellees. Additionally, Appellant filed a number of motions to strike the supplemental responses. Again each of the motions was directed to a different set of Appellees.

{¶89} This Court finds that declaring Appellant a vexatious litigant is an extreme measure which should only be granted when there is no nexus between the filings made by the Appellant and his intended claims. While the motions filed by Appellant may have seemed redundant, this Court finds that a characterization of same as "serial" is not accurate in that each of the motions was directed to a separate set of Appellees. This Court is mindful of Appellees' and the trial court's frustration in this matter, but it cannot declare Appellant a vexatious litigant on a motion for summary judgment simply because he filed a motion for discovery and a motion to strike. Likewise, the trial court cannot declare Appellant to be a vexatious litigant solely because he filed a lawsuit that Appellees consider frivolous.

{¶90} For the foregoing reasons, the Court hereby finds that Appellees have not met the criteria in R.C. §2323.51(A)(2) and we therefore find that the trial court erred in granting Appellees' motion for summary judgment on the issue of vexatious litigation.

{¶91} Appellant's Fourth Assignment of Error is sustained.

V.

{¶92} In his Fifth Assignment of Error, Appellant argues that the trial court erred in imposing sanctions against him in the amount of $141,475.63 pursuant to Civ.R. 11 and R.C. §2323.51. We disagree.

{¶93} Ohio law provides two separate mechanisms for an aggrieved party to recover attorney fees, court costs, and other reasonable expenses arising out of frivolous conduct: R.C. §2323.51 and Civ.R. 11. *ABN AMRO Mtge. Group, Inc. v. Evans,* 8th Dist. Cuyahoga No. 98777, 2013–Ohio–1557, ¶ 15 citing *Sigmon v. S.W. Gen. Health Ctr.,* 8th Dist. Cuyahoga No. 88276, 2007–Ohio–2117, ¶ 14. Although both provisions allow for the award of sanctions, they have separate standards of proof and differ in application. *Id.*

{¶94} The trial court herein based its decision on R.C. §2323.51, which reads, in pertinent part:

> ***
>
> (2) "Frivolous conduct" means either of the following:
>
> (a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other party's counsel of record that satisfies any of the following:
>
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper

> purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (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.
>
> (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.
>
> (iv) The conduct consists of denials or 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.

{¶95} A motion for sanctions pursuant to R.C. §2323.51 requires a three-step analysis by the trial court: (1) whether the party engaged in frivolous conduct, (2) if the conduct was frivolous, whether any party was adversely affected by it, and (3) if an award is to be made, the amount of award. *Tipton v. Directory Concepts.*, 5th Dist., Richland App. No. 13CA61, 2014-Ohio-1215, citing *Ferron v. Video Professor Inc.,* 5th Dist. Delaware No. 08–CAE–09–0055, 2009–Ohio–3133. The question of what constitutes frivolous conduct may be either a factual determination, or a legal determination. *Pingue v. Pingue,* 5th Dist. Delaware No. 06–CAE–10–0077, 2007 WL 2713763 (Sept. 18, 2007), citing *Wiltberger v. Davis,* 110 Ohio App.3d 46, 673 N.E.2d 628 (10th Dist.1996). A determination that the conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law requires a legal analysis. *Lable & Co. v. Flowers,* 104 Ohio App.3d 227, 661 N.E.2d 782 (9th Dist.1995).

{¶96} In determining whether a claim itself is frivolous under the statute, the test is whether no reasonable lawyer would have brought the action in light of the existing law. *Orbit Elecs., Inc. v. Helm Instrument Co.,* 167 Ohio App.3d 301, 2006–Ohio–2317, ¶ 49 (8th Dist.) (citation omitted).

{¶97} "[A]n appellate court applies an abuse-of-discretion standard with respect to a trial court's decision to award attorney fees on the basis that frivolous conduct has adversely affected a party." *Bowling v. Stafford & Stafford Co., L.P.A.,* 1st Dist. Hamilton No. C–090565, 2010–Ohio–2769, ¶ 8

{¶98} Plaintiff-appellant asserts that his suit against Appellees was founded on good faith allegations and was therefore not legally groundless.

