

## IN THE SUPREME COURT OF OHIO

Frank E. Bellamy, Sr., and  
Cooper & Elliott, LLC,

Appellees,

v.

Robert G. Montgomery, *et al.*,

Appellants

Case No.

12-1890

On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District

Court of Appeals  
Case No. 11AP-1059

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANTS ROBERT G. MONTGOMERY,  
BRAD HENNEBERT AND FRANKLIN COUNTY, OHIO**

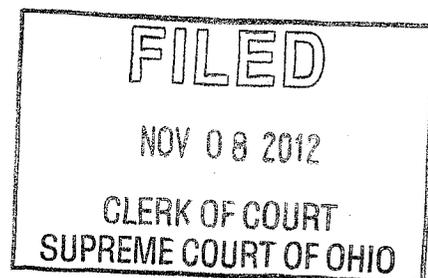
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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

The discovery process is arguably the most significant aspect of civil litigation. Discovery is what allows the parties to adequately evaluate the merits of the claims and defenses for settlement purposes. In the absence of settlement, discovery is necessary to prepare civil cases for dispositive motions and, ultimately, for trial. When discovery is stalled or impeded, a case can drag on unnecessarily and the judicial process is inefficient, costing the court and the parties money and time. It is for these reasons that Civ.R. 37(B)(2) exists. The present case demonstrates a perfect example of the effects that obstructive discovery tactics have upon the judicial process and other parties, and the need for the imposition of sanctions on counsel pursuant to Civ.R. 37(B)(2) when counsel participate in or condone the obstructive behavior.

In this case, the court of appeals substituted its judgment for that of two trial court judges who were witness to counsel's sanctionable conduct, who heard four days of testimony on the matter, and who reviewed voluminous documentary evidence of same.

**STATEMENT OF THE CASE AND FACTS**

This appeal involves the review of the trial court's order awarding monetary sanctions against Cooper & Elliott, LLC (hereinafter "the appellee"), the law firm hired by Frank E. Bellamy (hereinafter "the plaintiff") to represent him in an employment action filed on June 23, 2004, against then Franklin County Recorder Robert G. Montgomery, employee Brad Hennebert, and Franklin County, Ohio (hereinafter collectively referred to as "the appellants").

On July 1, 2004, the appellants requested copies of the plaintiff's state and federal tax returns. The appellee objected to this request. On March 2, 2005, the appellants made a second

request for the tax returns and the appellee again objected. The appellants sought the tax returns through a Civ.R. 30(B)(4) request when the plaintiff's continued deposition was noticed on April 7, 2005. The plaintiff appeared at the deposition without the records.

Being forced to explore alternatives, the appellants served a subpoena upon the Tax Commissioner of Ohio on April 29, 2005. The appellee filed a motion for a protective order and a motion to quash the subpoena arguing the records were not relevant, that the subpoena served merely to harass, and that the records contained the plaintiff's personal information. The appellants filed a motion to compel. On July 8, 2005, the trial court issued a decision denying the appellee's motions and granting the appellants' motion to compel. The trial court, recognizing long standing Ohio law, held that the tax returns were relevant and discoverable, and that there was no privilege protecting the requested information, and that there was no evidence of harassment by the appellants.

The Tax Commissioner provided some information regarding the state tax returns in response to the subpoena, but that information was incomplete in that complete returns were not provided for all years, and indeed some years were missing altogether. Counsel for the appellants contacted the appellee on July 17, 2005 to inquire about the production of the returns. They were advised that the plaintiff was in process of obtaining responsive documents. Eventually, all that the plaintiff did produce were cover sheets for his federal tax returns for 2001, 2002 and 2003, but not the entire returns, and nothing for the remaining years, nor the state tax returns. The appellants were advised that the plaintiff had no other tax information in his possession.

In a continuing effort to obtain the necessary returns, counsel for the appellants forwarded I.R.S. releases to the appellee on September 12, 2005, requesting that the plaintiff execute the releases, and return the same to the appellants along with a check for the I.R.S.

Having received nothing from the appellee for a month, on October 11, 2005, the appellants filed a motion to show cause. On November 20, 2005, the appellee finally delivered the executed releases to the appellants' counsel, but without the check necessary to process the request through the I.R.S. On November 18, 2005, the trial court granted the appellants' motion to show cause and ordered the plaintiff to produce the tax returns by December 9, 2005, five months after his original order.

Having given the plaintiff and counsel one last chance to comply, on January 5, 2006, the trial court issued a decision that dismissed the plaintiff's complaint and awarded the appellants reasonable expenses, including attorney fees, caused by the failure to produce the tax returns. The trial court ordered a hearing to be held to determine the amount of the expenses to be awarded along with the level of responsibility for them of the plaintiff and the appellee.

The hearing was held over 3 days (October 6, October 30, and November 15, 2006) before a visiting judge. Just prior to the hearing, the appellee withdrew as counsel for the plaintiff and the plaintiff did not attend the hearing. On December 29, 2006, the plaintiff and the appellee resumed their attorney-client relationship. On October 7, 2008, the visiting judge journalized his findings of facts and conclusions of law in an entry awarding the appellants' \$41,982.77, and imposing joint and several liability upon the plaintiff and the appellee. The appellee appealed the decision to the court of appeals.

The court of appeals remanded the matter back to the trial court for more complete findings as to the relative levels of responsibility between the plaintiff and the appellee, as well as a redetermination as to the total amount owed to the appellants as a result of the discovery abuse. The trial court, upon remand, conducted an evidentiary hearing to determine the level of responsibility between the plaintiff and the appellee and the appropriate amount of fees to be

awarded. The hearing was held on September 12, 2011, and the decision was rendered on November 1, 2011, awarding the appellants the sum of \$13,095.26, and finding the appellee to be 25% responsible. The appellee again appealed and the court of appeals determined that the trial court used the wrong legal standard in apportioning liability and that there were no facts that could support the trial court's decision.

