

MEMORANDUM IN OPPOSITION TO JURISDICTION

I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case does not present a question of public or great general interest, and it does not involve a substantial constitutional question. This case involves allegations that a public officeholder required employees to contribute time and money to his election campaign as a condition of employment, a dismissal of the plaintiff's claims when the plaintiff did not produce tax information in a timely manner in response to the trial court's order, and a monetary sanction against the plaintiff because of the noncompliance. The defendant's unhappiness stems from the fact that he was unsuccessful in a punitive effort to have sanctions imposed on plaintiff's *counsel* for the plaintiff's failure to produce the tax information. However, the Tenth District Court of Appeals correctly rejected appellants' arguments because plaintiff's counsel did not in any way condone or participate in the plaintiff's failure to abide by the discovery order.

II. STATEMENT OF THE CASE AND FACTS

Franklin Bellamy was employed by the Franklin County Recorder. He filed suit alleging he had been discriminated against, and ultimately terminated, because he refused to comply with his employer's insistence that he contribute his time and money to the Recorder's political campaign as a condition of his employment.

The defendants requested Bellamy's tax returns. In July 2005 the trial court denied Bellamy's motion for a protective order and granted the defendants' motion to compel. Bellamy was in the process of relocating from Columbus to Youngstown and provided his counsel, Cooper & Elliott with the limited tax information he had in his possession. Cooper & Elliott immediately produced the documents (consisting of the first page of Bellamy's tax returns for three separate years) to defense counsel and informed counsel that Bellamy had been instructed

to continue searching his belongings (which, as a result of Bellamy relocating, were stored in boxes). After receiving confirmation from Bellamy that he had no additional records, Cooper & Elliott informed defense counsel, and offered that Bellamy would sign authorization forms permitting defendants to obtain tax records directly from the IRS. This is a common local practice – to allow opposing counsel to obtain records directly from the source – and defense counsel agreed to this procedure and agreed to prepare the release forms.

Defense counsel prepared the releases and sent them to Cooper & Elliott, who immediately forwarded them to Bellamy and instructed him to sign and return them. Bellamy, who was transient and was living with friends and family in various places in Youngstown, twice lost the forms and Cooper & Elliott resent the forms to him.

Because Bellamy lacked a fixed address and at times could only be reached by calling his son's cell phone, it was extraordinarily difficult to contact him. Between July, 2005 (when the trial court denied the motion for a protective order) and November 22, 2005, Cooper & Elliott made 44 telephone phone calls to the various cell phone numbers Bellamy had provided to stress the importance of complying with the trial court's order and to urge him to sign and return the IRS release forms. Because Bellamy was so difficult to reach and had no fixed address, Cooper & Elliott's staff was instructed that if Bellamy ever called the office they were to interrupt counsel - no matter what - so that she could speak with him.

Bellamy finally signed and returned the forms, and as soon as Cooper & Elliott received them on Tuesday, November 22, 2005, the law firm had them hand-delivered to defense counsel. Later that very day, however, both parties received an order that the trial court had issued and mailed the previous Friday, November 18, 2005. The order instructed Bellamy to produce the tax information within 21 days, and further stated that defense counsel was not required to undertake the task of sending the authorization forms to the IRS. As a result, even though

defense counsel had received the IRS release forms just hours earlier, defense counsel indicated they were not going to send the forms to the IRS. Cooper & Elliott immediately prepared new forms and sent them to Bellamy by Federal Express. Due to the Thanksgiving holiday, the forms were signed and returned to Cooper & Elliott on Monday, November 28, 2005, and upon receiving them the firm immediately sent them to the IRS, again by Federal Express, and paid a fee to the IRS for expedited service.

The IRS moves at its own pace. As a result, neither Bellamy nor his counsel could ensure that the trial court's 21-day deadline would be met. As the deadline neared, Cooper & Elliott prepared, filed and hand-delivered to chambers a memorandum informing the trial court of the steps that had been taken and the status of the tax information. The IRS eventually provided the information, on January 4, 2006 (past the 21-day deadline) and the information was immediately hand-delivered to defense counsel. In addition, a notice was filed with the court and hand-delivered to chambers informing the court that the tax information had been received and provided. Nonetheless, on January 5, 2006 the trial court dismissed the case. Unaware of Cooper & Elliott's efforts to obtain Bellamy's compliance, the trial court rebuked Bellamy and lumped Cooper & Elliott into the mix, stating that "[s]ince Plaintiff has failed to comply with two Court orders . . . the Court must now determine the proper sanctions to impose against Plaintiff and his counsel."

As a result of the trial court's decision, Cooper & Elliott withdrew as Bellamy's counsel and an evidentiary hearing was conducted in 2006 to determine the amount of monetary sanctions and the responsibility, if any, Cooper & Elliott had for Bellamy's failure to comply with the discovery order. The matter was assigned to a visiting judge. After an evidentiary hearing was held in 2006 (which Bellamy did not attend), the visiting judge issued a written

decision in October 2008 assessing \$41,982.77 in attorney fees and imposing joint and several liability on Bellamy and Cooper & Elliott for this amount.

