

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO EX REL.)
BRIAN BARDWELL,)
)
 Relator/Appellant,)
)
 vs.)
)
 CUYAHOGA COUNTY BOARD)
 OF COMMISSIONERS,)
)
 Respondent/Appellee.)

Case No. 2009-2140
On Appeal from the
Cuyahoga County Court of Appeals,
Eighth Appellate District

APPELLEE'S MERIT BRIEF

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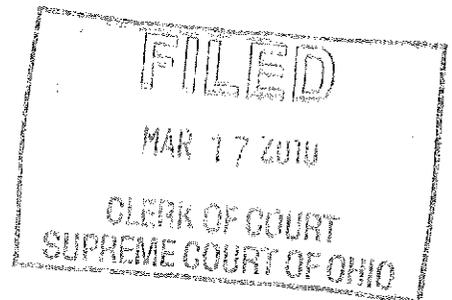


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STATEMENT OF THE FACTS

Ohio Civil Rule 11 authorizes the imposition of sanctions when a party signs a pleading knowing that there are not good grounds to support it. In this case, relator/appellant Brian Bardwell (“appellant”) filed a Verified Petition for Writ of Mandamus (“Petition”) in the Court of Appeals against respondent/appellee Cuyahoga County Board of Commissioners (“appellee”) that alleged seven (7) separate and distinct claims for alleged violations of Ohio’s public records law, R.C. 149.43, for which appellant sought maximum statutory damages in addition to a writ of mandamus. Sadly, and despite proclaiming by affidavit that his claims were based “upon information and belief,” most of appellant’s allegations either had no basis in fact whatsoever or were demonstrably untrue – and appellant knew it when he filed the case.

Thus far from being the situation in which a “good government watchdog” sought to shine a light on a public office by suing for alleged public records (that in fact had either been given to him before the case was even filed or within a reasonable period of time thereafter) as appellant’s Merit Brief would simplistically suggest, this really is a case in which appellant accused a public office of numerous public records act violations that, while utterly unsubstantiated, nevertheless required a substantive response by the appellee to each allegation and due consideration by the Court of Appeals to each claim. Appellant’s filing necessarily caused the Court of Appeals to expend its judicial resources on appellant’s case rather than on other cases pending on the appellate court’s docket. And while appellant’s Merit Brief would now attempt to shift blame to the appellee and/or the Court of Appeals for not disposing of appellant’s case more expeditiously, it was appellant’s own multiple-count court filing -- about which his Merit Brief here is conspicuously silent -- that caused valuable judicial resources to be expended without good cause.

Finding that appellant signed his Petition in bad faith and willful violation of Civil Rule 11, the Court of Appeals imposed sanctions on him in the amount of \$1,050.42. Because the record here fails to show any abuse of discretion by the Court of Appeals, appellee respectfully urges this Court to affirm the judgment of the Court of Appeals.

The facts of this case are that on March 26, 2009, an individual presented himself in the office of the Cuyahoga County Prosecuting Attorney, delivering a hand-written note to the receptionist that said the following:

I would like to inspect the following records:

- Records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts
- Drafts of contracts of development agreements related to Medical Mart projects
- Your record retention schedule.

Thank you.

(See “Respondent’s Motion for Summary Judgment” at Exhibit A.)¹

The requester would not give the receptionist any identifying information, but appellant’s mandamus Petition filed the very next day acknowledged that it was appellant. (See Petition at paras. 1-9.) After explaining what records he was seeking, appellant was promptly referred to the Prosecuting Attorney’s public information officers, to whom appellant again declined to give any identifying information. (See Petition at paras. 9-15.)

¹ Although the appendix to appellant’s Merit Brief contains photocopies of the parties’ court filings and opinions rendered by the Court of Appeals in this case, the photocopies contained in the appendix inexplicably appear to have been altered electronically inasmuch as they contain numerous instances of altered text that is not present in the original documents that comprise the record for this case. See, e.g., A-32, A-44, A-46, A-47, A-49, A-51, A-65, A-94, A-97, A-101, A-102, A-110, A-123.

Agreeing to return later that same day, appellant was given a copy of the Prosecuting Attorney's record retention schedule that had been requested earlier that day. (See Petition at paras. 16-19.) The public information officers told appellant that copies of communications between the County and The Plain Dealer would be made available the next morning and that drafts of the proposed development agreement, which were then protected by the attorney-client privilege, would be released once the terms of the development agreement were finalized. (See Petition at paras. 20-30.)

Appellant returned to the Prosecutor's office on March 27, 2009 and received photocopies of communications from the Plain Dealer's counsel regarding the release of development agreement contract or drafts of the same. (See Petition at paras. 31-32.) Appellant acknowledges that he additionally received a written response to his March 26, 2009 request. (See Petition at paras. 38-39.) The March 27, 2009 response memorialized the following:

- All communication records from the Plain Dealer to the county regarding release of Medical Mart contracts or drafts were attached to the prosecutor's March 27, 2009 written response, thus fulfilling the response to the first category of records requested on March 26, 2009.
- Drafts of the Development Agreement were not public record at that time because the terms of the Development Agreement were still being negotiated, no agreement had been submitted to the Board of Commissioners for approval, and working drafts were exempt from disclosure because they included confidential communications between a public client and its attorneys including attorney work product (citing *State ex rel. Benesch, Friedlander, Coplan & Arnoff LLP v. Rossford* (2000), 140 Ohio App.3d 149, 746 N.E.2d 1139), thus responding to the second category of records requested on March 26, 2009.
- A copy of the Prosecuting Attorney's record retention schedule had been given to the requester on March 26, 2009, thus fulfilling a response to the third category of records requested on March 26, 2009.

(See "Respondent's Motion for Summary Judgment" at Exhibit B.) With regard to the request for drafts of the Development Agreement, the prosecutor's March 27, 2009 response also said

the following: “When an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available.” (See “Respondent’s Motion for Summary Judgment” at Exhibit B.)

Later that same day, appellant filed his original action in mandamus against appellee Cuyahoga County Board of Commissioners in the Court of Appeals.² Appellant alleged that the appellee violated R.C. 149.43 by:

- 1) failing to provide all the records requested by appellant that were subject to disclosure;
- 2) failing to release nonexempt portions of unidentified records that supposedly contained redacted information – *even though the records that were provided to appellant contained no redactions at all;*
- 3) failing to organize and maintain records in a manner that would make them readily available for inspection and copying – *even though appellant knew absolutely nothing about the office’s organization and maintenance of its records;*
- 4) failing to have a copy of the office’s record retention schedule readily available – *even though a copy of the office’s record retention schedule was given to appellant later that same day;*
- 5) failing to provide appellant with any opportunity to revise his public records request – *even though appellant’s request was specific and required no further revision;*
- 6) failing to provide any explanation, including legal authority, for denying appellant’s public records request – *even though appellant did receive a written response, complete with citation to legal authority, that appellant chose not to attach to his Petition;* and
- 7) demanding appellant’s identify without first saying that it did not have to be revealed – *even though his access to records was never conditioned on disclosing his identity and there was no “lost use” resulting from a receptionist’s innocuous request for appellant’s name before paging the office’s public information officers.*

(See Petition.) Appellant’s commencement of the mandamus lawsuit – and a brief news item that appeared in the next day’s newspaper after appellant contacted the Plain Dealer to publicize

² Although appellant named appellee Cuyahoga County Board of Commissioners as the respondent to his mandamus case, appellant in fact had no interaction at all with the appellee prior to filing suit and asserting his claims. To the contrary, appellant’s only interaction in this matter was with the *legal counsel* for the appellee.

its filing – revealed that appellant was the person who had appeared at the Prosecutor’s Office on March 26 and March 27, 2009.

