

[Cite as *Gardner v. Bisciotti*, 2010-Ohio-5875.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jennifer J. Gardner, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-375
 : (C.P.C. No. 99DR-01-235)
 Rudy A. Bisciotti, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on December 2, 2010

Kokensparger & Ryan, LLC, Corinne N. Ryan, and Steven J. Kokensparger, for appellee.

Rudy A. Bisciotti, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

SADLER, J.

{¶1} Appellant, Rudy A. Bisciotti ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas, Division of Domestic Relations, granting the motion of appellee, Jennifer J. Gardner ("appellee"), for a finding that appellant was in contempt of court for failing to abide by the terms of the court's decree of dissolution issued on March 4, 1999, and court orders regarding appellant's

visitation with appellant and appellee's minor child. For the reasons that follow, we affirm.

{¶2} The decree of dissolution incorporated the terms of an amended separation agreement that included as one of its terms that the parties would not "molest, harass, disturb, torment, interfere with or annoy" each other in any manner, and would regularly consult with each other regarding their daughter's education, health, and welfare, and all issues relating thereto. On March 27, 2000, the trial court signed an agreed entry regarding visitation issues. The agreed entry included, among other provisions, terms that required appellant to: (1) successfully complete alcohol counseling, (2) refrain from consuming alcohol for at least eight hours prior to any visitation with his daughter, (3) refrain from consuming alcohol during any visitation with his daughter, (4) attend and complete a parenting class, and (5) refrain from calling appellee more than once a day. The agreed entry also included provisions requiring both appellant and appellee to refrain from making any derogatory, disrespectful or non-cordial comments about the other in front of their daughter, and to refrain from calling each other before 8:00 a.m. or after 9:00 p.m.

{¶3} On August 8, 2008, appellee filed a motion asking the trial court to find appellant in contempt of those provisions of the amended separation agreement and the agreed entry regarding visitation. In the motion, appellee alleged that appellant had engaged in a series of harassing phone calls multiple times per day that included profane language and multiple threats. The motion also alleged that appellant had failed to attend the required parenting classes, did not immediately seek and complete substance abuse counseling, and had appeared to be intoxicated during parenting

times with their daughter. The motion sought a finding of contempt and sought payment of attorney fees in connection with the filing of the motion.

{¶4} On November 14, 2008, appellant filed a motion styled as a motion to compel appellee to comply with the terms of the divorce decree and amended separation agreement. Appellant argued that appellee had begun taking their daughter to counseling without consulting him. Although the motion did not seek a finding of contempt, appellant sought to recover attorney fees for the cost of bringing the motion.

{¶5} On February 2, 2009, appellee filed a second motion for contempt. In the motion, appellee alleged that since the filing of the first motion for contempt, appellant had continued to make harassing telephone calls.

{¶6} The trial court referred the case to a magistrate for further proceedings. On March 10, 2009, the magistrate issued a decision regarding a hearing held on February 9. The magistrate's decision made a number of modifications to the visitation schedule, and included orders directing appellant to attend a parenting class and to participate in chemical dependency counseling. The magistrate's decision also dismissed appellant's motion to compel appellee's compliance with the amended separation agreement because appellant had failed to appear for the hearing.

{¶7} On April 21, 2009, the magistrate held a hearing on the two motions for contempt filed by appellee. Appellant and appellee both testified at the hearing regarding communications between the parties. Appellee testified regarding a number of e-mails, voicemail messages, and text messages she had received from appellant in which appellant expressed a great deal of anger directed at appellee. Appellee also offered as evidence recordings of some of the voicemail messages left by appellant. In

his questioning of appellee, appellant focused not on the allegations set forth in the contempt motions, but instead on whether appellee had been negligent in an incident in which their daughter fell down a set of stairs on her first birthday, and on whether appellee was improperly holding herself out to be a certified public accountant. Appellant also argued that appellee had herself violated the court's orders by failing to consult with appellant before obtaining counseling for their daughter, and was therefore barred from seeking a finding of contempt against appellant based on the equitable doctrine of "unclean hands."

{¶8} On June 16, 2009, the magistrate issued a decision. The magistrate concluded that appellee had failed to prove by clear and convincing evidence that appellant had violated the provisions of the court's orders regarding counseling, substance abuse counseling, and parenting classes because appellee had not offered any evidence on those issues. The magistrate found that appellee had proven by clear and convincing evidence that appellant had violated the court's orders by making derogatory, disrespectful, and non-cordial comments about appellee in front of their daughter; by making telephone calls to appellee before 8:00 a.m. or after 9:00 p.m., and by telephoning appellee more than one time per day; and by molesting, harassing, disturbing, tormenting, interfering with, and annoying appellee.

