

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHAEL DENNIS EARLY, et al.,

Case No. 13-0463

Appellee,

Court of Appeals Case No. L-11-1002

vs.

THE TOLEDO BLADE
COMPANY,

Appellant.

MEMORANDUM IN RESPONSE OF APPELLEE
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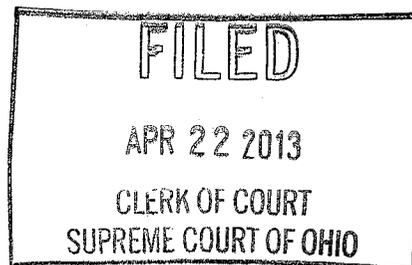


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IS TAKEN, OTHER THAN MATTERS CLEARLY
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DOES A STATE COURT UNDER R.C.2323.51 HAVE
JURISDICTION TO SANCTION ATTORNEYS FOR CONDUCT
BEFORE THE UNITED STATES SUPREME COURT?

Proposition of Law (issue) asserted in the Court of Appeals NO.5

ASSUMING A COURT OF APPEALS DECISION IS A "JUDGMENT" FOR PURPOSES OF R.C. 2323.51(B)(1), IS THE TWENTY- ONE DAY REQUIREMENT OF SAID STATUTE A STATUTE OF LIMITATION OR OTHERWISE JURISDICTIONAL?

Proposition of Law (issue) asserted in the Court of Appeals NO.6

WHEN A MOVANT PROFFERS NO EVIDENCE OF COUNSEL'S CONDUCT ON APPEAL, AND THE RECORD BEFORE THE TRIAL COURT CONTAINS NO EVIDENCE OF COUNSEL'S CONDUCT AND/OR ARGUMENT ON APPEAL, IS A JUDGMENT FINDING SUCH CONDUCT TO BE FRIVOLOUS UNSUPPORTED BY SUCH EVIDENCE?

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NOT A CASE OF GREAT PUBLIC INTEREST NOR ONE INVOLVING A CONSTITUTIONAL QUESTION
FOR THE APPELLANT

This is not a case of great public interest since there are multiple intertwined issues that were not resolved as moot by the Court of Appeals. The trial court granted summary judgment on July 8, 1997, the Toledo Blade on July 29 filed a motion for sanctions for asserted frivolous conduct during the trial of the case. It did not request sanctions for any conduct on appeal, indeed an appeal of the summary judgment wasn't filed until August 7, 1997. This case was never remanded back to the trial court by any appellate court. The Toledo Blade never moved an appellate court for sanctions for counsel's conduct during any appeal. The Toledo never amended its July 29, 1997 sanctions motion nor made a new motion for sanctions for any conduct of counsel on appeal. The Toledo Blade submitted none of the appellate briefs, nor gave any testimony, nor submitted any evidence of counsel's conduct in the appellate courts, at any hearing, and there is no such evidence in the record of this case. The issue of imposing sanctions for counsel's conduct during appellate proceedings had not been raised by motion, evidence, or argument. The trial court ruled on the sanctions motion on January 28, 2009, finding no frivolous conduct during the proceedings in the case before the trial court. It was the addition at the tail end of that decision that counsel's conduct became frivolous by appealing that was a surprise. Plaintiff's counsel requested and was granted leave to brief the issue of awarding sanctions for conduct of counsel on appeal. The trial court did not address any of the issues raised by plaintiff's counsel and entered final judgment awarding sanctions for counsel's conduct on appeal. The issues of due process notice and lack of evidence would have to be dealt with on the merits if this case was to be granted a review and full briefing.

The Court of Appeals decision agreeing with the statutory construction analysis of the Court of Appeals in *Mueller v. City of Vandalia*, 2d Dist. No. 17285, 1999 WL 19791 (Mar. 31, 1999) appears well reasoned and substantial. Cases cited by the petitioner are distinguishable either as superceded by the issuing court, distinguished on the facts as having been remanded to the trial

court, as having the underlying claim as frivolous, as having filed an appeal but dismissing same prior to any appellate court proceedings. This case does not involve a constitutional issue except upon appellee's part to due process and due course of the law, if this case is accepted for review.