On April 9, 2009, following the April 8, 2009 public release of the proposed Development Agreement between Cuyahoga County, Merchandise Mart Properties, Inc., MMPI Development LLC, and Cleveland MMCC LCC, and consistent with what had been indicated in the Prosecutor’s March 27, 2009 written response to appellant’s public records request, copies of the final version of the proposed Development Agreement as well as preceding drafts were mailed to appellant. (See “Respondent’s Motion for Summary Judgment” at Exhibit C.) The April 9, 2009 correspondence noted that the production of those prior drafts completed the response to the appellant’s March 26, 2009 request.

On June 8, 2009, the appellee filed its motion for summary judgment in the Court of Appeals, addressing not only appellant’s now moot contention that appellee had failed to make public records available but also appellant’s other remaining claims that appellee had violated Ohio’s public records law in the various respects alleged in the Petition.

Appellant filed nothing in response.

On July 2, 2009, the Court of Appeals granted the appellee’s motion for summary judgment, denied appellant’s request for a writ of mandamus, and *sua sponte* ordered appellant to show cause why sanctions should not be imposed against him. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, Cuyahoga App. No. 93058, 2009-Ohio-3273.

On September 22, 2009, the Court of Appeals held a hearing in open court to provide appellant with the opportunity to show cause why sanctions should not be imposed. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, Cuyahoga App. No. 93058, 2009-Ohio-5573 at

¶ 7. The three-judge appellate panel heard oral testimony and received exhibits into evidence. Id.

On October 19, 2009, the Court of Appeals issued its decision imposing sanctions on appellant for his willful violation of Ohio Civil Rule 11. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, Cuyahoga App. No. 93058, 2009-Ohio-5573, at ¶¶ 10-14. The Court of Appeals additionally considered but ultimately declined to sanction appellant for frivolous conduct under R.C. 2323.51. Id. at ¶¶ 15-21. For violating Civil Rule 11, the Court of Appeals ordered appellant to pay attorney fees in the total amount of \$1,050.42. Id. at ¶¶ 32-33.

On November 24, 2009, appellant filed his notice of appeal in the Supreme Court of Ohio.

ARGUMENT

Appellant signed and filed in the Court of Appeals a pleading that he knew lacked good grounds. It contained factual assertions that were either utterly without substantiation or were demonstrably false. Appellant's filing necessitated an appropriate response from the appellee and an appropriate disposition by the Court of Appeals. And under the circumstances of this case, the appellate court's decision to impose modest sanctions on appellant for ignoring his obligations under Ohio Civil Rule 11 was not an abuse of discretion. For the reasons that will be discussed hereafter, appellee respectfully submits that appellant's appeal and propositions of law are without merit and that the judgment of the Court of Appeals should be affirmed.

Although appellant's Merit Brief contains two (2) propositions of law, each proposition fundamentally contests the imposition of sanctions in this action brought pursuant to Ohio's public records law. Because there does not appear to be any appreciable difference in the legal argument for those legal propositions, this Merit Brief will address and respond to them together.

APPELLEE'S PROPOSITION OF LAW:

Actions brought pursuant to Ohio's public records act, R.C. 149.43, are subject to sanctions under Ohio Civil Rule 11.

Appellant's appeal fundamentally contends that judicial sanctions either should not be imposed, or at least should be imposed only sparingly, upon persons who bring actions to enforce Ohio's public records law, R.C. 149.43. But as solicitous as the courts should be -- and the Court of Appeals below was -- to such actions, no litigant should be able to file false or unsubstantiated legal papers without consequence. In this case, appellant signed and filed a pleading that he knew lacked good grounds. After affording him the opportunity to show cause why sanctions should not be imposed, the Court of Appeals imposed a modest monetary sanction for his willful violation of Ohio Civil Rule 11. Because nothing in appellant's appeal shows that the Court of Appeals abused its sound discretion, the judgment of the Court of Appeals should be affirmed.

To first set the record straight, the record here reflects that after denying appellant's request for a writ of mandamus, the Court of Appeals *sua sponte* ordered appellant to show cause why sanctions should not be imposed on him pursuant to Ohio Civil Rule 11 and/or R.C. 2323.51. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-3273, at ¶ 22. The Court of Appeals subsequently held a hearing during which the court heard testimony and received evidentiary exhibits. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-5573 at ¶¶ 6-9. Thereafter, the Court of Appeals imposed sanctions on appellant only for his willful violation of Ohio Civil Rule 11. *Id.* at ¶¶ 10-14. The Court of Appeals considered

but ultimately declined to sanction appellant for frivolous conduct under R.C. 2323.51. Id. at ¶¶ 15-21.³

For this appeal, appellant argues that the Court of Appeals erred by imposing sanctions on him. The issue thus presented is whether the Court of Appeals abused its discretion by imposing sanctions on appellant under Ohio Civil Rule 11. Because the Court of Appeals' decision here was not unreasonable, arbitrary, or unconscionable, the judgment should be affirmed.

Rule 11 of the Ohio Rules of Civil Procedure provides as follows, in relevant part:

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name *** . A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. Except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. ***

Ohio Civ.R. 11.

The purpose of Ohio Civil Rule 11, like its federal counterpart, "is to curb abuse of the judicial system because '[b]aseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay.'" *Capitol One Bank v. Day*, 176

³ Appellant's Merit Brief says the following at one point: "The appellate court erroneously applied Rule 11 and Revised Code Section 2323.51 to sanction Bardwell." See Merit Brief at p. 16. That is not accurate. While the Court of Appeals did consider appellant's conduct in light of Civil Rule 11 and R.C. 2323.51, the Court of Appeals actually imposed sanctions only under Civil Rule 11, not under R.C. 2323.51.

Ohio App.3d 516, 2008-Ohio-2789, 892 N.E.2d 932, at ¶ 11 (quoting *Moss v. Bush*, 105 Ohio St.3d 458, 2005-Ohio-2419, 828 N.E.2d 994, at ¶ 21 (Moyer, C.J.)) (internal citations omitted).

“[T]he specter of Rule 11 sanctions encourages civil litigants to stop, think, and investigate more carefully before serving and filing papers.” *Capitol One Bank v. Day*, supra at ¶ 11 (citations and internal punctuation omitted).

In *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, the Supreme Court of Ohio stated: “Civ.R. 11 employs a subjective bad-faith standard to invoke sanctions by requiring that any violation must be willful.” *Id.* at ¶ 19. The court additionally declared:

We will not reverse a court’s decision on a Civ.R. 11 motion for sanctions absent an abuse of discretion. *State ex rel. Fant v. Sykes* (1987), 29 Ohio St.3d 65, 29 OBR 446, 505 N.E.2d 966. An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Worrell v. Ohio Police & Fire Pension Fund*, 112 Ohio St.3d 116, 2006-Ohio-6513, 858 N.E.2d 380, ¶ 10.

Id. at ¶ 18.

In the case at bar, appellant contests the appellate court’s imposition of sanctions pursuant to Civil Rule 11. But because appellant cannot show that the appellate court’s decision was unreasonable, arbitrary, or unconscionable, he cannot show any abuse of discretion warranting reversal. Thus for the reasons that follow, his appeal is not well taken and the judgment should be affirmed.