{¶99} Upon review, based on its findings that same was barred by judicial estoppel and the statute of limitations, we find that the trial court did not abuse its discretion in finding that Appellant had "engaged in frivolous conduct in this action, including, but not limited to, the filing of the Complaint against the Genshaft, Cloverleaf, and Prime ProData Defendants."

{¶100} The trial court further found Appellees were "adversely affected by having incurred legal fees and expenses." The trial court then went on to find, "based upon the testimony of the expert witness", that "such legal fees and expenses were reasonable and necessary and were otherwise in full compliance with the Rules of Professional Conduct."

{¶101} Appellant argues that Appellees were required to affirmatively demonstrate that fees and expenses were actually incurred "as a direct, identifiable

result of defending the frivolous conduct in particular" citing *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46.

{¶102} As noted by this Court in *Mid–Ohio Mechanical v. Eisenmann Corp.,* 5th Dist. Guernsey Nos. 07 CA 000035, 08 CA 00012, 2009–Ohio–5804, R.C. §2323.51 was altered by the amendments in subtle but significant ways. In *Eisenmann,* this Court found that, "[t]he amendment to the statute clearly removed the requirement that fees be necessitated by the frivolous conduct, and replaced it with language allowing a party to recover attorney's fees 'reasonably incurred' by a party in a civil action." *Eisenmann* at ¶ 157; *see* R.C. 2323.51(B)(3). This Court found reliance on *Wiltberger*'s specific holding after the statute's amendment was "misplaced." *Id.; see also Helfrich v. Madison,* 5th Dist. Licking No. 2011–CA–89, 2012–Ohio–3701, ¶¶ 46–51.

{¶103} The First District Court of Appeals agreed with this distinction in *Bowling v. Stafford & Stafford Co., L.P.A.,* 1st Dist. Hamilton No. C–090565, 2010–Ohio–2769, ¶ 14, where it held that since R.C. 2323.51 had been amended it "require[d] proof only that the fees had been 'incurred in connection with the civil action' in which the frivolous conduct had occurred. Under the amended statute, the requirement that the expenditures be specifically 'necessitated by the frivolous conduct' applies only to court costs and expenses, not to attorney fees." *Bowling* at ¶ 14.

{¶104} At the sanctions hearing in this case, Appellant was not present but was represented by counsel. During the hearing, Appellees presented testimony of an expert witness, Attorney Michael Thompson, who testified that he had reviewed the detailed invoices for legal fees submitted by each of the sets of Appellees and found that the time spent by each was reasonable and necessary. He also testified that the hourly

rates charged by each of the attorneys involved in defending this case was reasonable based on their background and experience. Additionally, Mr. Thompson testified that it was his opinion that Appellant's conduct in this matter constituted frivolous conduct under R.C. §2323.51. (T. at 16).

{¶105} Counsel for Appellant cross-examined the witness but did not challenge the number of hours expended or the hourly rates charged by Appellees' attorneys. Counsel for Appellee did not put on any evidence in support of their position that Appellant's conduct in this case was not frivolous.

{¶106} Upon review, under the abuse of discretion standard, we do not find the trial court erred in finding Appellant's actions in this matter to be frivolous, nor do we find error in the award of sanctions. In this case there was a clear financial impact on Appellees for having to defend against Appellant's complaint. The trial court acted within its discretion to determine that attorney's fees had been reasonably incurred in this case by defending against the frivolous conduct. Therefore, Appellant's argument on this issue is not well-taken.

{¶107} Appellant's Fifth Assignment of Error overruled.

{¶108} For the foregoing reasons, the decision of the Court of Common Pleas of Stark County, Ohio, is affirmed in part and reversed in part.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

JWW/d 0428