Finally, public policy requires that there be room for counsel to argue that existing law be reversed, or that new law be created. This counsel has done so in the past in *Weiker v. Motorists Mut. Ins. Co.* (1998) , 82 Ohio St. 3d. 182, *Miller v. Progressive Cas. Ins. Co.*(1994), 69 Ohio St.3d 619, *Tokles & Sons, Inc v. Midwestern Indemnity Co.* (1992), 65 Ohio St. 3d 621, *Nationwide Mutual Ins. Co. v. Campbell* (1994), 70 Ohio St. 3d 490, and several appellate cases. In this case counsel was using established causes of action, factual considerations in Ohio Jury Instructions, and engaged expert opinion. The only somewhat new consideration argued for was in the privacy area that a privacy interest is regained in once public records after the long passage of time eliminates a public interest therein, and as shown in FOIA cases.

STATEMENT OF THE CASE

Counsel George C. Rogers, for plaintiffs (ten police officers and relatives) filed a complaint on October 11, 1990, as subsequently amended, against the Toledo Blade Company for seven counts of defamation and three counts of invasion of privacy. R item 1.

On July 8, 1997, the Trial Court granted summary judgment to defendant dismissing the complaint. R item 199.

On July 29, 1997, The Toledo Blade Company filed a motion for sanctions for asserted frivolous conduct during the trial. R item 200.

On August 7, 1997, Counsel for Plaintiff filed a Notice of Appeal to the Court of Appeals from the July 8, 1997 Summary Judgment. R item 201..

On September 18, 1997, Counsel for Plaintiffs filed their Memorandum Contra the Motion for Sanctions. R item 212.

On Oct. 9, 1998, the judgment of the Court of Appeals affirming the Trial Court judgment was filed. R item 213. No motion was made in the Court of Appeals under Appellate Rule 23 for sanctions. No motion for sanctions pursuant to RC. 2323.51 for sanctions was filed within twenty-one days thereafter, nor ever filed.

On November 8, 1999, The Toledo Blade Company filed a "notice" of the denial of certiorari in the U.S. Supreme Court, and requested a hearing on its motion of July 29, 1997. R item 215.

On August 8, 2000, The Toledo Blade Company filed a brief on its motion for sanctions. R. item 220.

On August 25, 2000, Plaintiffs counsel filed their brief contra. R. item 222.

On November 7, 2007, the Trial Court (newly assigned judge) sua sponte ordered a hearing on the long outstanding motion. R. item 223.

On December 12, 2007, oral arguments were given at a hearing. Transcript

On Jan. 28, 2009, in an opinion and entry, R. item 225, the trial court found that there was no frivolous conduct during the proceedings of the case in the trial court, but found that the taking of an appeal from the summary judgment was frivolous conduct.

The Trial Court ordered the Toledo Blade to submit an itemized fee statement, and an application for attorney fees was filed by the Toledo Blade on March 31, 2009. R. item 227 & 228.

Plaintiffs' counsel filed on April 17, 2009, a motion to strike the application for attorneys fees as requesting fees for work performed in Court of Appeals. R. item 229. The Toledo Blade memorandum contra the motion to strike was filed on May 8, 2009, R. item 230, and the motion to strike was dismissed by the Court on August 20, 2009. R. item unnumbered. A hearing was scheduled on attorney fees for September 16, 2009.

At the hearing, the Court agreed to additional briefing on its authority to award sanctions for conduct of counsel in appeal cases. Order of September 29, 2009. R. item 241.

On December 17, 2009, Plaintiffs counsel's memorandum was filed with the

Court, and accepted by order of December 28, 2009. R. item 248 & 249. The Court gave the Toledo Blade leave to respond thereto. On January 11, 2010, The Toledo Blade filed its response memorandum. R. item 252.

On April 16, 2000 and again on November 11, 2010, plaintiffs counsel requested the Trial Court to issue a final ruling. R. item 253 & 255.

On December 21, 2010, the court by opinion and entry, R. item 257, issued a final judgment against George C. Rogers for the sum \$163,301.00 for defense counsel fees in the appellate courts including the U.S. Supreme Court.

On January 4, 2011, plaintiffs counsel, George C. Rogers, filed his Notice of appeal to the Sixth District Court of Appeals of Ohio. R. item 258. On February 8, 2013 issued its decision agreeing with the trial court that the trial litigation was not frivolous and reversed the trial court's judgment for asserted frivolous conduct before the appellate courts. The Court of Appeals reversed on the one issue that R.C. 2323.51 did not authorize a trial court to assess sanctions for conduct before appellate courts other than in prisoner's appeals. The Court held that the other five issues presented were moot.