To begin, appellant’s attempt to disturb the appellate court’s judgment should be rejected initially based on the presumption of validity that attaches to proceedings occurring before the Court of Appeals. The record here reflects that after denying the requested writ of mandamus and ordering appellant to show cause why sanctions should not be imposed, the Court of Appeals issued an order on August 13, 2009 that scheduled the hearing on the pending show cause order

for September 22, 2009. The August 13, 2009 appellate court order additionally said the following: “The parties are instructed that upon prior written notice to the court, any party may make arrangements for the recording of the show cause hearing by any authorized means. See Loc.R. 45(B)(8).”

During the September 22, 2009 show cause hearing, the Court of Appeals received oral testimony and evidentiary exhibits. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-5573 at ¶ 7. However, neither party arranged for an official court reporter to record the September 22, 2009 show cause proceedings. *Id.* at ¶ 7, fn. 1. Consequently, there is no transcript of the September 22, 2009 show cause hearing. The Court of Appeals issued its sanctions order one month later on October 19, 2009. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-5573.

On this record, a presumption of validity should attach to the appellate court’s proceedings. In *State ex rel. Duncan v. Village of Middlefield*, 120 Ohio St.3d 313, 2008-Ohio-6200, 898 N.E.2d 952, Duncan argued that the court of appeals erred in imposing a discovery sanction on him. *Id.* at ¶¶ 26-27. After noting that the imposition of sanctions is subject to review for abuse of discretion, the Supreme Court of Ohio said the following:

Duncan cannot establish an abuse of discretion here. He failed to submit a transcript of the evidentiary hearing before the court of appeals magistrate on the motion for sanctions. “When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus as to those assigned errors, the court has no choice but to presume the validity of the lower court’s proceedings, and affirm.” *Crane v. Perry Cty. Bd. of Elections*, 107 Ohio St.3d 287, 2005-Ohio-6509, 839 N.E.2d 14, quoting *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384; cf. Civ.R. 53(D)(3)(b)(iii).

Id. at ¶ 28.

In the instant case, appellant likewise failed to provide any transcript of the September 22, 2009 proceedings held in open court before the Court of Appeals. The court there heard testimony and received exhibits. The court thereafter rendered its judgment finding that appellant had willfully violated Civil Rule 11. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-5573 at ¶¶ 10-14. Because appellant has not provided any transcript of those proceedings for this Court to pass upon, it is appropriate to apply the presumption of validity to those proceedings to affirm the appellate court's judgment.

But even without regard to the presumption of validity, the record here would still provide ample grounds to find that the Court of Appeals' decision to sanction appellant was not unreasonable, arbitrary, or unconscionable.

Putting aside for the moment appellant's request for a writ of mandamus to compel the release of alleged public records – the only claim in the mandamus Petition that appellant's Merit Brief here acknowledges – appellant's Petition made factual assertions that appellant knew were utterly without basis.

In particular, his Petition alleged that the appellee failed to release nonexempt portions of unidentified records that supposedly contained redacted information, even though there were no redactions made to any of the records provided to appellant. Appellant never contested this in the court below.

Appellant alleged that the appellee failed to organize and maintain records in a manner that would make them readily available for inspection and copying, even though appellant knew nothing about the office's system for organizing and maintaining records. Appellant never contested this in the court below.

Appellant alleged that the appellee failed to have a copy of its record retention schedule readily available, even though he received a copy of it the same day he asked for it, which was the day before he filed suit to complain about it. Appellant did not contest this in the court below.

Appellant said that the appellee failed to give him any opportunity to revise his public records request, even though his request was specific and no “revision” would have resulted in any different response. This was uncontested in the court below.

Perhaps most egregiously, appellant accused the appellee of failing to provide any explanation, including legal authority, for denying appellant’s public records request, even though appellant received on March 27, 2009 – just a short time before he filed his Petition that same day – a written response, complete with citation to legal authority, which explained the basis for deferring release of the remaining documents he requested. Indeed, appellant’s own Petition acknowledged at paragraphs 38 and 39 that he received a “letter” stating that drafts of the development agreement were not provided because they were protected by the attorney-client privilege, yet appellant chose not to attach that to his Petition but rather make the bold assertion that the appellee’s denials “did not include an explanation, including legal authority, setting forth why [appellant’s] request was denied” and that appellee’s “failed to comply with the [Public Records] Act by failing to include with their denials an explanation or legal authority setting forth why the request was denied.” See Petition at paras. 67 and 68. Appellant’s allegations were demonstrably false and he knew it.

Appellant finally sought the maximum statutory damages for a receptionist’s request for his name, even though access to the requested records was not limited or conditioned on the disclosure of the appellant’s identity, see R.C. 149.43(B)(4), and, as the Court of Appeals noted,

appellant could not establish any “lost use” resulting from this innocuous query before paging the office’s public information officers to respond. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-3273, at ¶ 21. This was uncontested in the court below.

In short, appellant’s Petition below contained a smorgasbord of alleged public records law violations – claims that are strikingly similar to those that he has asserted in at least three (3) of the other public records mandamus cases he has filed that resulted in opinions issued by Ohio courts of appeals. See *State ex rel. Bardwell v. Cleveland*, Cuyahoga App. No. 91831, 2009-Ohio-5688, at ¶ 1, appeal pending, Ohio Supreme Court Case No. 2009-2192; *State ex rel. Bardwell v. Ohio Attorney General*, Franklin App. No. 08 AP 358, 2009-Ohio-1265, at ¶ 1; *State ex rel. Bardwell v. Rocky River Police Dept.*, Cuyahoga App. No. 91022, 2009-Ohio-727.⁴ Appellant’s contentions lacked any basis in fact if they were not contrary to fact – all of which was known to appellant on March 27, 2009 when he filed his Petition shortly after he received responsive records and an explanation supported by legal authority for deferring release of the other documents. Appellant clearly proceeded without any regard to fact in a seeming rush to use his mandamus case for what the court below suggested was little more than a “gotcha exercise.” See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-5573 at ¶ 20.

For his part, appellant’s Merit Brief makes repeated references to Ohio’s “frivolous conduct” statute, R.C. 2323.51, insisting that his conduct in this case did not satisfy the standard

⁴ Appellant acknowledged in this case that as of September 21, 2009, he had filed nineteen (19) public records mandamus actions in the Ohio courts of appeal – including ten (10) cases on one day alone. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-5573 at ¶ 18. It is unknown whether those cases contained comparable claims.

necessary to impose sanctions for frivolous conduct under that statute.⁵ See Merit Brief at pp. 5-7. That discussion does not help appellant in this case for several reasons.

First, it is beside the point here because the Court of Appeals did not impose sanctions on appellant under R.C. 2323.51.

Second, it is immaterial legally whether different standards may apply to sanctions under Civil Rule 11 than apply to sanctions under R.C. 2323.51 because they address different forms of misconduct that are not necessarily duplicative. Civil Rule 11 warrants sanctions when a party signs a pleading knowing that there are not good grounds to support it. But the fact that a litigant is sanctioned under one provision does not necessarily mean that the litigant must be sanctioned under the other. But by the same token, the fact that a litigant is *not* sanctioned under one provision does not necessarily mean that the litigant is immune from sanctions under the other. In this case, the Court of Appeals appropriately determined that appellant signed his Petition knowing that there were not good grounds for alleging that the appellee violated Ohio's public records law.

