Nos. L-98-1053, L-08-1333
Court of Appeals of Ohio, Sixth District, Lucas County

Pheils v. Palmer

2009 Ohio 6342
Decided Dec 4, 2009

Nos. L-98-1053, L-08-1333.

Decided: December 4, 2009.

Trial Court No. CI 95-1150.

David Pheils, pro se.

David Palmer, et al., pro se.

Timothy C. James for appellant Ok Sun Palmer.

DECISION AND JUDGMENT

HANDWORK, P.J.

{¶ 1} This cause comes before the court on appeal from a judgment of the Lucas County Court of Common Pleas. *2

{¶ 2} The parties to this appeal have a history of extensive litigation. See, e.g., *Pheils v. Palmer* (Mar. 29, 1999), 6th Dist. No. L-98-1092; *Pheils v. Palmer* (May 14, 1993), 6th Dist. No. L-91-426. Initially, appellee, David R. Pheils, Jr., and his law firm represented OK Sun Palmer in litigation arising from an automobile accident in Michigan in 1987. *Palmer v. David R. Pheils, Jr. Associates*, 6th Dist. No. WD-01-010, 2002-Ohio-3422, ¶ 2. Then, in 1991, appellants, OK Sun and David Palmer, sued Pheils and his associates for breach of privilege, defamation, and invasion of privacy. Id. at ¶ 4. Part of their action addressed the purportedly excessive fees charged by appellee in the original negligence action.

{¶ 3} In 1995, Pheils instituted the instant defamation action against appellants. Appellee claimed that appellants made the defamatory statements with actual malice. Appellee also sought compensatory and punitive damages for intentional infliction of emotional distress, and civil conspiracy. He also asserted that David Palmer trespassed upon appellee's property. David Palmer filed counterclaims against appellee alleging claims of malicious prosecution, fraud, and defamation.

{¶ 4} After a jury trial, the court entered judgment in favor of appellee, awarding him $110,000 on the defamation claim, $10,000 on the civil conspiracy claim, and $800 on the claim of the infliction of intentional emotional distress. The jury also awarded Pheils $120,000 in punitive damages. The jury further found in favor of appellee on the claims raised by appellants. Final judgment was entered by the common pleas court on December 23, 1997. *3

{¶ 5} Appellant, David Palmer, appeals that judgment and sets forth the following assignments of error:

{¶ 6} "I. TRIAL COURT ERRED WHEN IT ADMITTED SURVEILLANCE EVIDENCE AT THE TRIAL REGARDING APPELLANT DAVID PALMER."

{¶ 7} "II. TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT."

{¶ 8} "III. TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S MOTION IN LIMINE."

{¶ 9} "IV. TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL."

{¶ 10} "V. TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS TO A FAIR TRIAL."

{¶ 11} "VI. TRIAL COURT LACKED JURISDICTION TO RULE ON APPELLANT'S RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT."

{¶ 12} OK Sun Palmer filed a separate brief on appeal and maintains that the court below committed as error:

{¶ 13} "I. THE TRIAL COURT ERRED WHEN IT ADMITTED SURVEILLANCE EVIDENCE REGARDING APPELLANT, OK SUN PALMER."

{¶ 14} "II. The TRIAL COURT ERRED WHEN IT DID NOT GRANT APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE THE EVIDENCE DEMONSTRATES APPELLANT, OK SUN PALMER, DID NOT PARTICIPATE IN [4] THE PUBLICATION AND DISTRIBTION OF ALLEGEDLY DEFAMATORY MATERIALS AGAINST APPELLEE."

{¶ 15} "III. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S ORIGINAL AND SUPPLEMENTAL 60(B) MOTION FOR RELIEF FROM JUDGMENT."