The court of appeals erred in ruling that the appellee neither condoned nor participated in the failure of the plaintiff to produce his tax returns to the appellants. In support of their position on these issues, the appellants present the following argument.

### **ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW**

**Proposition of Law No. I: An attorney should be issued discovery sanctions pursuant to Civ.R. 37(B)(2) when the attorney condones and participates in the failure to abide by a court's discovery order.**

It does not appear that this Court has established a standard for determining when counsel should be sanctioned for discovery violations pursuant to Civ.R. 37(B)(2). This Court has, however, set forth a strict abuse of discretion standard of trial court decisions regarding the issue: "The discovery rules give the trial court great latitude in crafting sanctions to fit discovery abuses. A reviewing court's responsibility is merely to review these rulings for an abuse of discretion....In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Nakoff v. Fairview Gen. Hosp.*, 1996-Ohio-159, 75 Ohio St.3d 254, 256. In the instant matter, there are three trial court decisions finding the appellee culpable for the failure to produce its client's tax records. Each of those decisions is supported by the trial court's review of

the facts of the case and the trial court's reasonable exercise of judgment that the appellee participated in its client's discovery abuse.

In the first trial court decision issued on January 5, 2006, dismissing the plaintiff's complaint because of his discovery abuse in not producing his tax returns, the trial judge found that the appellee engaged in a "pattern of deceit, neglect and negligence." The trial court went on to state that the appellee acted to "stall and delay" the progress of the case and attempted to blame the appellants for that delay. The trial court specifically ruled that the appellee was to be held responsible, at least in part, for the cost to the appellants resulting from the failure to produce the tax returns. The trial court ordered that a hearing be held to determine the cost to the appellants as well as what portion should be attributed to the appellee and what portion should be attributed to the plaintiff.

After holding that hearing, a visiting judge issued a decision finding the appellee jointly and severally liable for the sanctions. In doing so, the trial court cited the following facts as examples of the appellee's culpability for the discovery abuse. First, the appellee knew that the returns had not been produced, but its only explanation for the failure was that its client had moved to Youngstown. Second, the appellee refused to recognize a subpoena *duces tecum* for its client to bring the requested tax returns to his noticed deposition. Third, it moved to quash the subpoena that the appellants filed with the Ohio State Tax Commissioner. Fourth, the appellee filed a surreply with respect to the appellants' motion to show cause relating to the failure to produce the tax returns in which they misrepresented the facts. Fifth, the appellee did not inform the trial court of its attempts to comply with the July 8 order to compel and the November 18 order to show cause until December 7, 2005, which was only two days prior to the deadline for producing the tax returns. Finally, the visiting judge, who heard three days of testimony,

determined that the appellee's "efforts to secure and produce the tax returns does not evidence a model of urgency." Of import to the trial court (both the assigned trial court judge and the visiting judge who presided over the hearing) was that after five months of delay, the appellee was able to secure a release from its client to obtain the records within five days (which included Thanksgiving and the Thanksgiving holiday weekend). The court cited to federal case law permitting joint and several liability pursuant to Fed.R.Civ. 37.

In reviewing the trial court's imposition of joint and several liability against the appellee and its client, the court of appeals agreed that Civ.R. 37 contemplates joint and several liability but found that the visiting judge's opinion imposing joint and several liability upon the appellee "falls somewhat short of the specificity discussed in" *Weisberg v. Webster* (D.C.C. 1984), 749 F.2d 864. The court of appeals went on to opine that the visiting judge failed to indicate the level of responsibility between the appellee and its client. However, the visiting judge found the appellee jointly and severally liable, which, by definition, means that he found them equally culpable. Given that the court of appeals agreed that joint and several liability can be issued pursuant to Rule 37, it is difficult to discern why the trial court should have also apportioned liability. The court of appeals remanded the case "for more complete findings as to Cooper & Elliott's level of responsibility, if any." The basis for the appellate court's addition of the words "if any" is also a mystery given that two trial court judges had already determined that the appellee was responsible.

Faced with the appellate court's conflicting opinion and unclear standard for imposing sanctions against counsel and despite the fact that the trial court already heard testimony and admitted many exhibits with respect to the issue of discovery sanctions, in its cautious effort to satisfy the court of appeals, the trial court held another evidentiary hearing to determine the

appellee's level of responsibility for the discovery sanctions. After doing so, the trial court issued yet another decision finding the appellee liable for the discovery abuse. Specifically, the court assigned 25 percent of the responsibility for the discovery abuse to the appellee. In support of this decision, the trial court listed several specific facts in support of its finding. The trial court stated that counsel told its client to comply and then washed its hands of the matter. The trial court stated that counsel met with the plaintiff personally twice after the first order compelling production and did not bother to obtain a release for the returns - even though counsel knew that its client moved to a different city and had already looked unsuccessfully for the returns. The trial court stated that counsel never took responsibility for obeying the court's order. The trial court stated that, based upon the testimony at the second hearing, counsel had no sense of urgency in complying with the order to compel between when it was issued on July 8, 2005, and when the court issued its second order to produce on November 18, 2005. The trial court had also previously stated that the fact counsel was able to obtain the signed releases from its client and get the releases and the check for the records to the IRS in under a week over a holiday weekend demonstrated that counsel was capable of abiding by the court's orders, but simply chose not to do so until the trial court threatened sanctions. By apportioning a specific amount of liability on the appellee and citing specific facts in support of its apportionment, the trial court complied with the appellate court's instructions.