Third, the fact that the Court of Appeals here considered but ultimately decided against imposing sanctions on appellant under R.C. 2323.51 demonstrates that the Court of Appeals did *not* act unreasonably, arbitrarily, or unconscionably. To the contrary, this record demonstrates

⁵ In discussing R.C. 2323.51, appellant's Merit Brief selectively omits portions of the statutory text. For example, appellant purports to quote R.C. 2323.51(a)(i) to show that conduct is "frivolous conduct" if "[i]t obviously serves merely to harass or maliciously injure another party to the civil action *** including, but not limited to, *** a needless increase in the cost of litigation." See Merit Brief at p. 6 (omissions in original). In fact, R.C. 2323.51(a)(1) provides that conduct is "frivolous conduct" if "[i]t 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." (Emphasis added.) The "improper purpose" element deliberately omitted by appellant is curious inasmuch as the Court of Appeals specifically considered, and indeed emphasized, that element when deciding whether to sanction appellant under R.C. 2323.51. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-5573 at ¶¶ 16-21.

that the Court of Appeals carefully examined appellant's conduct before deciding to sanction appellant only under Civil Rule 11. Such deliberative scrutiny cannot be characterized fairly as an abuse of discretion.

At any rate, appellant's Merit Brief here does not address any of the other public records law violations he alleged in his Petition. Failing to take any responsibility for his own conduct, appellant instead criticizes the appellee for having filed a motion for summary judgment as opposed to a one-page suggestion of mootness and likewise criticizes the Court of Appeals for supposedly failing to recognize that appellant's case was moot and just dismissing the case summarily. See Merit Brief at p. 12-14.

Appellant's argument ignores the fact that the disposition of his mandamus claim for being moot – which both the appellee argued and the Court of Appeals decided – did *not* render moot the remaining claims that appellant asserted in his apparent attempt to seek maximum statutory damages for alleged public records law violations. Those claims still required a response from the appellee. Those claims still required due consideration by the Court of Appeals. And this expenditure of public resources was required all because appellant signed a pleading which purported to contain statements of fact ostensibly based on appellant's "information and belief." In truth, appellant's allegations were bereft of information or belief.

Appellant nevertheless insists that he at least had good grounds to sue in mandamus to compel production of the working drafts that had not been released instantaneously upon his walk-up demand. According to appellant, the appellee Cuyahoga County Board of Commissioners "did not provide [appellant] with all the records he requested" and he "reasonably believed that the Commissioners and their counsel would refuse to produce or unreasonably delay the production of the public records he requested." See Merit Brief at p. 7.

Of course, appellant never requested public records from the appellee Board of Commissioners – he directed his request to the appellee’s legal counsel. And even there, he was promptly informed that the working drafts would be made available once the Development Agreement was finalized and ready to be submitted to the Board of Commissioners for approval – a fact that appellant chose not to reveal when he filed his mandamus Petition a short time later on March 27, 2009. Regardless of whether appellant really believed the documents sought were subject to immediate public release, R.C. 149.43 at least allows public offices some opportunity and a reasonable period of time to review and examine records prior to their public release. See *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, at ¶¶ 16-17.

But even assuming *arguendo* that the response appellant received were deemed to be an outright denial of his public records request, there is no dispute that appellant did receive the only records not given to him prior to suit – the working drafts of the proposed Development Agreement – ten (10) business days after he requested them. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-3273 at ¶ 17.⁶ Even appellant concedes that rendered his mandamus claim moot as a matter of law. See Merit Brief at p. 12. See, also, *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221; *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894

⁶ Appellant suggests that there was no public scrutiny of the final Development Agreement and preceding drafts prior to the Board of Commissioners’ execution of the Agreement. See Merit Brief at p. 10. In fact, the final agreement and preceding drafts were released publicly on April 8, 2009 and mailed to appellant on April 9, 2009, one week before the Cuyahoga County Board of Commissioners approved and executed the Development Agreement at their April 16, 2009 public meeting. A copy of the executed Development Agreement may be viewed online at http://bocc.cuyahogacounty.us/pdf_bocc/en-US/CLEVELAND-1048597-v12-Development_Agreement_3_16_2009A.pdf. Appellant’s suggestion that the agreement was signed with no public scrutiny is thus belied by the public record.

N.E.2d 686. Still, appellant gave no indication in the court below that he was abandoning that claim – or any of his other claims – thus necessitating appropriate dispositive motion practice on behalf of the appellee.

For his appeal, appellant attempts to defend his filing by arguing that the preliminary drafts of the Development Agreement that he was told he would receive – and that he did receive – were not exempt from disclosure under R.C. 149.43. See Merit Brief at pp. 7-11. Appellant’s argument should be rejected here for several reasons.

First, in its July 2, 2009 merits decision that denied appellant’s request for a writ of mandamus, the Court of Appeals held that the preliminary drafts of the Development Agreement sought by appellant were not public records. See *State ex rel. Bardwell vs. Cuyahoga Cty. Bd. of Comms.*, 2009-Ohio-3273 at ¶ 17. Appellant did not appeal that merits determination. To the contrary, appellant only appealed from the subsequent October 19, 2009 decision that imposed sanctions. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Comms.*, 2009-Ohio-5573. And appellant’s propositions of law here concern only the imposition of sanctions, thus tacitly confirming that the underlying merits of appellant’s action are not properly before the Court in this case.

Second, even if the underlying merits were subject to review here, appellant concedes that the provision of the remaining records rendered his case moot. Consequently, this appeal would really present only an academic question seeking an advisory opinion from this Court. Under well-settled precedent, the Ohio Supreme Court does not indulge in advisory opinions. See *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of America v. Bureau of Workers Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, at ¶ 60.

Third, appellant's claim lacked merit in any event because the preliminary drafts of the proposed Development Agreement were not subject to immediate release as public records under R.C. 149.43. In particular, the documents requested by appellant were preliminary and evolving drafts that were prepared by appellee's counsel and were the subject of ongoing negotiations. Until an agreement was in a form that was ready for submission to the appellee Board of Commissioners for action, the preliminary drafts of the agreement would not qualify as a "record" under R.C. 149.011(G), which states:

"Records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, **which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.**

R.C. 149.011(G) (emphasis added).

Until such time as an instrument is submitted to the public office for formal action or decision, it could not document that public office's organization, functions, policies, decisions, procedures, operations, or other activities because nothing had crystallized to the point for public action. Consequently, preliminary drafts of a potential agreement would not qualify as a "record" under R.C. 149.011(G) at least until they were submitted to the public office for public action. Indeed, it would be absurd to require a public office to release working drafts – that may evolve on a daily basis – while negotiations of an economic development agreement are in progress. Until such time as the public office is ready to take formal action, tentative proposals do not document public office action.

To be sure, "records" under R.C. 149.011(G) can include a document that is in draft, compiled, raw, or refined form. See *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, syllabus at paragraph one. In that case, the "records" in question consisted of

employee compensatory time sheets. But those comp-time records were in a form that the employer used and could be relied upon. *Id.* at ¶¶ 20-25. They accordingly documented the city's procedures or operations. Those comp-time sheets plainly were not works in progress.

Appellee is mindful of decisions in which drafts were found to be subject to release as public records. See *State ex rel. Cincinnati Enquirer, Div. of Gannet Satellite Information Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163; *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St.3d 229, 2000-Ohio-142, 729 N.E.2d 1182. But even in those cases, the "drafts" in question were documents that were submitted to the public office for formal action, not preliminary working drafts that were not yet ready for action.

Thus in *State ex rel. Cincinnati Enquirer, Div. of Gannet Satellite Information Network, Inc. v. Dupuis*, *supra*, the court held that the Department of Justice's proposed settlement agreement that was received by the City of Cincinnati on March 7, 2002 and used by the City in attempting to reach a settlement in the DOJ investigation of the city's police department was a public record. *Id.* at ¶¶ 2, 12-14.