STATEMENT OF THE FACTS

The salient facts of this appeal on the award of sanctions for conduct of counsel on appeal, are that there was NO MOTION for any award of sanctions for conduct of counsel on appeal, NOR ANY EVIDENCE of such conduct filed in the record.

The record shows that the only motion for sanctions before the Court was the motion of July 29, 1997, R item 200, before any appeal or conduct on appeal took place. The cause was never remanded to the Trial Court by any appellate court and no amendment of such motion was filed, nor could one have been filed.

The Toledo Blade Company did not file an App. R 23 request to the Court of Appeals for damages for frivolous conduct on appeal, and The Toledo Blade Company did not file a RC. 2323.51 motion for frivolous conduct within 21 days after the Court of Appeals judgment of affirmance of March 19, 1998.

The Toledo Blade Company did not file any evidence of plaintiffs counsel's conduct on appeal. No briefs, nor any records of motions or arguments made before the appellate courts were filed in the record. The Trial court, in making its ruling, apparently merely presumed that any possible argument on appeal would have to be frivolous.

The Trial Court failed to even discuss or rule on the issues raised by plaintiffs' counsel, George C. Rogers, in his memorandum of December 17, 2009, R item 248, on the issue of awarding sanctions for his conduct before appellate

courts. The issue covered 1) the lack of due process as no motion or other pleading was ever filed requesting sanctions for appellate conduct; 2) that neither Civ. R. 11, nor R.C. 2323.51 authorize an award for sanctions for appellate conduct, and no remand was made by an appellate court to the Trial Court under which it could consider such an award; 3) that any motion, even if proper, would have to be made prior to expiration of twenty-one days following such appellate "judgment". Additionally, the record shows that there was simply no evidence of plaintiffs counsel's conduct before the appellate courts that the Trial Court could determine was frivolous. Finally, the lower court assumed jurisdiction under R.C. 2323.51 to award sanctions for conduct before the Federal U.S. Supreme Court.

The memorandum of the Toledo Blade filed January 11, 2010, R. item 252, on these issues likewise failed to assert any facts, hardly any argument supported by authority addressing any of these issues. It certainly failed to specify when and where it made a pleading, or motion, to raise an issue asserting frivolous conduct by counsel in any of the appellate courts.

The Court of Appeals properly found that the trial proceedings were not frivolous in any respect. The complaint was brought on causes of action recognized by Ohio law, Defamation and Invasion of Privacy. The facts of the cases were virtually undisputed by the published newspaper articles, the affidavits, and depositions. In the defamation cases counsel asserted the five tests in Ohio Jury Instructions 264.05 (10) for determining reckless disregard by circumstantial evidence. Counsel asserted that two more tests should also apply as shown by later caselaw. Plaintiff's counsel then engaged two Ohio university professors, both whom had been previously recognized

by Ohio courts as experts in prior defamation cases, to give their opinions as to whether the facts were of and concerning the police officers and as applied to these tests. The trial court determined that these experts in prior defamation cases were not experts in his opinion, that in his opinion the defamatory statements in the articles were not of and concerning the officers. The trial court granted summary judgment holding that no reasonable man could find so. In effect plaintiffs university professors were not only not experts but were not even reasonable men. The privacy claims were asserted by wives and significant others of the police officers who made internal affairs complaints that were confidential (private) when made. They were so many years in the past that there was no public interest in having their names publicly disclosed. Counsel cited several cases but the most analogous was Dept. of Air Force v. Rose 425 U.S. 352 (1976), a FOIA case that didn't allow the disclosure of the names of former Air Force academy cadets who were subjected to discipline as there was no public interest in disclosure of their names and consequent embarrassment. The trial court dismissed consideration of the FOIA cases as unrelated to privacy. Counsel argued that if the names of the Air Force officers in old disciplinary actions were not to be publicly disclosed then certainly the names of the wives in old internal affairs complaints should even have more of a privacy interest. In any event the Court of Appeals correctly held that the trial court did not abuse its discretion in denying the sanctions motion.