There are additional facts in the record that support a finding that counsel was culpable. It was counsel's decision to object to a routine request for tax returns in an employment case. Such an objection shows that counsel was the instigator of the discovery abuse. Further, as of August 24, 2005, when it learned its client did not have possession of the records, there was nothing else that the plaintiff could do to comply with the order, except to sign a release and provide it to his

counsel. When counsel obtained the release from its client and sent it to the appellants, it failed to provide the check necessary to obtain the records from the IRS despite appellants' very specific request that it do so, with no objection from the appellee. In addition, at no time between July 2005 and January 2006 did counsel ever indicate that it had a problem communicating with its client. Counsel attended a status conference and filed a response to the appellants' motion to show cause in 2005 and said nothing about its client being unresponsive. In fact, in its response to the motion to show cause, counsel misrepresented that tax returns were produced. Finally, from the time it sent the plaintiff the release for the returns until even after receiving the appellants' motion to show cause – for an entire month – the appellee made not one single phone call to its client.

The trial court was not creating a new standard of review for sanctions when it stated that counsel showed a “lack of adequate respect for the Court’s order.” The court was merely stating a fact. The trial court complied with the court of appeals’ decision. It assigned a specific level of responsibility to the appellee and cited specific facts upon which it based its decision. However, when the appellate court reviewed the matter again, it determined that the trial court used the wrong standard and further found that there were no facts to support a finding of sanctions against the appellee. In short, the court of appeals substituted its judgment for that of the trial court in contravention of the appropriate standard of review.

### **CONCLUSION**

This case involves matters of public and great general interest regarding the responsibility of counsel to abide by court orders and an appellate court’s limited review of a trial court’s

determination regarding counsel's failure to do so. The appellants request that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,  
RON O'BRIEN  
Prosecuting Attorney



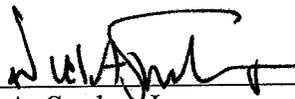
\_\_\_\_\_  
Nick A. Soulas, Jr. (Counsel of Record)  
First Assistant Prosecuting Attorney

COUNSEL FOR APPELLANTS

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was served, by regular U.S. mail, this 8<sup>th</sup> day of November 2012, upon the following:

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Charles H. Cooper, Jr.  
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\_\_\_\_\_  
Nick A. Soulas, Jr.  
First Assistant Prosecuting Attorney  
COUNSEL FOR APPELLANTS

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Frank E. Bellamy, Sr.,	:	
	:	
Plaintiff-Appellee,	:	
	:	
[Cooper & Elliott, LLC,	:	No. 11AP-1059
	:	(C.P.C. No. 04CVH-06-6540)
Appellant],	:	
	:	(REGULAR CALENDAR)
v.	:	
	:	
Robert G. Montgomery et al.,	:	
	:	
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on September 20, 2012

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*Cooper & Elliott, LLC, Charles H. Cooper, and Rex H. Elliott,*  
for appellant.

*Ron O'Brien, Prosecuting Attorney, Nick A. Soulas, Jr., and Denise L. DePalma,* for appellees Robert G. Montgomery, Brad Hennebert, and Franklin County.

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Appellant, Cooper & Elliott, LLC ("Cooper & Elliott"), appeals the judgment of the Franklin County Court of Common Pleas, which imposed sanctions against Cooper & Elliott, pursuant to Civ.R. 37(B)(2), in relation to Cooper & Elliott's representation of Frank E. Bellamy, Sr. ("Bellamy"), in an employment discrimination and wrongful termination action against defendants-appellees, Robert G. Montgomery, Brad Hennebert, and Franklin County (collectively, "defendants").

## I. BACKGROUND

{¶ 2} On January 5, 2006, pursuant to Civ.R. 37(B)(2), the trial court dismissed Bellamy's complaint and awarded defendants reasonable expenses, including attorney fees, caused by Bellamy's failure to comply with court orders compelling production of his federal and state income tax returns. The trial court ordered a hearing to determine the amount of expenses, "along with the level of responsibility for them of [Bellamy] and his counsel." A visiting judge held a three-day expense hearing, which Bellamy did not attend, in late 2006. On September 9, 2008, the visiting judge issued findings of fact and conclusions of law. The visiting judge subsequently issued a judgment entry, awarding expenses of \$41,982.77 against Bellamy and Cooper & Elliott, jointly and severally.

{¶ 3} Cooper & Elliott appealed the dismissal of Bellamy's complaint and the imposition of sanctions, and defendants filed a cross-appeal, challenging the trial court's denial of their motion for summary judgment. In *Bellamy v. Montgomery*, 188 Ohio App.3d 76, 2010-Ohio-2724 (10th Dist.) ("*Bellamy I*"), this court held that Cooper & Elliott lacked standing to challenge the dismissal of Bellamy's complaint and, consequently, determined that defendants' cross-appeal was moot. This court went on, however, to reverse the award of sanctions and to remand for further proceedings to limit the award to fees incurred as a result of noncompliance with discovery orders and for more complete findings as to Cooper & Elliott's level of responsibility, if any, for the failure to produce the requested tax documents.

{¶ 4} On remand, the trial court held another evidentiary hearing with respect to the amount and apportionment of expenses; Bellamy did not attend. In a Decision and Final Order filed November 1, 2011, the trial court reduced the amount of expenses to \$13,095.26, and it assigned 25 percent of the responsibility to Cooper & Elliott. The court therefore ordered that Cooper & Elliott is responsible for fees of \$3,273.82, while Bellamy is responsible for the remaining \$9,821.44.

## II. ASSIGNMENT OF ERROR

{¶ 5} Cooper & Elliott has again appealed and now asserts the following assignment of error:

The trial court erred by holding Cooper & Elliott liable for monetary sanctions assessed against Cooper & Elliott's former client, Franklin Bellamy, as a result of Bellamy's failure to timely produce his tax returns.