Similarly in *State ex rel. Calvary v. City of Upper Arlington*, *supra*, the court held that the December 10, 1999 draft of the city's tentative verbal agreement with the union that was delivered to the respondent Upper Arlington City Council was public record because it documented the city's version of the agreement that the city relied upon and submitted to city council for formal approval. See 89 Ohio St.3d at 229, 2000-Ohio-142, 729 N.E.2d 1182; *id.* at 232-233, 2000-Ohio-142, 729 N.E.2d 1182.

Those cases are fundamentally distinguishable from the circumstances of this case where a proposed agreement had not yet been submitted for formal action by the public office.

Indeed, appellant's Merit Brief does not appear to take issue with the Court of Appeals' determination that the preliminary drafts did not qualify as "records" under R.C. 140.011(G). See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-3273 at ¶ 17. Instead, appellant disputes the appellate court's further determination that the preliminary drafts fell within the protection of the attorney-client privilege. According to appellant, such instruments are not even protected by the attorney-client privilege. See Merit Brief at p. 8. Appellant's contention is not well taken.

There is no dispute that the rough drafts of the agreement sought by appellant were prepared by attorneys for the appellee in the course of rendering legal services on behalf of the appellee. Ohio law firmly establishes that the attorney-client privilege protects confidential communications between government agencies and their lawyers. See *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990. That privilege extends not only to the testimonial privilege codified under R.C. 2317.02(A) but also to the common-law attorney-client privilege that "reaches far beyond a proscription against testimonial speech [and] protects against any dissemination of information obtained in the confidential relationship." *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, at ¶ 24.

In its recent decision in *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, the Supreme Court of Ohio held that an investigative report prepared by a public office's outside counsel was related to the rendition of legal services and was therefore exempt from disclosure under the attorney-client privilege. *Id.* at ¶¶ 20-33. "[I]f a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is

privileged.” *Id.* at ¶ 27 (quoting *Dunn v. State Farm Fire & Cas. Co.* (C.A.5 1991), 927 F.2d 869, 875).

Like the investigative report at issue in that case, the drafts of the Development Agreement in this case plainly concerned communications between a public office and its counsel who were attempting to draft the terms for a proposed development agreement on behalf of the government client. And considering that the appellant’s request here was made not to the government client – appellee Cuyahoga County Board of Commissioners – but rather was made to the government client’s lawyers, counsel could not waive the attorney-client privilege because that is a privilege that belongs to the client. See *State v. Doe*, 101 Ohio St.3d 170, 2004-Ohio-705, 803 N.E.2d 777, ¶ 15 (“The attorney-client privilege belongs solely to the client – not the attorney.”)

And in a case that is analogous to the facts of this case, the court in *State ex rel. Benesch, Friedlander, Coplan & Arnoff, L.L.P. v. City of Rossford* (2000), 140 Ohio App.3d 149, 746 N.E.2d 1139, held that preliminary drafts of bond documents prepared by a public office’s attorneys were exempt from release as public records because they consisted of “confidential information supplied to the attorneys by their [government] clients coupled with legal advice and opinions, that is, legal proposals as to the substance of the bond instruments, based on that confidential information.” *Id.* at 155, 746 N.E.2d 1139. The court accordingly held that the preliminary drafts of bond documents reflecting information provided by the city and the legal advice flowing from that information were protected by the attorney-client privilege and thus were not subject to public release. *Id.* at 156, 746 N.E.2d 1139.

Likewise here, preliminary drafts of a development agreement drafted by the public office’s counsel reflect information provided by the public client and legal advice rendered in the

course of the legal representation of the public client. The attorney-client privilege attached to those drafts and rendered them exempt from disclosure as public records pursuant to R.C. 149.43(A)(1)(v). Contrary to appellant's contention, the Court of Appeals did not "read the attorney-client privilege *** too broadly," see Merit Brief at p. 11, but rather recognized correctly that the working drafts reflected communications between attorney and client in the course of rendering legal services by the attorney on behalf of the client. And even though the public office chose to release the preliminary drafts of the proposed agreement after the Development Agreement was submitted to the Board of Commissioners for approval, that does not mean that the public office had to release privileged communications with its counsel before that time.

Nor would the fact of ongoing negotiations and exchange of working drafts operate as a waiver any attorney-client privilege. Under Ohio law, R.C. 2317.02(A) provides the exclusive means by which privileged communications between an attorney and client can be waived. See *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487. No such express waiver was shown in this case.

Indeed, attorneys representing clients negotiate with counsel representing opposing parties every day in civil and criminal cases, yet it cannot be said that an attorney's very advocacy on behalf of the client – be it public or private – operates to waive the confidential relation that exists between the attorney and the client. Surely a client can authorize its attorney to represent the client's interest by limited discussions with an opposing party without fear that the very act of client advocacy will breach the confidentiality that is central to the attorney-client relationship. In this case, the attorneys' preliminary drafts constituted privileged attorney-client communications that were not public record under Ohio law.

Beyond all that, even if appellant's mandamus claim for public records had some facial plausibility for the ten (10) business days before it became moot, that should not excuse appellant from being held accountable for the remainder of his groundless claims. They needlessly consumed appellate judicial resources that could have been expended on other legal matters.

Appellant finally contends that the Court of Appeals' imposition of sanctions under Civil Rule 11 (and the prospect of sanctions under R.C. 2323.51) is contrary to Ohio public policy that favors open access to public records. See Merit Brief at pp. 14-18. But nothing in Ohio law insulates litigants – whether represented or *pro se* – from abusing the judicial process by filing legal documents that do not comport with the minimum standards of pleading. Nor should litigants who seek public records be immunized from such minimum pleading standards.

And contrary to appellant's alarmist fear that that this decision will chill government activists from exercising their right to seek public records under R.C. 149.43, this case appears to be the first time ever that a court imposed sanctions against an individual who sought public records. The Court of Appeals' measured analysis here belies any suggestion that the court acted unreasonably, arbitrarily, or unconscionably. Determining that appellant had signed a pleading that contained assertions he knew lacked good grounds, the Court of Appeals imposed the sanctions warranted by Civil Rule 11. There is no contention that the attorney fee award of \$1,050.42 was unreasonable.

In short, the record of this case reflects that appellant filed a pleading that lacked good grounds in multiple respects. Appellant's groundless filing necessitated a response to expose its deficiencies. Appellant's groundless filing necessitated consideration by the Court of Appeals to adjudicate its claims. The Court of Appeals carefully scrutinized appellant's conduct before

deciding to impose sanctions under Civil Rule 11 but not under R.C. 2323.51. Nothing in this record suggests that the Court of Appeals acted unreasonably, arbitrarily, or unconscionably. Because appellant has not shown any abuse of discretion warranting reversal, appellee respectfully requests that this Court affirm the judgment of the Court of Appeals.

CONCLUSION

Appellee Cuyahoga County Board of Commissioners respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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C

Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

Chapter 149. Documents, Reports, and Records (Refs & Annos)

Miscellaneous Provisions

 → **149.011 Definitions**

As used in this chapter, except as otherwise provided:

(A) "Public office" includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

(B) "State agency" includes every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including any state-supported institution of higher education, the general assembly, any legislative agency, any court or judicial agency, or any political subdivision or agency of a political subdivision.

(C) "Public money" includes all money received or collected by or due a public official, whether in accordance with or under authority of any law, ordinance, resolution, or order, under color of office, or otherwise. It also includes any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.