ARGUMENT
Proposition of Law NO.1

DOES DUE PROCESS CLAUSE OF THE FOURTEENTH
AMENDMENT REQUIRE PROCEDURAL NOTICE TO A PARTY BY
WAY OF PLEADING OR MOTION BEFORE A TRIAL COURT MAY
CONDUCT A HEARING AND MAKE A MONETARY AWARD ?

Procedural due process of the Fourteenth Amendment requires notice stating with particularity the grounds thereafter, a hearing, and a neutral magistrate Goldberg v. Kelly, 377 US 254 (1970). Ohio has incorporated such requirement in civil cases with the Ohio Rules of Civil Procedure and Appellate Procedure. Under Civ. R. 7 and App. R.15 a motion "shall state with particularity the grounds therefor, and set forth the relief and order sought." George C. Rogers, as counsel, was not a party to the defamation/privacy case, he could only be made a defendant for monetary sanction under the Civil Rules by a pleading or motion authorized by statute. There was no pleading in the case so that a proper motion pursuant to R.C. 2323.51(B)(2) was required.nl

¹ Civ. R 11 does not apply upon appeal of any judgment where App. R 23 provides the recourse.
² RC. 2323.51(B)(2) provides "an award of reasonable attorney's fees may be made pursuant to division (B) (1) of this section upon motion of a party to a civil action.

As is clear from the record, the motion of the Toledo Blade Company does not state any particular frivolous conduct in the Appellate Courts, nor does it request relief or an order for any such conduct. In the absence of such notice, the requirements of procedural due process for an award of sanctions for conduct before appellate courts has not been met. The "issue" of counsel's conduct in the Appellate Courts was also not before the Court. The judgment of the Trial Court awarding monetary sanctions would be reversed on this ground if the matter was not moot.

¹ Civ. R 11 does not apply upon appeal of any judgment where App. R 23 provides the recourse.
² RC. 2323.51(B)(2) provides "an award of reasonable attorney's fees may be made pursuant to division (B) (1) of this section upon motion of a party to a civil action.

Proposition of Law NO.2

DOES RC. 2323.51 GIVE JURISDICTION TO A TRIAL COURT TO AWARDS SANCTIONS FOR CONDUCT OF COUNSEL BEFORE A COURT OF APPEALS WHEN THE APPEAL IS OTHER THAN A PRISONER'S APPEAL?

In State ex rel. Ohio Dept. of Health v. Sowald (1992), 65 Ohio St. 3d 338, 1992-OHIO-1, this Court stated at 343,

Under Civ. R 54(A), a "judgment" is an order from which an appeal can be taken, and under Civ. R 58(A), "entry of judgment" occurs after the verdict or decision in a civil action. Thus, the statute refers to trial court judgments in civil actions, not to appellate judgments. Accordingly, R.C. 2323.51 does not contemplate awarding attorneys fees for defending appeals of civil actions. (Emphasis added).

The rationale of this Court was further supplemented in Muellerv. City of Vandalia (Mont. App. 1999), 1999 Ohio App. LEXIS 1543. The Court noted that R.C. 2323.51 was amended in 1996. The Court noted:

The facts in this case,

First, as Defendants-appellants point out in their brief, "the question of whether or not a civil action is frivolous is an entirely separate question from whether or not an appeal is frivolous

Second, amendments to R.C. 2323.51 that became effective on January 12, 1997, through the enactment of H.B. 350, the previous year now extend its coverage to attorney fees incurred in appeals by inmates in civil actions. Division (A)(I)(b). No other form of appeal is included. This suggests that the General Assembly did not intend to include any form of appeal in the statute's prior version.

Third, App. R. 23 permits an award of attorney fees and expenses by an appellate court if an appeal is found to be frivolous. This independent basis for that relief protects a party who is adversely affected at the appellate level.

The statute as amended authorizes sanctions for frivolous inmates' appeal of civil actions but does not provide for sanctions for appeals of other civil actions. The Mueller

court was clearly correct in its holding that R.C. 2323.51 provides no authority for a trial court to award sanctions for frivolous attorney conduct in the Court of Appeals. Particularly, as to the motion in this case of July 27, 1997, R.C. 2323.51 as amended effective January 12, 1997 with its limitation to inmate appeals, provides no authority for sanctions for conduct in non-inmate appeals, Garhart Petroleum, Inc., v. People's Trans. Inc., 2011-OHIO-385.