{¶ 16} Appellants' Assignments of Error Nos. I address the same issue and shall, therefore, be considered together. In both of these assignments of error, appellants contend that the trial court abused its discretion in allowing, over appellants' objection, the testimony of appellee's private investigator, Michael Mullin, into evidence. This testimony related to OK Sun's mobility. They also argue that the court below abused its discretion in admitting a videotape of OK Sun made by Mullin into evidence. The objection to the testimony and the videotape was that it was untimely and that it was irrelevant to the question of whether OK Sun participated in the creation and distribution of the fliers to the point that it caused her unfair prejudice. The trial court overruled the objection holding:

{¶ 17} "I think it goes to the credibility of both Mr. and Mrs. Palmer. I think it would be best — having seen it before. I think you have had plenty of time to take — the tape had been noticed to the Defendant some time ago. You have had time really to depose this fellow. His testimony should be no surprise because he testified in a prior case." [5]

{¶ 18} Briefly, in his complaint, appellee maintained that, commencing in May 1994, appellants began distributing fliers that indicated that he and his associates were, inter alia, "incompetent, dishonest, and corrupt." Pheils asserted that additional fliers bearing his photograph and containing the following language were distributed throughout Wood and Lucas Counties:

{¶ 19} "WANTED FOR BEING A CROOKED ATTORNEY

{¶ 20} "DAVID R. PHIELS, JR.

{¶ 21} "GUILTY OF FRAUD, GROSS INCOMPETENCE, CHARGING AN EXCESSIVE FEE, PERJURY AND EXTORTION."

{¶ 22} Other fliers stated that appellee was the "KING OF SLEAZE" and earned this title the "OLD FASHIONED WAY."

{¶ 23} Appellee testified that these fliers were put on the mailbox at his residence, taped on the windows of his automobile and his office, and posted on utility poles throughout Wood and Lucas Counties. He also stated that the fliers were placed in his neighbors' mailboxes. Pheils further indicated, through the testimony of his former associate, Dale Crandall, and a photograph, that the fliers were even taped to OK Sun's van. Moreover, appellee maintained that appellants sent letters to individuals claiming that Pheils committed, among other things, perjury, extortion, fraud, and deception.

{¶ 24} According to appellee, OK Sun, who was seriously injured as a result of the 1987 automobile accident and had difficulty walking, not only participated in the creation of the fliers, but also, helped her husband in the
6 distribution of the same. At trial, OK *6 Sun testified that she did not know anything about the fliers. Furthermore, she denied ever aiding her husband in creating and distributing those fliers. David Palmer also swore that he was the only person who investigated appellee's performance as an attorney, created the fliers and letters, and distributed them. He further testified that, physically, his wife had her "good days" and her "bad days."

{¶ 25} At trial, Mullin narrated during the playing of the surveillance tape, which shows OK Sun picking up a large rock, carrying two filled shopping bags plus her cane, and, on a third occasion, getting out of a car and carrying shopping bags without any difficulty. On cross-examination, appellants' attorney questioned Mullen on the issue of whether he ever saw OK Sun engage in any strenuous activities, such as running, jumping, mowing the grass, heavy lawn work, or riding a bike. Mullen answered: "No Sir."

{¶ 26} "Relevant evidence" is that evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401. Unfair prejudice is that evidence that might serve as an improper basis for a jury's decision. *Davis v. Killing, 171* Ohio App.3d 400, 2007-Ohio-23, ¶ 16, citing *Hampton v. Saint Michael Hosp.*, 8th Dist. No. 81009, 2003-Ohio-1828, ¶ 55. In general, but not always, evidence is unfairly prejudicial when it evokes an emotional response from the jury rather than an intellectual response. Id. Examples are evidence that
7 "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish." Id. *7

{¶ 27} In the present case, the videotape and Mullen's testimony were offered to show that OK Sun had the physical capacity to participate in the creation and distribution of the fliers that were the foundation of appellee's defamation action. Consequently, this evidence goes to the issue of whether the testimony of OK Sun and David Palmer was credible when they testified that she did not participate. This evidence was, however, not unfairly prejudicial because Mullin's testimony and the acts depicted do not evoke horror or appeal to a juror's emotions or the instinct to punish. They are simply acts that might be accomplished by OK Sun on one of her "good days." Therefore, OK Sun's Assignment of Error No. I is found not well-taken, and David Palmer's Assignment of Error No. I is found not well-taken.

{¶ 28} In his Assignment of Error No. III, David Palmer maintains that the trial court erred in granting appellee's motion in limine limiting the introduction of any evidence of fraud and/or perjury committed by appellee with regard to the costs and fees that he charged appellants in cases occurring prior to May 5, 1995. In

addition, the court granted the motion in limine as to any acts, e.g., divulging attorney-client confidences prior to that date.