(D) "Public official" includes all officers, employees, or duly authorized representatives or agents of a public office.

(E) "Color of office" includes any act purported or alleged to be done under any law, ordinance, resolution, order, or other pretension to official right, power, or authority.

(F) "Archive" includes any public record that is transferred to the state archives or other designated archival institutions because of the historical information contained on it.

(G) "Records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

CREDIT(S)

(2006 H 9, eff. 9-29-07; 2003 H 95, eff. 9-26-03; 1985 H 238, eff. 7-1-85)

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Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

Chapter 149. Documents, Reports, and Records (Refs & Annos)

Records Commissions

⇒ **149.43 Availability of public records; mandamus action; training of public employees; public records policy; bulk commercial special extraction requests**

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

- (h) Confidential law enforcement investigatory records;
- (i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;
- (j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;
- (k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;
- (l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;
- (m) Intellectual property records;
- (n) Donor profile records;
- (o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;
- (p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;
- (q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;
- (r) Information pertaining to the recreational activities of a person under the age of eighteen;
- (s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;
- (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;

(y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(z) Records listed in section 5101.29 of the Revised Code.

(aa) [FN1] Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, pa-

role officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) [FN2] of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) [FN3] of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current re-

records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this

section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the pub-

lic interest.

As used in this division, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public re-

cords reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public

records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of

all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

CREDIT(S)

(2009 H 1, eff. 10-16-09; 2008 S 248, eff. 4-7-09; 2008 H 214, eff. 5-14-08; 2006 H 9, eff. 9-29-07; 2006 H 141, eff. 3-30-07; 2004 H 303, eff. 10-29-05; 2004 H 431, eff. 7-1-05; 2004 S 222, eff. 4-27-05; 2003 H 6, eff. 2-12-04; 2002 S 258, eff. 4-9-03; 2002 H 490, eff. 1-1-04; 2002 S 180, eff. 4-9-03; 2001 H 196, eff. 11-20-01; 2000 S 180, eff. 3-22-01; 2000 H 448, eff. 10-5-00; 2000 H 640, eff. 9-14-00; 2000 H 539, eff. 6-21-00; 1999 H 471, eff. 7-1-00; 1999 S 78, eff. 12-16-99; 1999 S 55, eff. 10-26-99; 1998 H 421, eff. 5-6-98; 1997 H 352, eff. 1-1-98; 1996 S 277, § 6, eff. 7-1-97; 1996 S 277, § 1, eff. 3-31-97; 1996 H 438, eff. 7-1-97; 1996 S 269, eff. 7-1-96; 1996 H 353, eff. 9-17-96; 1996 H 419, eff. 9-18-96; 1995 H 5, eff. 8-30-95; 1993 H 152, eff. 7-1-93; 1987 S 275; 1985 H 319, H 238; 1984 H 84; 1979 S 62; 130 v H 187)

[FN1] Division (A)(1)(aa) appeared as division (A)(1)(z) prior to the harmonization of 2008 S 248 and 2008 H 214.

[FN2] So in original; should this read "(B)(9)"?

[FN3] So in original; should this read "(B)(9)"?

Current through 2009 File 20 of the 128th GA (2009-2010), apv. by 3/9/10 and filed with the Secretary of State by 3/9/10.

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Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

▣ Chapter 2317. Evidence (Refs & Annos)

▣ Competency of Witnesses and Evidence; Privileged Communications

→ **2317.02 Privileged communications and acts**

The following persons shall not testify in certain respects:

(A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.

(B)(1) A physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply, and a physician or dentist may testify or

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may be compelled to testify, in any of the following circumstances:

(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(i) If the patient or the guardian or other legal representative of the patient gives express consent;

(ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;

(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(b) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(c) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the patient's whole blood, blood serum or plasma, breath, urine, or other bodily substance at any time relevant to the criminal offense in question.

(d) In any criminal action against a physician or dentist. In such an action, the testimonial privilege established under this division does not prohibit the admission into evidence, in accordance with the Rules of Evidence, of a patient's medical or dental records or other communications between a patient and the physician or dentist that are related to the action and obtained by subpoena, search warrant, or other lawful means. A court that permits or compels a physician or dentist to testify in such an action or permits the introduction into evidence of patient records or other communications in such an action shall require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the records is maintained. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(e)(i) If the communication was between a patient who has since died and the deceased patient's physician or dentist, the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased patient when the deceased patient executed a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when the

deceased patient executed a document that is the basis of the dispute.

(ii) If neither the spouse of a patient nor the executor or administrator of that patient's estate gives consent under division (B)(1)(a)(ii) of this section, testimony or the disclosure of the patient's medical records by a physician, dentist, or other health care provider under division (B)(1)(c)(i) of this section is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103, and an authorization or opportunity to be heard shall not be required.

(iii) Division (B)(1)(e)(i) of this section does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.

(iv) An interested person who objects to testimony or disclosure under division (B)(1)(e)(i) of this section may seek a protective order pursuant to Civil Rule 26.

(v) A person to whom protected health information is disclosed under division (B)(1)(c)(i) of this section shall not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and shall return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.

(2)(a) If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to section 2317.022 of the Revised Code, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

(b) If a health care provider possesses any records of the type described in division (B)(2)(a) of this section regarding the person in question at any time relevant to the criminal offense in question, in lieu of personally testifying as to the results of the test in question, the custodian of the records may submit a certified copy of the records, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any certified copy of records submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test to which the records pertain, the person under whose supervision the test was administered, the custodian of the records, the person who made the records, or the person under whose supervision the records were made.

(3)(a) If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(b) If the testimonial privilege described in division (B)(1) of this section does not apply to a physician or dentist as provided in division (B)(1)(c) of this section, the physician or dentist, in lieu of personally testifying as to the results of the test in question, may submit a certified copy of those results, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any certified copy of results submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test in question, the person under whose supervision the test was administered, the custodian of the results of the test, the person who compiled the results, or the person under whose supervision the results were compiled.

(4) The testimonial privilege described in division (B)(1) of this section is not waived when a communication is made by a physician to a pharmacist or when there is communication between a patient and a pharmacist in furtherance of the physician-patient relation.

(5)(a) As used in divisions (B)(1) to (4) of this section, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A "communication" may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

(b) As used in division (B)(2) of this section, "health care provider" means a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner.

(c) As used in division (B)(5)(b) of this section:

(i) "Ambulatory care facility" means a facility that provides medical, diagnostic, or surgical treatment to patients who do not require hospitalization, including a dialysis center, ambulatory surgical facility, cardiac catheterization facility, diagnostic imaging center, extracorporeal shock wave lithotripsy center, home health agency, inpatient hospice, birthing center, radiation therapy center, emergency facility, and an urgent care center. "Ambulatory health care facility" does not include the private office of a physician or dentist, whether the office is for an individual or group practice.

(ii) "Emergency facility" means a hospital emergency department or any other facility that provides emergency

medical services.

(iii) "Health care practitioner" has the same meaning as in section 4769.01 of the Revised Code.

(iv) "Hospital" has the same meaning as in section 3727.01 of the Revised Code.

(v) "Long-term care facility" means a nursing home, residential care facility, or home for the aging, as those terms are defined in section 3721.01 of the Revised Code; an adult care facility, as defined in section 3722.01 of the Revised Code; a nursing facility or intermediate care facility for the mentally retarded, as those terms are defined in section 5111.20 of the Revised Code; a facility or portion of a facility certified as a skilled nursing facility under Title XVIII of the "Social Security Act," 49 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended.