On appeal, the Tenth District Court of Appeals reversed. *Bellamy v. Montgomery*, 188 Ohio App.3d 76, 2010-Ohio-2724. Citing numerous cases, the Court observed that a high degree of culpability must be shown before sanctions can be assessed against an attorney for a client's discovery violation, and remanded the case for further proceedings to determine Cooper & Elliott's responsibility, if any. The court also determined that the award appeared to include fees not caused by Bellamy's failure to comply with the discovery order, and instructed the trial court to limit the fees to those incurred as a result of noncompliance with the court's orders.

Following remand, the trial court conducted an evidentiary hearing in September 2011. Bellamy again did not attend. After the September 2011 hearing, the trial court issued a decision reducing the amount of the sanctions to approximately \$13,000 and imposing 25% responsibility on Cooper & Elliott.

The trial court did not explain why it reduced the award, did not explain how Cooper & Elliott was responsible for Bellamy's failure to produce his tax information, and did not cite or address any of the numerous cases the Tenth District Court of Appeals had cited in its decision. The trial court stated "there is no evidence that [Cooper & Elliott] directly advised Plaintiff to not comply with the discovery order," and explained that it "never actually believed [Cooper & Elliott] did." The trial court further noted that Cooper & Elliott "made numerous phone calls and sent numerous letters to Plaintiff instructing him to comply with the Court's order." Nonetheless, and contrary to the many cases cited by the appellate court, the trial court fashioned its own standard: it imposed liability on Bellamy's counsel, because, in the trial court's view, "[w]hile an order is directed to a party, it is that party's lawyer that is expected to ensure compliance," and

the law firm's failure to ensure complaint "showed a lack of adequate respect for the court's order."

On appeal, the Tenth District Court of Appeals again reversed. The appellate court concluded 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.

III. ARGUMENT OPPOSING PROPOSITIONS OF LAW

Appellants' Proposed 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."

Appellants' proposed proposition of law does not match the reason they seek review. The proposed proposition of law is the very standard the appellate court employed. See *Bellamy v. Montgomery, et al.*, Case No. 11AP-1059, 2012-Ohio-4304, ¶35 ("[T]he 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."). Appellants simply disagree with the conclusion the Court of Appeals reached when it that standard was correctly applied.

Appellants' proposition of law is the standard the trial court *should have* applied. In the first appeal ("Bellamy I"), the Tenth District Court of Appeals explained to the trial court that this was the correct standard to evaluate whether a party's attorneys should pay a share of sanctions imposed for violation of a discovery order. See *Bellamy v. Montgomery, et al.*, 188 Ohio App.3d 76, 84-85 (2010)(explaining that the trial court had failed to indicate how much responsibility was due to the plaintiff's recalcitrance and how much, if any, was due to counsel's

condonance and participation in the disobedience). The appellate court remanded the matter to the trial court for "findings as to Cooper & Elliott's level of responsibility, if any."

On remand, the trial court conducted an evidentiary hearing and found no evidence that Cooper & Elliott had condoned or participated in Bellamy's recalcitrance. The trial court stated "there is no evidence that [Cooper & Elliott] directly advised Plaintiff to not comply with the discovery order," and explained that it "never actually believed [Cooper & Elliott] did." The trial court further noted that Cooper & Elliott "made numerous phone calls and sent numerous letters to Plaintiff instructing him to comply with the Court's order." Despite these findings, the trial court assessed against Cooper & Elliott 25% of the penalty imposed on Bellamy.

Applying the standard appellants have articulated as their proposition of law, the Court of Appeals reached the inescapable conclusion that counsel should not bear any responsibility for Bellamy's conduct:

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.

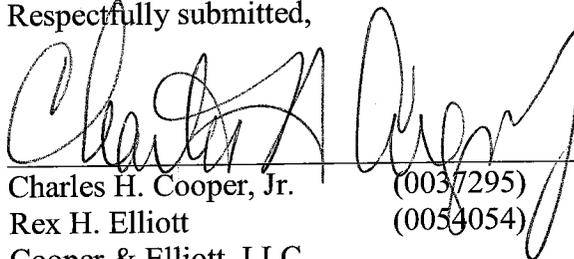
Bellamy, 2012-Ohio-4304, ¶30. This language makes clear that (a) the Court of Appeals applied the standard appellants wish to impose, and (b) the trial court's own findings precluded any assessment of responsibility against Cooper & Elliott.

The legal principles applied in the case below are not controversial; in fact, appellants agree with the standard. They simply do not like the outcome. Their dissatisfaction, however, does not transform this ordinary case into one of "public or great interest."

IV. Conclusion

For the foregoing reasons, this Honorable Court should decline jurisdiction.

Respectfully submitted,



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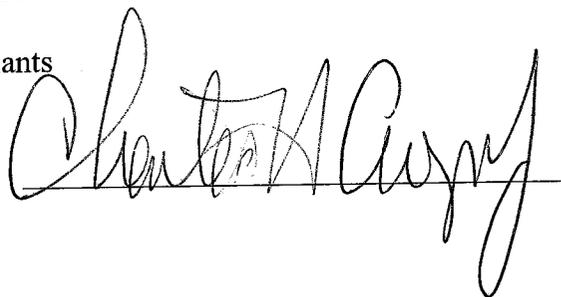
Cooper & Elliott, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Opposition to Jurisdiction was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this 10th day of December, 2012:

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A handwritten signature in cursive script, appearing to read "Charles H. Curry", written over a horizontal line.