{¶ 29} A motion in limine is a preemptive trial tactic that obtains a ruling to exclude or limit the use of certain evidence which the movant believes to be improper, and is made in advance of the actual presentation of the evidence to the trier of fact. *State v. Winston* (1991), 71 Ohio App.3d 154, 158. "The motion asks the court to
8 exclude the evidence unless and until the court is first shown that the material is relevant *8 and proper." Id. A decision to admit or exclude evidence is a matter left to the discretion of the trial court; thus, we will not disturb a trial court's ruling on a motion in limine absent a showing that the court's attitude was unreasonable, arbitrary, or unconscionable. *Tracy v. Merrell Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152.

{¶ 30} Here, those matters that appellant sought to include are bits and pieces of other cases, some of which did not involve appellants, that appellants wanted to use to attack appellee's credibility on the issue of defamation. According to appellants, these documents, e.g., "fraudulent" time sheets prepared and submitted by appellee in a 1991 case, would establish that the statements published by appellants were true as to appellee's excessive and/or fraudulent costs and fees. None of the documents, including portions of court transcripts and depositions, submitted by appellants are either authenticated original documents or sworn to and/or certified copies of the originals. See Evid. R. 901 and Evid. R. 1005. Moreover, appellant was allowed to testify to numerous instances that he discovered concerning Attorney Pheils' alleged excessive/fraudulent costs and fees. Therefore, the jury did have evidence before it upon which to determine the credibility of appellee. Accordingly, David Palmer's Assignment of Error No. III is found not well-taken.

{¶ 31} In his Assignment of Error No. VI, Palmer asserts that the trial court erred in overruling appellants' Civ. R. 60(B)(2) motion for relief from judgment. His sole argument in support of this assignment of error is that the
9 trial court lacked the jurisdiction to determine this motion because Palmer filed an affidavit of prejudice *9 against the trial judge in the Supreme Court of Ohio. The Honorable Richard Markus rendered his decision on appellants' motion on August 20, 2008. This judgment is file-stamped as being journalized at "P 4:20." Attached to David's brief on appeal is a United States Postal Office tracking and confirmation sheet indicating that an unidentified "item" was sent by an unknown party to a second unknown party in Columbus, Ohio, at 9:40 a.m. on August 20, 2008.

{¶ 32} We reject David Palmer's argument for two reasons. First, this issue was never raised in appellants' motion for relief from judgment or in David Palmer's supplemental motion for relief from judgment and is, therefore, waived on appeal. *Mason v. Meyers*, 140 Ohio App.3d 474, 477, 2000-Ohio-1698 (Citations omitted.). Furthermore, we conclude that the tracking and confirmation sheet is insufficient evidence to establish that appellants' alleged affidavit of prejudice was filed in the Ohio Supreme Court on August 20, 2008, thereby precluding the trial judge from entering his judgment at a later point on that same date. Accordingly, David Palmer's Assignment of Error No. VI is found not well-taken.

{¶ 33} In her Assignment of Error No. III, OK Sun Palmer contends that the trial court committed reversible error when it denied appellants' motion for relief from judgment predicated on newly discovered evidence. David Palmer raises the same issue in his Assignment of Error No. II.

{¶ 34} In the case before us, appellee's claims were based upon the allegation that appellants defamed him by
10 publishing materials that claimed he was guilty of fraud, *10 perjury, and charging excessive fees. As noted above, final judgment was entered in favor of appellee on these claims on December 23, 1997. Appellants filed a motion for a new trial on January 6, 1998, which was denied by the trial court on January 28, 1998.

{¶ 35} On November 13, 1998, appellants' filed their motion for relief from judgment. Appellants based their motion on Civ. R. 60(B)(2), which relieves a party from a final judgment if that party offers evidence that could not, with due diligence, have been discovered in time to move for a new trial under Civ. R. 59(B). According to appellants, appellee improperly received fraudulent and excessive court costs in the amount of $11,211.12 from OK Sun Palmer in Lucas County Common Pleas Court Case Nos. 88-0289 and 89-0200. See *David Pheils Assoc. v. Palmer*, 6th Dist. No. L-98-1110, 2009-Ohio-3491, affirming, inter alia, the trial court's award of costs. They therefore argued that this newly discovered evidence proved that the statements published by appellants were not defamatory or fraudulent.

