

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3142
Summary Calendar

FACILITY MANAGEMENT OF LOUISIANA,
Plaintiff,

VERSUS

AMERICAN SIGN AND INDICATOR CORPORATION,
Defendant.

AMERICAN SIGN AND INDICATOR CORPORATION,
Third Party Plaintiff,

VERSUS

DIAMOND VISION, INC.,
Third Party-Defendant-Appellee,

VERSUS

RAYMOND FITZGERALD,
Movant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
CA 91 CV 609

July 16, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:¹

¹Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

Raymond Fitzgerald, counsel for the Brae Companies, appeals the district court's sanction order. The underlying litigation has been compromised and is not relevant to this appeal. During the course of the litigation, the magistrate judge found that Fitzgerald scheduled a number of out-of-state depositions and gave counsel only one week notice of the deposition. When counsel sought to reschedule the depositions to permit him to attend, counsel refused to cooperate and assist to work out the scheduling problem. As a result of Fitzgerald's conduct, Diamond Vision, Inc. (DVI) was forced to file a motion for protective order and a motion to quash two days before the scheduled deposition. The magistrate judge sanctioned Fitzgerald under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying proceedings and for willfully refused to confer in good faith on a discovery dispute in violation of Uniform Local Rule 2.11 of the Eastern District of Louisiana. The magistrate judge required DVI to file an affidavit to document the legal expenses incurred in filing the motion and attending three hearings in connection with the motion. The magistrate imposed sanctions against Fitzgerald solely in the amount of \$2244.75.

We have reviewed the record and are persuaded that the findings of the magistrate judge are not clearly erroneous. For the reasons stated in her (date) order she did not abuse her discretion in assessing sanctions.

Pursuant to that Rule, the Court has determined that this opinion should not be published.

Fitzgerald presents one issue on appeal that requires discussion. He argues that the magistrate judge had an improper ex parte communication with opposing counsel that placed him at an unfair disadvantage. We disagree. The magistrate judge, following the hearing in which she imposed sanctions, received a letter dated July 30 from counsel for DVI asking that sanctions be imposed and furnishing an affidavit to establish the amount of DVI's attorney's fees and expenses. Then on July 31, after counsel for DVI was told that the impending settlement depended upon a resolution of the sanctions issue, DVI counsel communicated with the magistrate judge and asked that she defer entering the sanctions order against Fitzgerald. The magistrate judge was understandably confused by these conflicting letters and telephoned counsel for DVI. After receiving a brief explanation, the magistrate judge then asked counsel for DVI to explain the inconsistency in writing and copy all counsel. The magistrate judge then on August 18, 1992, ordered a hearing on the motion to reconsider sanctions award for September 2, 1992. The scheduled hearing was held and Fitzgerald had a full opportunity to explain his position. It is noteworthy that although Mr. Fitzgerald was aware of the magistrate judge's telephone conversation with counsel at the time of the September 2 hearing he raised no objection to it nor asked the magistrate judge to recuse herself because of it. It was only after the magistrate judge ruled that Mr. Fitzgerald raised this issue.

We are satisfied from the record that Fitzgerald suffered no prejudice as a result of the telephone conversation between the

magistrate and counsel for DVI. The magistrate judge understandably sought clarification of the conflicting motions filed by DVI and directed counsel to explain the inconsistency in writing and furnish a copy to opposing counsel. Thereafter Mr. Fitzgerald had full opportunity for a hearing to which he availed himself.

Because we find no error, the order of the district court is
AFFIRMED.