(vi) "Pharmacy" has the same meaning as in section 4729.01 of the Revised Code.

(d) As used in divisions (B)(1) and (2) of this section, "drug of abuse" has the same meaning as in section 4506.01 of the Revised Code.

(6) Divisions (B)(1), (2), (3), (4), and (5) of this section apply to doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, and dentists.

(7) Nothing in divisions (B)(1) to (6) of this section affects, or shall be construed as affecting, the immunity from civil liability conferred by section 307.628 of the Revised Code or the immunity from civil liability conferred by section 2305.33 of the Revised Code upon physicians who report an employee's use of a drug of abuse, or a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee in accordance with division (B) of that section. As used in division (B)(7) of this section, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(C)(1) A cleric, when the cleric remains accountable to the authority of that cleric's church, denomination, or sect, concerning a confession made, or any information confidentially communicated, to the cleric for a religious counseling purpose in the cleric's professional character. The cleric may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust and except that, if the person voluntarily testifies or is deemed by division (A)(4)(c) of section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust.

(2) As used in division (C) of this section:

(a) "Cleric" means a member of the clergy, rabbi, priest, Christian Science practitioner, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

(b) "Sacred trust" means a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church, if both of the following apply:

(i) The confession or confidential communication was made directly to the cleric.

(ii) The confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

(D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist;

(E) A person who assigns a claim or interest, concerning any matter in respect to which the person would not, if a party, be permitted to testify;

(F) A person who, if a party, would be restricted under section 2317.03 of the Revised Code, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, shall be restricted in the same manner in any action or proceeding concerning the property or thing.

(G)(1) A school guidance counselor who holds a valid educator license from the state board of education as provided for in section 3319.22 of the Revised Code, a person licensed under Chapter 4757. of the Revised Code as a professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or registered under Chapter 4757. of the Revised Code as a social work assistant concerning a confidential communication received from a client in that relation or the person's advice to a client unless any of the following applies:

(a) The communication or advice indicates clear and present danger to the client or other persons. For the purposes of this division, cases in which there are indications of present or past child abuse or neglect of the client constitute a clear and present danger.

(b) The client gives express consent to the testimony.

(c) If the client is deceased, the surviving spouse or the executor or administrator of the estate of the deceased client gives express consent.

(d) The client voluntarily testifies, in which case the school guidance counselor or person licensed or registered under Chapter 4757. of the Revised Code may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the client is not germane to the counselor-client, marriage and family therapist-client, or social worker-client relationship.

(f) A court, in an action brought against a school, its administration, or any of its personnel by the client, rules after an in-camera inspection that the testimony of the school guidance counselor is relevant to that action.

(g) The testimony is sought in a civil action and concerns court-ordered treatment or services received by a patient as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(2) Nothing in division (G)(1) of this section shall relieve a school guidance counselor or a person licensed or registered under Chapter 4757. of the Revised Code from the requirement to report information concerning child abuse or neglect under section 2151.421 of the Revised Code.

(H) A mediator acting under a mediation order issued under division (A) of section 3109.052 of the Revised Code or otherwise issued in any proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of children, in any action or proceeding, other than a criminal, delinquency, child abuse, child neglect, or dependent child action or proceeding, that is brought by or against either parent who takes part in mediation in accordance with the order and that pertains to the mediation process, to any information discussed or presented in the mediation process, to the allocation of parental rights and responsibilities for the care of the parents' children, or to the awarding of parenting time rights in relation to their children;

(I) A communications assistant, acting within the scope of the communication assistant's authority, when providing telecommunications relay service pursuant to section 4931.35 of the Revised Code or Title II of the "Communications Act of 1934," 104 Stat. 366 (1990), 47 U.S.C. 225, concerning a communication made through a telecommunications relay service. Nothing in this section shall limit the obligation of a communications assistant to divulge information or testify when mandated by federal law or regulation or pursuant to subpoena in a criminal proceeding.

Nothing in this section shall limit any immunity or privilege granted under federal law or regulation.

(J)(1) A chiropractor in a civil proceeding concerning a communication made to the chiropractor by a patient in that relation or the chiropractor's advice to a patient, except as otherwise provided in this division. The testimonial privilege established under this division does not apply, and a chiropractor may testify or may be compelled to testify, in any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(a) If the patient or the guardian or other legal representative of the patient gives express consent.

(b) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent.

(c) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(2) If the testimonial privilege described in division (J)(1) of this section does not apply as provided in division (J)(1)(c) of this section, a chiropractor may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the chiropractor by the patient in question in that relation, or the chiropractor's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(3) The testimonial privilege established under this division does not apply, and a chiropractor may testify or be compelled to testify, in any criminal action or administrative proceeding.

(4) As used in this division, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a chiropractor to diagnose, treat, or act for a patient. A communication may include, but is not limited to, any chiropractic, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

(K)(1) Except as provided under division (K)(2) of this section, a critical incident stress management team member concerning a communication received from an individual who receives crisis response services from the team member, or the team member's advice to the individual, during a debriefing session.

(2) The testimonial privilege established under division (K)(1) of this section does not apply if any of the following are true:

(a) The communication or advice indicates clear and present danger to the individual who receives crisis response services or to other persons. For purposes of this division, cases in which there are indications of present or past child abuse or neglect of the individual constitute a clear and present danger.

(b) The individual who received crisis response services gives express consent to the testimony.

(c) If the individual who received crisis response services is deceased, the surviving spouse or the executor or administrator of the estate of the deceased individual gives express consent.

(d) The individual who received crisis response services voluntarily testifies, in which case the team member may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the individual who received crisis response services is not germane to the relationship between the individual and the team member.

(f) The communication or advice pertains or is related to any criminal act.

(3) As used in division (K) of this section:

(a) "Crisis response services" means consultation, risk assessment, referral, and on-site crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster.

(b) "Critical incident stress management team member" or "team member" means an individual specially trained to provide crisis response services as a member of an organized community or local crisis response team that holds membership in the Ohio critical incident stress management network.

(c) "Debriefing session" means a session at which crisis response services are rendered by a critical incident stress management team member during or after a crisis or disaster.

(L)(1) Subject to division (L)(2) of this section and except as provided in division (L)(3) of this section, an employee assistance professional, concerning a communication made to the employee assistance professional by a client in the employee assistance professional's official capacity as an employee assistance professional.

(2) Division (L)(1) of this section applies to an employee assistance professional who meets either or both of the following requirements:

(a) Is certified by the employee assistance certification commission to engage in the employee assistance profession;

(b) Has education, training, and experience in all of the following:

(i) Providing workplace-based services designed to address employer and employee productivity issues;

(ii) Providing assistance to employees and employees' dependents in identifying and finding the means to resolve personal problems that affect the employees or the employees' performance;

(iii) Identifying and resolving productivity problems associated with an employee's concerns about any of the

following matters: health, marriage, family, finances, substance abuse or other addiction, workplace, law, and emotional issues;

(iv) Selecting and evaluating available community resources;

(v) Making appropriate referrals;

(vi) Local and national employee assistance agreements;

(vii) Client confidentiality.

(3) Division (L)(1) of this section does not apply to any of the following:

(a) A criminal action or proceeding involving an offense under sections 2903.01 to 2903.06 of the Revised Code if the employee assistance professional's disclosure or testimony relates directly to the facts or immediate circumstances of the offense;

(b) A communication made by a client to an employee assistance professional that reveals the contemplation or commission of a crime or serious, harmful act;

(c) A communication that is made by a client who is an unemancipated minor or an adult adjudicated to be incompetent and indicates that the client was the victim of a crime or abuse;

(d) A civil proceeding to determine an individual's mental competency or a criminal action in which a plea of not guilty by reason of insanity is entered;

(e) A civil or criminal malpractice action brought against the employee assistance professional;

(f) When the employee assistance professional has the express consent of the client or, if the client is deceased or disabled, the client's legal representative;

(g) When the testimonial privilege otherwise provided by division (L)(1) of this section is abrogated under law.