{¶ 36} Appellants timely appealed the trial court's original judgment to this court. As a consequence, the common pleas court lost its jurisdiction to rule on the pending motion for relief from judgment. The Palmers filed for bankruptcy in August 1998. This case was not reinstated on our docket court until 2008. On June 25, 2008, we remanded this cause to the trial court for the purpose of obtaining a ruling on the Civ. R. 60(B) motion.

{¶ 37} On August 15, 2008, appellants submitted a "supplemental" motion for relief from judgment in which
11 they raised new "evidence" that the common pleas court *11 excluded at trial. Supposedly, this evidence would demonstrate appellee's misconduct and fraud and would prove fatal to his defamation action. This evidence consists of evidence excluded at trial upon appellee's motion in limine, appellee's alleged misconduct during the course of this case, and "evidence" from other cases related to the litigation involving the parties to this appeal. As stated above, the trial court denied the Civ. R. 60(B)(2) motion on August 20, 2008, rendering this issue ripe for our review.

{¶ 38} In order to prevail on a motion to vacate made pursuant to Civ. R. 60(B), a movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time. *Jones v. Gayhart*, 2d Dist. No. 21838, 2007-Ohio-3584, at ¶ 9, citing *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, 150. In the case of a motion for relief from judgment based upon Civ. R. 60(B)(2), the motion must be filed within a reasonable time and not more than one year after the entry of judgment. The moving party's failure to satisfy any one of the three requirements will result in the motion being overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. The motion and supporting documents, if any, must contain operative facts which demonstrate the timeliness of the motion, the reasons for seeking relief, and the movant's defense. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 102-103.

{¶ 39} A motion for relief from judgment, under Civ. R. 60(B), is addressed to the sound discretion of the trial
12 court, and such ruling will not be disturbed on appeal absent *12 a showing of an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion involves more than an error of judgment or law; it signifies that the trial court's attitude in reaching that judgment can be characterized as unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 40} "Newly discovered evidence refers to evidence in existence at the time of trial of which the aggrieved party is excusably ignorant." *Dunham v. Dunham, 171* Ohio App.3d 147, 2007-Ohio-1167, ¶ 109. As applied here, the judgment for costs in the amount of $11,211.12 was entered in *Pheils and Associates v. Palmer*, supra, on December 17, 1997. Id. ¶ 1. In support of their motion for relief from judgment, appellants submitted (1) exhibits of the costs incurred by appellee; and (2) time sheets allegedly reflecting attorney fees that appellee received in *Pheils and Associates v. Palmer.* According to appellants, the costs incurred and attorney fees submitted did not relate to that case and were, therefore, evidence of the truth of the statements made by

appellants in the materials that they created and distributed. Nonetheless, the record of this cause does not contain any affidavits or other documents averring that these are true and accurate copies of these documents or swearing that these costs were allegedly related to other lawsuits-some involving these parties and some involving other individuals-that date back to 1991. Moreover, many of these materials existed at the time that judgment was entered in this case and, with due diligence, could have been discovered for the purposes of filing a motion for a new trial within 14 days of that entry. Indeed, some of these materials were those precluded from entry into evidence at trial by *13 the common pleas court's grant of appellee's motion in limine. The same is true of appellants' supplemental motion for relief from judgment.

{¶ 41} In addition, appellants failed to provide any explanation for the 11 month delay in filing the original motion for relief from judgment and the 10 plus year delay in filing their supplemental motion. Even though a party has a potential right to file a motion to vacate a judgment up to one year after the entry of judgment, the motion is subject to the "reasonable time" requirement. *Adomeit v. Baltimore*, 39 Ohio App.2d at 106. A reasonable time is determined under the facts of each case. *Novak v. CDT Development Corp.*, 8th Dist. No. 83655, 2004-Ohio-2558, ¶ 12. In the absence of an explanation of the reason for a delay, the Eighth District court of Appeals found delays of four months or less unreasonable under Civ. R. 60(B). Id. Here, it is clear that the evidence appellants sought to use as a basis for their motion for relief from judgment was available either near to or at the time of the trial in the present case. Therefore, in the absence of a rationale for the delayed filing of their motion, we find that the 11 month delay was unreasonable. It follows that a 10 year delay in presenting their supplemental motion was also unreasonable. Accordingly, OK Sun Palmer's Assignment of Error No. III and David Palmer's Assignment of Error No. II are found not well-taken. *14