{¶9} The magistrate's decision included an extensive discussion regarding appellant's argument that appellee was prohibited from seeking a finding of contempt based on the equitable doctrine of unclean hands. The magistrate recognized that the unclean hands doctrine can apply in domestic relations cases, but concluded that appellant had failed to offer evidence that appellee's purported wrongful conduct related

both to appellee and to the basis for which appellee sought a finding of contempt. The magistrate also concluded that the unclean hands doctrine does not apply where the party claiming it has legal remedies available to address the opposing party's wrongful conduct, and that appellant had such a remedy by way of filing his own motion for contempt against appellee.

{¶10} Finally, the magistrate concluded that appellee's reasonable and necessary attorney fees in pursuing the motions totaled \$1,500. The magistrate therefore ordered appellant to pay that amount as a result of the contempt. The magistrate also ordered appellant to serve a sentence of 14 days in the Franklin County jail, but suspended that sentence on the condition that appellant purge himself of the contempt by paying the \$1,500 within 60 days.

{¶11} Appellant filed objections to the magistrate's decision, arguing that the magistrate erred in failing to cite decisions rendered by the Supreme Courts of the United States and Ohio, as well as other Ohio cases cited by appellant, regarding the unclean hands doctrine. Appellant also argued that appellee had continued to violate the court's orders by failing to answer or return phone calls he had made for the purpose of discussing their daughter's well-being. Appellant also took issue with a judgment entry that had been issued by the trial court after the magistrate's decision had been issued, but before the expiration of the time for filing objections, pursuant to Civ.R. 53, and argued that appellee's attorney had falsified the date of service on the second motion for contempt.

{¶12} On October 6, 2009, the trial court held a hearing on appellant's objections to the magistrate's decision. On March 22, 2010, the trial court issued a decision and

entry overruling appellant's objections to the magistrate's decision and adopting the magistrate's decision as the court's own.

{¶13} Appellant filed this appeal, asserting three assignments of error:

1. ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY IGNORING AND FAILING TO FOLLOW THE CONTROLLING LAW FROM THE UNITED STATES SUPREME COURT.

2. ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY FAILING TO REVIEW AND CONSIDER TESTIMONY AND EVIDENCE OFFERED BY APPELLANT IN OPPOSITION TO APPELLEE'S MOTIONS FOR CONTEMPT.

3. ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY FAILING TO COMPLY WITH THE MANDATORY REQUIREMENTS OF RULE 40(A)(2) AND/OR 40(A)(3) OF THE OHIO RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO.

{¶14} In his first assignment of error, appellant argues that the trial court failed to follow United States Supreme Court case law regarding the unclean hands doctrine. In support of this argument, appellant points to the fact that neither the magistrate nor the trial court cited a case that had been cited by appellant, *Keystone Driller Co. v. Gen. Excavator Co.* (1933), 290 U.S. 240, 54 S.Ct. 146. However, a trial court's failure to cite a particular case in its decision does not automatically constitute reversible error, and does not mean the trial court has ignored the legal principles set forth in a particular

cited case. The issue here is not what cases the trial court cited, but whether the trial court properly applied the unclean hands doctrine in this case.

{¶15} The unclean hands doctrine generally provides that when a party takes the initiative to set in motion a judicial action in order to obtain some remedy, the court will deny the remedy where the party seeking it has acted in bad faith by his or her prior conduct. *Marinero v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42. Ohio courts have recognized that the doctrine may be applied in domestic relations cases. See *Trott v. Trott*, 10th Dist. No. 01AP-852, 2002-Ohio-1077; *Safranek v. Safranek*, 8th Dist. No. 80413, 2002-Ohio-5066.

{¶16} In order for the doctrine to bar a party's claims, that party must be found to be at fault both in relation to the other party and in relation to the transaction upon which the claims are based. *Trott*. In other words, for the unclean hands doctrine to apply in this case to bar appellee's motion for contempt against appellant, there must be some relationship between appellee's alleged misconduct and her claim that appellant has engaged in misconduct amounting to contempt.

{¶17} For example, *Trott* involved one party to a divorce decree, the wife, seeking a finding of contempt based on the husband's refusal to allow her to speak to their children during a visitation period, and the husband's failure to inform her that he and the children were vacationing in Florida. The husband argued that her claim for contempt was barred by the unclean hands doctrine because the wife had improperly taken marital property in violation of a restraining order. We rejected the argument that the unclean hands doctrine applied because the action that formed the basis for the alleged contempt, the husband's refusal to allow the wife to speak to the children and

failure to inform her regarding the vacation, had no relation to the wife's improper taking of marital property. *Id.* at *15. See also *Bean v. Bean* (1983), 14 Ohio App.3d 358 (unclean hands doctrine barred wife's claim for contempt based on husband's failure to sell jewelry as called for by the divorce decree because the wife's retention of the jewelry prevented the husband from abiding by the decree).