CREDIT(S)

(2006 S 117, eff. 10-31-07 (*State ex rel. Ohio Gen. Assembly v. Brunner*); 2006 S 8, eff. 8-17-06; 2006 S 17, eff. 8-3-06; 2006 H 144, eff. 6-15-06; 2005 S 19, eff. 1-27-06; 2002 S 281, eff. 4-11-03; 2002 H 533, eff. 3-31-03; 2002 H 374, eff. 4-7-03; 2001 H 94, eff. 9-5-01; 2000 S 180, eff. 3-22-01; 2000 H 506, eff. 4-10-01; 2000 S

172, eff. 2-12-01; 2000 H 448, eff. 10-5-00; 1998 H 606, eff. 3-9-99; 1996 S 223, eff. 3-18-97; 1996 S 230, eff. 10-29-96; 1994 H 335, eff. 12-9-94; 1993 S 121, eff. 10-29-93; 1992 S 343; 1990 S 3, H 615; 1989 S 2; 1987 H 1; 1986 H 529, II 528; 1984 H 205; 1980 H 284; 1976 H 1426; 1975 H 682; 125 v 313; 1953 H 1; GC 11494)

Current through 2009 File 20 of the 128th GA (2009-2010), apv. by 3/9/10 and filed with the Secretary of State by 3/9/10.

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Title XXIII. Courts--Common Pleas

↳ Chapter 2323. Judgment (Refs & Annos)

↳ Miscellaneous Provisions

→ **2323.51 Definitions; award of attorney's fees as sanction for frivolous conduct**

(A) As used in this section:

(1) "Conduct" means any of the following:

(a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action;

(b) The filing by an inmate of a civil action or appeal against a government entity or employee, the assertion of a claim, defense or other position in connection with a civil action of that nature or the assertion of issues of law in an appeal of that nature, or the taking of any other action in connection with a civil action or appeal of that nature.

(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.

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(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.

(b) An inmate's commencement of a civil action or appeal against a government entity or employee when any of the following applies:

(i) The claim that is the basis of the civil action fails to state a claim or the issues of law that are the basis of the appeal fail to state any issues of law.

(ii) It is clear that the inmate cannot prove material facts in support of the claim that is the basis of the civil action or in support of the issues of law that are the basis of the appeal.

(iii) The claim that is the basis of the civil action is substantially similar to a claim in a previous civil action commenced by the inmate or the issues of law that are the basis of the appeal are substantially similar to issues of law raised in a previous appeal commenced by the inmate, in that the claim that is the basis of the current civil action or the issues of law that are the basis of the current appeal involve the same parties or arise from the same operative facts as the claim or issues of law in the previous civil action or appeal.

(3) "Civil action or appeal against a government entity or employee," "inmate," "political subdivision," and "employee" have the same meanings as in section 2969.21 of the Revised Code.

(4) "Reasonable attorney's fees" or "attorney's fees," when used in relation to a civil action or appeal against a government entity or employee, includes both of the following, as applicable:

(a) The approximate amount of the compensation, and the fringe benefits, if any, of the attorney general, an assistant attorney general, or special counsel appointed by the attorney general that has been or will be paid by the state in connection with the legal services that were rendered by the attorney general, assistant attorney general, or special counsel in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

(b) The approximate amount of the compensation, and the fringe benefits, if any, of a prosecuting attorney or other chief legal officer of a political subdivision, or an assistant to a chief legal officer of those natures, who has been or will be paid by a political subdivision in connection with the legal services that were rendered by the chief legal officer or assistant in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

(5) "State" has the same meaning as in section 2743.01 of the Revised Code.

(6) "State correctional institution" has the same meaning as in section 2967.01 of the Revised Code.

(B)(1) Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in division (E)(2)(b) of section 101.15 or division (I)(2)(b) of section 121.22 of the Revised Code, at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section.

(2) An award may be made pursuant to division (B)(1) of this section upon the motion of a party to a civil action or an appeal of the type described in that division or on the court's own initiative, but only after the court does all of the following:

(a) Sets a date for a hearing to be conducted in accordance with division (B)(2)(c) of this section, to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;

(b) Gives notice of the date of the hearing described in division (B)(2)(a) of this section to each party or counsel of record who allegedly engaged in frivolous conduct and to each party who allegedly was adversely affected by frivolous conduct;

(c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division, allows the parties and counsel of record involved to present any relevant evidence at the hearing, including evidence of the type described in division (B)(5) of this section, determines that the conduct involved was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made. If any party or counsel of record who allegedly engaged in or allegedly was adversely affected by frivolous conduct is confined in a state correctional institution or in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, the court, if practicable, may hold the hearing by telephone or, in the alternative, at the institution, jail, or workhouse in which the party or counsel is confined.

(3) The amount of an award made pursuant to division (B)(1) of this section that represents reasonable attorney's fees shall not exceed, and may be equal to or less than, whichever of the following is applicable:

(a) If the party is being represented on a contingent fee basis, an amount that corresponds to reasonable fees that would have been charged for legal services had the party been represented on an hourly fee basis or another basis other than a contingent fee basis;

(b) In all situations other than that described in division (B)(3)(a) of this section, the attorney's fees that were reasonably incurred by a party.

(4) An award made pursuant to division (B)(1) of this section may be made against a party, the party's counsel of record, or both.

(5)(a) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded reasonable attorney's fees and the party's counsel of record may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of the reasonable attorney's fees, an itemized list or other evidence of the legal services rendered, the time expended in rendering the services, and whichever of the following is applicable:

(i) If the party is being represented by that counsel on a contingent fee basis, the reasonable attorney's fees that would have been associated with those services had the party been represented by that counsel on an hourly fee basis or another basis other than a contingent fee basis;

(ii) In all situations other than those described in division (B)(5)(a)(i) of this section, the attorney's fees associated with those services.

(b) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded court costs and other reasonable expenses incurred in connection with the civil action or appeal may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of the costs and expenses, an itemized list or other evidence of the costs and expenses that were incurred in connection with that action or appeal and that were necessitated by the frivolous conduct, including, but not limited to, expert witness fees and expenses associated with discovery.

(C) An award of reasonable attorney's fees under this section does not affect or determine the amount of or the manner of computation of attorney's fees as between an attorney and the attorney's client.

(D) This section does not affect or limit the application of any provision of the Rules of Civil Procedure, the Rules of Appellate Procedure, or another court rule or section of the Revised Code to the extent that the provision prohibits an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal or authorizes an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal in a specified manner, generally, or subject to limitations.

CREDIT(S)

(2004 S 80, eff. 4-7-05; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97 (*State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999)); 1996 H 455, eff. 10-17-96; 1987 H 1, eff. 1-5-88; 1987 H 327)

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Rules of Civil Procedure (Refs & Annos)

Title III. Pleadings and Motions

→ Civ R 11 Signing of pleadings, motions, or other documents

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telephone number, telefax number, if any, and business e-mail address, if any, shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. Except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

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(Adopted eff. 7-1-70; amended eff. 7-1-94, 7-1-95, 7-1-01)

Current with amendments received through 1/15/10

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