### III. DISCUSSION

{¶ 6} Cooper & Elliott's assignment of error challenges the trial court's award of sanctions against Cooper & Elliott pursuant to Civ.R. 37(B)(2). That rule states, in pertinent part, as follows:

(2) If any party \* \* \* fails to obey an order to provide or permit discovery, \* \* \* the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

\* \* \*

(c) An order \* \* \* dismissing the action or proceeding or any part thereof \* \* \*;

\* \* \*

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order *or the attorney advising him or both* to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(Emphasis added.)

{¶ 7} A trial court has broad discretion when ruling upon a motion for sanctions pursuant to Civ.R. 37(B). *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, ¶ 18. Absent an abuse of discretion, an appellate court will not reverse a discovery sanction. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254 (1996), syllabus. Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). An appellate court may find an abuse of discretion when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous

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findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶ 15 (8th Dist.), citing *Berger v. Mayfield Hts.*, 265 F.3d 399, 402 (6th Cir.2001). Where no sound reasoning process would support the trial court's decision, appellate courts will find an abuse of discretion. *Ayer v. Ayer*, 1st Dist. No. C-990712 (June 30, 2000). An abuse of discretion also exists when there is no evidence to support a trial court's judgment. See *State ex rel. Smith v. Indus. Comm.*, 10th Dist. No. 83AP-387 (Jan. 17, 1984); *Schock v. Brown*, 9th Dist. No. 22107, 2005-Ohio-2159, ¶ 6.

{¶ 8} Cooper & Elliot argue that the trial court abused its discretion by applying an improper standard and by imposing sanctions against it where Cooper & Elliott informed Bellamy of his discovery obligation and repeatedly urged him to produce the requested discovery. This court addressed the standard for imposing Civ.R. 37(B)(2) sanctions against a party's attorney in *Bellamy I*. In doing so, we relied on federal case law applying Fed.R.Civ.P. 37(b)(2)(C), which is substantively similar to Civ.R. 37(B)(2). We described the approach taken by federal courts as requiring "a high degree of culpability" by an attorney before a court may assess sanctions against the attorney for a client's discovery violation. *Bellamy I* at ¶ 18. We quoted with approval the following statement from *Inter-Trade, Inc. v. CNPq-Conselho Nacional De Desenvolvimento Cientifico e Tecnologico*, 761 A.2d 834, 839 (D.D.C.2000): "[i]t is fair to hold individuals accountable for their own conduct. A lawyer can not always control the actions of a client, and it would be unfair to hold the lawyer accountable for them, unless it appeared that he or she had some responsibility for the client's recalcitrance." In apportioning liability for expenses under Civ.R. 37(B)(2), the court must determine and explain "how much responsibility is due to the client's recalcitrance and how much to the lawyer's condonance or participation in the client's disobedience.'" *Bellamy I* at ¶ 19, quoting *Weisberg v. Webster*, 749 F.2d 864, 874 (D.C.Cir.1984). "Indeed, both Civ.R. 37(B)(2) and [its] federal counterpart appear to require an attorney to actively participate and, at least in part, cause the client's noncompliance with a discovery order." *Bellamy I* at ¶ 18.

{¶ 9} In its final order, the trial court correctly described the issue before it as the level of responsibility attributable to Cooper & Elliott for Bellamy's failure to comply with the court's discovery orders. Nevertheless, the court did not discuss the standard

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for holding an attorney liable for a client's failure to comply and cited no case law, including *Bellamy I*, regarding that standard. The trial court found no evidence that Cooper & Elliott directly advised Bellamy to not comply with the court's discovery orders and further found that Cooper & Elliott made numerous telephone calls to Bellamy, instructing him to comply. The court held, however, that sanctions against Cooper & Elliott were warranted because Cooper & Elliott's actions showed "a lack of appropriate respect for the Court's order." The court stated that the firm's lack of respect was manifested in its habit of placing responsibility for the noncompliance on Bellamy or defendants and in its lack of urgency until the court threatened sanctions.

{¶ 10} Cooper & Elliott argue that the trial court's "lack of appropriate respect" standard conflicts with the standard set forth in *Bellamy I* and is so subjective and vague as to preclude attorneys from knowing what conduct will subject them to personal liability. We agree that the trial court failed to apply the standard set forth in *Bellamy I*, which requires highly culpable conduct, amounting to condonance or participation in the client's disobedience of discovery orders. The trial court's application of an improper standard constitutes a breach of discretion. *See State ex rel. Perry v. Indus. Comm.*, 10th Dist. No. 06AP-312, 2007-Ohio-4687, ¶ 16 (hearing officer's application of incorrect legal standard was an abuse of discretion); *State v. Wyke*, 10th Dist. No. 92AP-1137 (Apr. 8, 1993) (trial court abused its discretion by applying incorrect legal standard to appellant's motion to withdraw a plea). We do not suggest that the trial court lacks authority from other sources to sanction an attorney for a demonstrated lack of respect, but Civ.R. 37(B)(2), the sole basis upon which the court acted here, does not cloak the court with such authority.

{¶ 11} As part of its determination that Cooper & Elliott exhibited a lack of respect toward the court, the trial court found that Cooper & Elliott failed in its responsibility to ensure Bellamy's compliance with the court's orders. A party's failure to obey a court order obligates the court to order the payment of the opposing party's reasonable expenses unless the court finds the failure justified or that an award of expenses would be unjust. Civ.R. 37(B)(2) provides that the court may order payment by the party failing to obey the order, the attorney advising the party or both. Were we to accept the trial court's premise that counsel is liable for expenses whenever it fails to

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ensure a client's compliance with a discovery order, counsel would be liable for fees as a matter of course. That is not the case. In fact, in *Bellamy I* at ¶ 18, this court stated that "both Civ.R. 37(B)(2) and [its] federal counterpart appear to require an attorney to *actively participate* and, at least in part, *cause* the client's noncompliance with a discovery order" in order to be subject to sanctions. (Emphasis added.) Pursuant to *Bellamy I*, then, a party's noncompliance alone does not subject the party's attorney to sanctions under Civ.R. 37(B)(2).