{¶18} In this case, even assuming that appellee's failure to consult appellant regarding counseling for their daughter constituted a violation of the court's orders, that violation was not related to appellant's alleged violation of the court's orders. Consequently, the trial court properly concluded that the unclean hands doctrine did not bar appellee's motion for contempt.

{¶19} Moreover, Ohio courts have consistently held that the unclean hands doctrine does not apply in cases where a party has legal remedies available to address the misconduct of the party seeking the contempt finding. *Deutsche Bank Natl. Trust Co. v. Pevarski*, 187 Ohio App.3d 455, 2010-Ohio-785. In this case, appellant filed a motion which, although designated as a motion seeking to compel appellee to comply with the court's orders regarding consultation about counseling for their daughter, actually was a motion seeking a finding of contempt given appellant's request for a recovery of attorney fees incurred in filing the motion. The motion was dismissed based on appellant's failure to appear for a hearing that was to include consideration of that motion. Thus, appellant had an adequate remedy available to address appellee's purported misconduct, but chose not to pursue that remedy.

{¶20} Accordingly, appellant's first assignment of error is overruled.

{¶21} In his second assignment of error, appellant argues that the trial court failed to review testimony and evidence he submitted regarding appellee's contempt motion. Specifically, appellant points to testimony from the April 21, 2009 hearing, in which appellant: (1) stated that his purpose in calling appellee was not to harass her, but was simply to make inquiries regarding the health, education, and welfare of their daughter; (2) stated that he was concerned about the safety of their daughter, but had not been informed who their daughter's pediatrician was; and (3) asserted his right to be kept informed about issues regarding their daughter. Appellant also points to affidavits he attached to memoranda he submitted in opposition to appellee's two contempt motions, in which appellant stated that appellee had refused to consult with him on issues regarding their daughter.

{¶22} The trial court was not required to cite every piece of evidence or testimony offered in its decision, and the fact that a particular piece of evidence or testimony was not mentioned does not mean it was ignored. In fact, some of the evidence and testimony cited by appellant relates to appellant's argument that appellee had violated the court's orders by failing to adequately consult with him regarding their daughter's health, education, and welfare. Thus, the trial court did address that evidence and testimony in its discussion regarding the inapplicability of the unclean hands doctrine.

{¶23} Although not specifically worded as such in his assignment of error, it appears that appellant is arguing that the trial court's finding of contempt against him was against the manifest weight of the evidence. We disagree. Notwithstanding appellant's assertion that his actions were motivated solely by concern for his daughter,

the magistrate heard testimony that appellant repeatedly violated the terms of the court's orders regarding number and timing of telephone calls. The magistrate also heard evidence that appellant made derogatory, disrespectful, and non-cordial comments regarding appellee in front of their daughter, and had evidence before her sufficient to support the conclusion that appellant had violated the terms of the court's orders prohibiting him from molesting, harassing, disturbing, tormenting, interfering with, and annoying appellee. In fact, at the hearing before the magistrate, appellant did not contest any of the factual allegations made by appellee, but instead focused on his allegations that appellee was improperly holding herself out to be a certified public accountant, and that appellee's negligence had resulted in their daughter suffering injuries a number of years earlier.

{¶24} Consequently, the magistrate did not err in concluding that appellee provided clear and convincing evidence regarding appellant's violation of the court's orders, and the trial court did not err in adopting the magistrate's decision. Accordingly, appellant's second assignment of error is overruled.

{¶25} In his third assignment of error, appellant argues that the trial court committed reversible error by failing to issue its decision in accordance with Ohio Sup.R. 40(A)(2) and (3). Those rules provide that cases submitted to a trial court for decision shall be decided within 90 days of the date of the case's submission, and motions shall be ruled upon within 120 days of the date of filing. Appellant argues that, regardless of whether appellee's motion for contempt is categorized as a submitted case or a motion, the trial court did not render its decision within the timeframes required by the rule, and that this failure requires reversal of the trial court's decision.

{¶26} The Rules of Superintendence are intended only to serve as guidelines for the courts of Ohio, and are not intended to create substantive rights on the part of the individual litigants in a case. *State v. Mahoney* (1986), 34 Ohio App.3d 114; *State v. Cornwell*, 7th Dist. No. 00-CA-217, 2002-Ohio-5177. Thus, even if the trial court's decision was rendered outside the timelines set forth in Ohio Sup.R. 40(A)(2) and (3), appellant is not entitled to reversal of the trial court's decision on that basis.

{¶27} Therefore, appellant's third assignment of error is overruled.

{¶28} Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

McGRATH and CONNOR, JJ., concur.