{¶ 42} OK Sun's Assignment of Error No. II asserts that the trial court erred in failing to grant appellants' motion for a new trial because the evidence at trial proved that she did not create or distribute the fliers defaming appellee.[2]

[2] This issue was raised in appellants' motion for a new trial filed in the common pleas court.

{¶ 43} Civ. R. 59(A)(6) states that a new trial may be granted to all or any of the parties upon all or any of the issues before the court if the verdict is not sustained by the weight of the evidence. "Unless the weight of the evidence supported a contradictory finding, appellate courts must defer to the conclusion of the trial court because it is better equipped than the appellate court to view the witnesses, observe their demeanor, gestures, voice inflections, and use these observations in weighing the credibility of the conflicting testimony." *Jacobs v. McAllister*, 6th Dist. No. L-06-1172, 2007-Ohio-2032, ¶ 19, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. The decision to grant a motion for a new trial is a matter within the discretion of the trial court. *Sharp v. Norfolk W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224. Thus, the lower court's denial of appellants' motion for a new trial will not be disturbed unless this decision was arbitrary, unreasonable, or unconscionable. Id. (Citation omitted.)

{¶ 44} OK Sun Palmer claims that appellee failed to prove that David Palmer was acting as her agent because he failed to establish that she had the requisite control over her husband's actions; therefore, the trial court should have granted her motion for a new trial. We disagree. Appellee's theory of the case against both OK Sun and David Palmer *15 was that they engaged in a civil conspiracy-not that David Palmer was an agent of OK Sun-to defame him.

{¶ 45} The elements of a civil conspiracy claim under Ohio law are: (1) a malicious combination of two or more persons, (2) resulting in injury to person or property, and (3) an unlawful act independent from the actual conspiracy. *Berardi's Fresh Roast, Inc. v. PMD Enterprises*, 8th Dist. No. 90822, 2008-Ohio-5470, ¶ 45. The

unlawful act alleged in this case was defamation. Defamation is a false publication either spoken or written that injures a person's reputation. *Dale v. Ohio Civ. Serv. Emp. Assn.* (1991), 57 Ohio St.3d 112, 117. To prove defamation, the injured party must show that: (1) a false and defamatory statement was made about plaintiff; (3) the statement was published without privilege to a third party; (4) it was made with fault of at least negligence on the part of the defendant; and (5) it was either defamatory per se or caused special harm to the plaintiff. *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 601 (Citation omitted.).

{¶ 46} It is undisputed that fliers were created and published attacking appellee's character, claiming, inter alia, that he was a "crook," that he committed fraud and perjury, and that he charged excessive attorney fees. These fliers were introduced into evidence at trial. This was defamation per se because it reflected upon appellee's character in such a manner that it injured him in his trade or profession. *Becker v. Toulmin* (1956), 165 Ohio St. 549, 553. There is also no issue as to whether appellee suffered damages as a result of the defamation. The sole
16 question, therefore, is whether evidence was offered to *16 show that OK Sun maliciously conspired with David Palmer in the creation of and/or publishing of the defamatory fliers.

{¶ 47} A civil conspiracy is "a malicious combination of two or more persons to injure another, in person or property, in a way not competent for one alone."

{¶ 48} *Minarik v. Nagy* (1963), 8 Ohio App.2d 194, 196. The element of a "malicious combination to injure" does not require a showing of an express agreement between defendants, but only a common understanding or design, even if tacit, to commit an unlawful act. *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 219. (Citations omitted.) The element of malice is "inferred from or imputed to a common design by two or more persons to cause harm to another by means of an underlying tort, and need not be proven separately or expressly." *Gosdon*, supra, at 219-220.