{¶ 12} In *Inter-Trade*, which this court relied upon in *Bellamy I*, the District of Columbia Court of Appeals reversed an award of sanctions against an attorney that was based upon the client's failure to attend a deposition. The court held that the client's failure, in and of itself, did not give rise to sanctions against the attorney. Rather, the court held that attorneys should be held accountable only for their own conduct. The court agreed that "'an award ought to be made against the attorney only when it is clear that discovery was unjustifiably opposed principally at his instigation.'" *Inter-Trade* at 840, quoting *Crawford v. Am. Fedn. of Govt. Emps.*, 576 F.Supp. 812, 815 (D.D.C.1983), quoting *Humphreys Exterminating Co., Inc. v. Poulter*, 62 F.R.D. 392 (D.Md.1974). See also *Goldman v. Alhadeff*, 131 F.R.D. 188, 194 (W.D.Wa.1990) (assessing sanctions against the plaintiff and the three law firms representing him for their "deliberate actions in violating the court's orders"). In *Inter-Trade*, the district court was not entitled to sanction counsel because it did not know whether the client had consulted with counsel in forming his position regarding attendance at his deposition.

{¶ 13} "Rule 37 treats the client and his attorney separately." *Weisberg* at 874. "[A]n award of costs under Rule 37 against an attorney ought to be justified by reasons distinct from those justifying an award against the client." *Id.*, citing *Crawford*. Accordingly, neither a party's failure to comply with a discovery order nor the trial court's reasoning for imposing sanctions upon the party is sufficient to justify sanctions against the party's attorney. Rather, separate and distinct reasons must support sanctions against the attorney, and the court must explain those reasons. In *Weisberg* at 874, the D.C. Circuit explained that "[t]his requirement of findings to support an award of expenses against an attorney is prompted by the structure of Rule 37, by

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concerns for effective appellate review, and by concerns for the tension created in the attorney-client relationship when the attorney is subject to personal liability."

{¶ 14} Addressing language in R.C. 2323.51 that is substantially similar to the language in Civ.R. 37(B)(2), this court has stated that, "in allowing for the imposition of sanctions against the client, counsel or both, [R.C. 2323.51] provides a mechanism for the court to place the blame directly where the fault lies." *Estep v. Kasparian*, 79 Ohio App.3d 313, 317 (10th Dist.1992). The same reasoning applies to sanctions under Civ.R. 37(B)(2) and is consistent with the federal case law requiring highly culpable conduct by an attorney before a court may require the attorney to pay expenses. Therefore, we agree with Cooper & Elliott that a client's failure to comply with discovery orders is not, by itself, an appropriate basis for ordering the attorney to pay expenses pursuant to Civ.R. 37(B)(2).

{¶ 15} Before determining whether to remand this matter again, we will consider whether the trial court's findings would support an award of sanctions under the proper standard. If so, under our deferential standard of review, we may affirm the trial court's judgment despite the court's use of an improper standard. Consideration of the trial court's findings requires a thorough examination of the facts and, especially, the testimony concerning Cooper & Elliott's actions with respect to discovery of Bellamy's tax returns.

{¶ 16} In July 2004 and March 2005, defendants requested production of Bellamy's federal and state tax returns from 2001 to 2004. Cooper & Elliott, on Bellamy's behalf, objected to defendants' requests as irrelevant and as intending merely to harass Bellamy. Defendants subsequently requested that Bellamy produce his 1995 to 2004 federal and state tax returns at his deposition on April 7, 2005; Bellamy refused. On April 29, 2005, having received no tax documents from Bellamy, defendants issued a subpoena duces tecum to the Ohio Tax Commissioner for Bellamy's 1995 to 2004 Ohio tax returns.

{¶ 17} Bellamy moved the court for a protective order and to quash the subpoena, again arguing that his tax information was irrelevant and that the subpoena was intended merely to harass him and to obtain his personal information. Defendants, in

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turn, moved to enforce the subpoena and to compel production of Bellamy's 1995 to 2004 federal and state tax returns. On July 8, 2005, holding that Bellamy's tax returns were relevant and not privileged, the trial court denied Bellamy's motions and granted defendants' motions to enforce the subpoena and to compel production. The trial court's July 8, 2005 filing is captioned a decision, not a judgment entry or order, and, despite granting defendants' motion to compel, it contains neither an explicit order for Bellamy to produce the requested tax returns nor a timeframe in which to do so. Nevertheless, the parties treat the July 8, 2005 decision as a court order, and we will treat it likewise.

{¶ 18} Defendants received copies or computer transcripts of Bellamy's Ohio tax returns for 1999 to 2004 from the Ohio Tax Commissioner in May 2005. The Tax Commissioner certified that Bellamy did not file Ohio tax returns from 1995 to 1998.

{¶ 19} Cooper & Elliott associate Sheila Vitale ("Vitale") was Cooper & Elliott's "point person" on this case. (Sept. 12, 2011 Tr. 21.) At both the 2006 and the 2011 hearings, Vitale testified about Cooper & Elliott's response to the trial court's orders and, more generally, about its actions regarding discovery in this case. In July 2005, around the time the trial court granted defendants' motion to compel, Bellamy moved from Columbus to Youngstown, Ohio. Bellamy informed Cooper & Elliott that he would be staying with family members in Youngstown and instructed Cooper & Elliott to send written correspondence to his mother's address in Youngstown, although he was not living there. Bellamy's cell phone remained active for only a brief period after he moved, but, on July 11, 2005, Bellamy provided Vitale with his son's cell phone number and instructed that she could leave messages for him there. Vitale informed Cooper & Elliott office staff that, if Bellamy called the office, they were to interrupt her so she could speak with him immediately. Vitale described Bellamy, prior to his move, as accessible and willing to assist and discuss his case. In contrast, Vitale claimed it was difficult to contact Bellamy after his move.

{¶ 20} The trial court found that Cooper & Elliott "made numerous phone calls and sent numerous letters to [Bellamy] instructing him to comply with the Court's order." Vitale mailed a copy of the trial court's July 8, 2005 decision to Bellamy at his

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mother's address and left messages regarding the decision on his son's cell phone on July 12 and 14, 2005. Vitale spoke with Bellamy twice on July 15, 2005, and told him he needed to produce his tax returns, which Bellamy claimed were boxed somewhere because of his recent move. Between July 19 and August 4, 2005, Vitale left messages for Bellamy on nine additional occasions and spoke with Bellamy five times. On August 5, 2005, Vitale met with Bellamy to talk about his tax returns and to stress the urgency for producing them.

{¶ 21} On August 10, 2005, defendants filed a motion to dismiss, for sanctions, and for an award of expenses, based on Bellamy's failure to produce his tax returns. The next day, Bellamy produced to Vitale the limited tax documents in his possession, which consisted of the first page of his federal tax returns for 2001, 2002, and 2003. Vitale immediately forwarded those documents to defense counsel, along with a cover letter, in which she acknowledged the incompleteness of the response and stated that she had advised Bellamy to continue looking for additional records. Vitale again met with Bellamy on August 22, 2005, and explained the possibility of him signing a release to permit defense counsel to retrieve his federal tax returns from the Internal Revenue Service ("IRS"). Two days later, Vitale confirmed to defense counsel that Bellamy had no additional, responsive tax documents, but indicated that he was willing to sign a release, submitted by defendants, to permit retrieval of his federal tax returns. On August 29, 2005, Vitale filed a memorandum in opposition to defendants' motion to dismiss, for sanctions, and for expenses, stating that Bellamy had complied with the July 8, 2005 decision by providing all tax records in his possession.

{¶ 22} Defense counsel agreed to prepare and utilize releases to obtain Bellamy's tax returns from the IRS. Vitale received releases, requiring Bellamy's signature, from defense counsel on September 14, 2005, and forwarded them to Bellamy on September 20, 2005. In response to an email from Bellamy on October 5, 2005, stating that he had lost the releases, Cooper & Elliott resent the releases to Bellamy. From October 6 until November 22, 2005, Vitale made seven telephone calls to Bellamy, either on his son's cell phone or on another number obtained from Bellamy's son on October 28, 2005. Vitale testified that, when she was able to speak with Bellamy, she inquired about the status of the releases and reiterated the urgency of signing and

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returning them. On October 28, 2005, Bellamy promised to return the executed releases to Cooper & Elliott.

{¶ 23} On October 11, 2005, the trial court held a status conference, at which defense counsel submitted a motion to show cause or to hold Bellamy in contempt for failure to produce his tax returns. In response, Cooper & Elliott stated that it had produced all documents within Bellamy's possession and informed the court of Bellamy's agreement to execute releases for defense counsel to obtain his tax returns. Defense counsel did not express any unwillingness to accept the executed releases.

{¶ 24} The trial court granted defendants' motion to show cause on November 18, 2005. The court ordered Bellamy to produce actual copies of his 1995 to 2004 tax returns within 21 days (i.e., on or before December 9, 2005) and stated that "[s]igning a waiver and asking Defendants to retrieve them is not enough" unless defendants accept a waiver in lieu of the actual documents. The court warned that noncompliance would result in sanctions against Bellamy, up to and including dismissal of his complaint.

{¶ 25} Cooper & Elliott received the signed releases from Bellamy on November 22, 2005, and immediately had the releases hand-delivered to defense counsel.<sup>1</sup> Later that day, Vitale received the trial court's show cause order. Despite their agreement with Cooper & Elliott and their receipt of signed releases from Bellamy, defense counsel informed Vitale that defendants were no longer willing to accept the signed releases in lieu of Bellamy's actual tax returns.

{¶ 26} Faced with the December 9, 2005 deadline and defendants' refusal to accept the releases, Vitale sent new releases to Bellamy via Federal Express on November 22, 2005, and spoke with Bellamy to emphasize that he needed to immediately sign and return the releases in the enclosed Federal Express envelope. These new releases were required for the IRS to produce Bellamy's tax returns to Cooper & Elliott, as opposed to defense counsel. Vitale received the signed releases on Monday,

<sup>1</sup> Although defendants argue that Cooper & Elliott did not provide a check for the cost of obtaining Bellamy's tax records from the IRS, as requested by defendants, it is not clear that Bellamy would be responsible for those costs, and we conclude that the lack of a check does not provide a basis for sanctioning Cooper & Elliott. See *Anderson v. A.C. & S., Inc.*, 83 Ohio App.3d 581, 585 (9th Dist.1992) (when a taxpayer from whom discovery is sought does not possess copies of his tax returns, the costs for obtaining those records from the appropriate governmental agency should generally be placed on the party requesting the documents in discovery).

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November 28, 2005.<sup>2</sup> The same day, she transmitted the releases, along with a check for expedited service, to the IRS, via Federal Express. At that point, compliance with the show cause order was beyond either Bellamy or Cooper & Elliott's control. Vitale called the IRS every other day to check the progress of her request, but her experience was that even expedited requests to the IRS can take at least 45 days. Thus, despite her knowledge that obtaining the requested documents from the IRS within 17 days after her receipt of the court's order was virtually impossible, Vitale took immediate and decisive steps toward that goal.