{¶ 49} In the present case, the evidence offered at trial showed that David Palmer is unemployed. In addition, testimony was adduced from David and OK Sun indicating that the couple's home, as well as all of the parties' funds, were held solely in the name of OK Sun. She further attested, however, that David Palmer exercises the control over those funds, but that she does not sign any documents, including checks, presented to her by her husband unless he provides "an explanation." OK Sun and David also acknowledged that she owned the van that was used to transport the fliers for distribution. Evidence offered at trial demonstrated that some of these fliers were posted on the van itself. While OK Sun agreed that she would ride in the van, she denied ever doing
17 so when any fliers were posted thereon. Nonetheless, an exhibit entered into evidence at *17 trial revealed the fact that appellee saw OK Sun riding in the van festooned with said fliers on a day that David Palmer taped one of the fliers to appellee's office window. Based upon the foregoing, we find that the decision of the trial court denying appellants' motion for a new trial under Civ. R. 59(A)(6) as to OK Sun is not arbitrary, unreasonable, or unconscionable. Therefore, her Assignment of Error No. II is found not well-taken.

{¶ 50} In his Assignment of Error No. IV, David Palmer challenges the court's denial of appellants' Civ. R. 59 motion for a new trial on a different basis. He claims that the trial court erred in failing to grant his motion for a new trial, because appellee committed perjury during the damages hearing in order to persuade the court to award him punitive damages. David claims, as he did below, that he is entitled to a new trial under Civ. R. 59(A)(2) due to the misconduct of the prevailing party. Specifically, he contends that appellee perjured himself by testifying that he had not collected on a judgment in the amount of $316,314.71 in a separate case against OK Sun Palmer. In the lower court, appellants claimed that the jury would not have awarded appellee substantial punitive damages if its members had known that appellee had collected significant amounts of

money from them. The "proof of the purported payment consists of an uncertified judgment allegedly from "Case No. 88-0289 89-0200" and is, therefore, not admissible evidence. That is, Evid. R. 1005 restricts secondary evidence offered to prove the contents of a public record, in this case, the record of a lawsuit, to either a certified copy of the record or an uncertified copy supported by the sworn testimony of a person with
18 knowledge who testifies that the copy is true and correct. *State v. Flege*, 2d Dist. *18 No. 06-CA-113, 2007-Ohio-2134, ¶ 37. Therefore, the common pleas court did not abuse its discretion in denying appellants' motion for a new trial premised upon this allegation, and David Palmer's Assignment of Error No. IV is found not well-taken.

{¶ 51} Finally, in his Assignment of Error No. V, David Palmer contends that the trial judge, the Honorable Richard McQuade, violated his due process rights to a fair trial. In particular, he claims that the judge displayed "actual bias" toward appellants. The Due Process Clause of the United States Constitution entitles defendants in both civil and criminal cases to a trial before a tribunal that is fair and impartial, and not predisposed to find against them. *Marshall v. Jerrico, Inc.* (1980), 446 U.S. 238, 242. Nevertheless, R.C. 2701.03 is the sole means by which a litigant may claim that a common pleas judge is biased and prejudiced. *State v. Scruggs*, 10th Dist. No. 02AP-621, 2003-Ohio-2019, at ¶ 15, quoting *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 11. See, also, *Berdyck v. Shinde* (1998), 128 Ohio App.3d 68, 81. Only the Chief Justice of the Ohio Supreme Court or his designee has the authority to pass upon the disqualification of a common pleas court judge. *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441; *State v. Dougherty* (1994), 99 Ohio App.3d 265, 268-269. Thus, if David Palmer believed that Judge McQuade was biased or prejudiced against him, his remedy was to file an affidavit of disqualification for prejudice with the clerk of the Supreme Court of Ohio. R.C. 2701.03. Accordingly, we lack the authority to render a decision as to disqualification or to void a trial court's judgment on the basis of
19 alleged bias. As a result, David Palmer's Assignment of Error V is found not well-taken. *19

{¶ 52} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App. R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App. R. 27. See, also, 6th Dist. Loc. App. R. 4.

Peter M. Handwork, P.J., Thomas J. Osowik, J. and John R. Willamowski, J., Concur.

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

1 *1