{¶ 27} On December 7, 2005, Vitale filed a Notice of Status of Compliance, in which she informed the court of Cooper & Elliott's efforts to comply with the show cause order and stated that she would provide defendants with all documents upon receipt from the IRS. On January 4, 2006, Vitale submitted to defense counsel the tax documents she had received the previous day from the IRS, along with a copy of a Notice of Service of Federal Income Tax Documents, which she filed with the trial court.

{¶ 28} On January 5, 2006, the day after Vitale served Bellamy's tax returns, the trial court dismissed Bellamy's complaint and imposed sanctions. The trial court's decision focused primarily on Bellamy's actions. It accepted that Bellamy lacked actual copies of his tax returns beyond those he produced, held that Bellamy's delay in signing the releases prepared by defense counsel "has cost him greatly," and stated that Bellamy "squandered" the second chance the court provided via its November 18, 2005 order. With respect to Cooper & Elliott, the trial court stated as follows:

The actions of Plaintiff's counsel have shown a pattern of deceit, neglect and negligence that is unacceptable to this Court. Plaintiff's counsel has been faced with the orders of this Court and has acted to stall and delay the progress of this case. All the while attempting to blame that delay on the actions of Defendants. As stated earlier, it was not Defendants who were ordered to retrieve the requested tax returns, it was Plaintiff. Being lawyers, Plaintiff's counsel are expected to be competent and knowledgeable of the Rules of Civil Procedure. Pursuant to these rules Plaintiff's counsel should be aware that sanctions can be imposed against them

<sup>2</sup> Bellamy received the releases the day before Thanksgiving, and Cooper & Elliott's offices were closed on Thursday, November 24, and Friday, November 25, 2005.

for their failure to comply with them and their failure to comply with direct Court orders. Plaintiff's counsel has ignored these rules and for almost six months has been violating the direct orders of this Court. These violations will no longer be tolerated. Therefore, this Court imposes the sanctions of dismissal of Plaintiff's Complaint, and the awarding to Defendants of reasonable expenses, including attorney's fees, caused by Plaintiff[s] failures.

{¶ 29} As we noted, after its January 5, 2006 judgment entry, a visiting judge conducted a three-day hearing, issued findings of fact and conclusions of law, and issued a judgment entry, holding Bellamy and Cooper & Elliott jointly and severally liable for defendants' reasonable expenses stemming from Bellamy's noncompliance with the discovery orders. Upon remand in 2011, the trial court conducted a second hearing regarding the amount and allocation of Civ.R. 37(B)(2) sanctions, after which it reduced the amount of expenses and allocated 25 percent of the responsibility for those expenses to Cooper & Elliott and allocated the remaining 75 percent to Bellamy. The record before this court contains transcripts of both sanctions hearings.

{¶ 30} Upon review of the entire file and the trial court's findings, we discern no support for a finding that Cooper & Elliott engaged in highly culpable conduct that amounted to condonance of or participation in Bellamy's noncompliance with the trial court's discovery orders. The court acknowledged that Bellamy moved to Youngstown around the time of the court's July 8, 2005 decision. The court found no evidence that Cooper & Elliott advised Bellamy to ignore the court orders; to the contrary, the trial court recognized that Cooper & Elliott instructed him to comply on numerous occasions. The trial court did not find that Cooper & Elliott attempted to keep Bellamy's tax returns from defendants after the trial court's July 8, 2005 decision. In fact, the undisputed evidence demonstrates that Vitale transmitted the limited documents in Bellamy's possession to defense counsel, without delay, upon her receipt of those documents, and offered a release for defense counsel to procure Bellamy's remaining tax returns from the IRS.

{¶ 31} In its decision, the trial court identified two factual bases for assigning responsibility to Cooper & Elliott. Those include Cooper & Elliott's habit of displacing

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responsibility onto Bellamy or defendants and Cooper & Elliott's lack of urgency regarding the discovery order.

{¶ 32} We first consider what the trial court described as Cooper & Elliott's habit of blaming Bellamy and/or defendants for the failure to comply with discovery orders. The court stated that Cooper & Elliott "would tell [Bellamy] that he had to comply [with the discovery orders] and then wash its hands of the matter." Vitale's testimony and the court's own findings that Cooper & Elliott made numerous efforts to encourage and expedite production, however, contradict the court's statement. Within a week of the trial court's July 8, 2005 decision, which overruled Cooper & Elliott's objections, Vitale mailed the court's decision to Bellamy, called Bellamy four times, and spoke with Bellamy twice for a total of 47 minutes. The following week, Vitale called Bellamy seven times and spoke with him three times for a total of 35 minutes. Vitale also met with Bellamy on two occasions in August 2005 regarding production of his tax returns and produced all tax documents Bellamy was able to locate. Vitale also offered to have Bellamy sign releases for defendants to obtain his remaining tax return from the IRS, and defendants concede that they agreed to that arrangement. The trial court's findings that Cooper & Elliott simply told Bellamy to comply "and then wash[ed] its hands of the matter," and that Cooper & Elliott acted without urgency prior to the trial court's order to show cause is unsupported by any evidence in the record and is erroneous.

{¶ 33} As an additional example of Cooper & Elliott's supposed pattern of pushing responsibility onto others, the court generally cited Cooper & Elliott's interaction with defendants and their counsel. Quoting its January 5, 2006 decision, the trial court stated that Bellamy "'attempts to place the blame for his non-compliance on Defendants'" and that Bellamy and Cooper & Elliott "'[try] to ensue [sic] that Defendants' counsel prevented them from getting a valid release for the tax returns.'" The trial court's finding is erroneous; we are unable to locate any written assertion by Cooper & Elliott that defendants are responsible for the delay in the production of Bellamy's tax returns. At most, Cooper & Elliott insinuate that defendants could have acted more quickly in preparing releases for Bellamy's signature, but the delay in that regard was approximately three weeks. To be sure, review of the pleadings reveals a high level of contention between the attorneys in this case, and Cooper & Elliott did, at

times, accuse defendants of delay, destruction of evidence, and distortion of the facts regarding matters other than the dispute over Bellamy's tax records. While we can certainly understand the trial court's frustration with the contentiousness pervading this case, the persistent discovery disputes, and the attorneys' inability to resolve those disputes without the court's intervention, the parties' casting of blame is ultimately irrelevant to the question of whether Cooper & Elliott, as opposed to its client, was responsible for the failure to comply with discovery orders.

{¶ 34} As we noted, this court's interpretation of Civ.R. 37(B)(2) requires a trial court, as a prerequisite to imposing a sanction upon counsel, to find that counsel has engaged in highly culpable conduct that amounted to condonance or participation in a client's disobedience of a discovery order. The trial court did not make such a finding here and could not have properly done so given the evidence before it. Therefore, we sustain Cooper & Elliott's assignment of error.

#### IV. CONCLUSION

{¶ 35} For these reasons, we conclude that the trial court abused its discretion by utilizing an improper standard, relying on clearly erroneous findings of fact, and by entering judgment for expenses against Cooper & Elliott where the record contains no evidence upon which the court could conclude that Cooper & Elliott engaged in highly culpable conduct that amounted to condonance or participation in Bellamy's disobedience of the trial court's discovery orders. Accordingly, we sustain Cooper & Elliott's assignment of error and reverse the trial court's judgment against Cooper & Elliott. We note, however, that the trial court's judgment against Bellamy is not before this court, and that judgment is unaffected by our decision in this matter.

*Judgment reversed.*

CONNOR, J., concurs.

SADLER, J., concurs in part, dissents in part.

SADLER, J., concurring in part, dissenting in part.

{¶ 36} I concur with the majority's conclusion that the trial court abused its discretion when it utilized an improper standard in imposing the sanctions herein, as well as the majority's reasoning and application of *Bellamy v. Montgomery*, 188 Ohio

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App.3d 76, 2010-Ohio-2724 (10th Dist.), for why the standard utilized by the trial court cannot stand. However, I disagree with the majority's decision to reverse the trial court's judgment without issuing a remand.

{¶ 37} The majority states in paragraph 15 that, "[b]efore determining whether to remand this matter again, we will consider whether the trial court's findings would support an award of sanctions under the proper standard. If so, under our deferential standard of review, we may affirm the trial court's judgment despite the court's use of an improper standard." Absent from the majority's decision, however, is authority for the proposition that after finding the trial court employed an incorrect standard, we, as an appellate court applying an abuse of discretion standard, should simply apply the correct legal standard and conduct a de novo weighing of the evidence in light of the same to reverse the trial court.

{¶ 38} In my view, the proper remedy in this instance is to reverse the trial court's judgment and remand this matter to the trial court for application of the correct legal standard. In *Krumm v. Upper Arlington City Council*, 10th Dist. No. 05AP-802, 2006-Ohio-2829, this court reviewed an appeal concerning the Upper Arlington Board of Zoning and Planning. Because the trial court failed to consider a requisite factor, and because the trial court utilized an incorrect legal standard, this court stated, "given our limited standard of review, we are precluded from simply applying the correct legal standards and reweighing the evidence ourselves. Rather, we are constrained to remand this case to the trial court so that it can review and weigh the evidence in light of \* \* \* the correct legal standards." *Id.* at ¶ 38. *See also Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos.*, 67 Ohio St.3d 274 (1993) (explaining that the reason for a remand for further proceedings was the trial court's utilization of incorrect legal standards); *Flowers v. Ohio Dept. of Job & Family Servs.*, 5th Dist. No. 05 CA 94, 2006-Ohio-2159, ¶ 10, citing *Diversified Benefit Plans Agency, Inc. v. Duryee*, 101 Ohio App.3d 495 (9th Dist.1995) (where trial court applies an incorrect legal standard, the "proper remedy is to reverse and remand to the trial court for application of the proper standard"). Based on said authority, I believe the trial court should be the first to weigh the evidence under the correct legal standard to determine whether any responsibility rests with Cooper & Elliott.

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{¶ 39} Because I would reverse the trial court's judgment and remand for the trial court to consider the evidence under the correct legal standard, I respectfully dissent from that portion of the majority's decision to reverse without issuing a remand, but otherwise concur in the majority's decision.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Frank E. Bellamy, Sr.,	:	
Plaintiff-Appellee,	:	
[Cooper & Elliott, LLC,	:	No. 11AP-1059
Appellant],	:	(C.P.C. No. 04CVH-06-6540)
v.	:	(REGULAR CALENDAR)
Robert G. Montgomery et al.,	:	
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 20, 2012, appellant's single assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas against appellant is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision. We note, however, that the trial court's judgment against plaintiff-appellee is not before this court, and that judgment is unaffected by our decision in this matter. Costs shall be assessed against defendants-appellees.

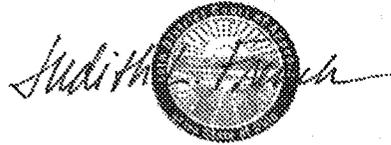
FRENCH and CONNOR, JJ.  
SADLER, J., concurs in part.

/S/ JUDGE

Franklin County Ohio Court of Appeals Clerk of Courts-2012 Sep 24 12:01 PM-11AP001059

**Date:** 09-24-2012  
**Case Title:** FRANK E BELLAMY SR -VS- ROBERT G MONTGOMERY INDV  
**Case Number:** 11AP001059  
**Type:** JEJ TRIAL COURT JUDGMENT REVERSED AND REMANDED

So Ordered



/s/ Judge Judith L. French

Electronically signed on 2012-Sep-24 page 2 of 2