Proposition of Law NO.3

ABSENT A REMAND DOES A TRIAL COURT RETAIN JURISDICTION OVER ANY MATTER AFTER AN APPEAL IS TAKEN, OTHER THAN MATTERS CLEARLY ANCILLARY TO SAID APPEAL?

As stated in Jay v. Massachusetts Casualty Ins. Co., 5th Dist. No. 2009 CA 00056, 2009-Ohio-4519, ~10, that absent a statutory grant of authority, a trial court is without jurisdiction to award appellate attorney fees.

It is well settled that "trial court loses its jurisdiction when an appeal is taken, and absent a remand, it does not regain jurisdiction subsequent to the Court of Appeals decision."

See also, Nosal v. Szabo, 2004-Ohio-4076, ~33-36, where a lack of motion under App. R. 23 and no authority to remand to the Trial Court for an assessment of attorneys fees under statute was shown.

In this case, there is no motion, no remand, and no statutory authority for the trial court to have awarded attorneys fees for conduct in the appellate court.

Proposition of Law NO.4

DOES A STATE COURT UNDER R.C, 2323.51 HAVE JURISDICTION TO SANCTION ATTORNEYS FOR CONDUCT BEFORE THE UNITED STATES SUPREME COURT?

R.C. 2323.51(A)(1) defines "conduct" as filing a civil action or asserting a claim, defense, or other position in a civil action. The "civil action" refers to the "civil action" as stated in Civ. R. 2, Ohio Rules of Civil Procedure. The Ohio Rules of Civil Procedure are limited to "the courts of this state."

There is no plausible reading of R.C. 2323.51 that would imply that the Ohio legislature by virtue of the statute was claiming the right to regulate the conduct of attorneys and parties in Federal Court. The Supremacy Clause of Article VI of the Constitution would clearly prevent state officials from interfering with the administration of the Federal Courts.

Proposition of Law NO.5

ASSUMING A COURT OF APPEALS DECISION IS A "JUDGMENT" FOR PURPOSES OF RC. 2323.51(B)(1), IS THE TWENTY- ONE DAY REQUIREMENT OF SAID STATUTE A STATUTE OF LIMITATION OR OTHERWISE JURISDICTIONAL?

Pursuant to State ex reI Ohio Dept. of Health v. Soward, supra, RC. 2323.51 refers to "entry of judgment" which occurs in trial court's judgments in civil actions under Civ. R 58(A), and therefore does not refer to appellate judgments. However, even assuming that an appellate court judgment could be a "entry of judgment" referred to by RC. 2323.51, said statute requires a motion for sanctions to be made within twenty-one days after the "entry of judgment".

As stated in syllabus ~1 of Soler v. Evans, St. Clair & Kelsey (2002),⁹⁴ Ohio St. 3d 432,

Pursuant to RC. 2323.51 an aggrieved party has the option of filing a sanctions motion at any time prior to the commencement of the trial or within twenty-one days after a final judgment.

This Court found that the requirement to file a motion prior to

twenty-one days after the judgment [being a final judgment] to be similar to a statute of limitations. This Court stated that "this would assure that twenty-one days after the entry of final judgment, the proceedings would be over."

Since the twenty-one day time limit is jurisdictional for trial court judgments, it would also be jurisdictional if RC. 2323.51 were read to include appellate "judgments". In this case, no motion was made to the Court of Appeals under App. R 23. No RC. 2323.51 motion was filed after any asserted frivolous conduct in the Court of Appeals, and within twenty-one days following its "judgment".

In Kudukis v. Mascinkas, 2005-OHIO-2465, the court found that the "judgment" of this statute and the "last judgment" as referred to in Soler, supra, does not include the last appellate decision in the case. The Court then held that the sanctions motion should have been denied as untimely.

Proposition of Law NO.6

WHEN A MOVANT PROFFERS NO EVIDENCE OF COUNSEL'S CONDUCT ON APPEAL, AND THE RECORD BEFORE THE TRIAL COURT CONTAINS NO EVIDENCE OF COUNSEL'S CONDUCT AND/OR ARGUMENT ON APPEAL, IS A JUDGMENT FINDING SUCH CONDUCT TO BE FRIVOLOUS UNSUPPORTED BY THE EVIDENCE?

Even assuming RC. 2323.51 authorizes a trial court, absent a motion, or remand, to award sanctions for counsel's conduct in the Court of Appeals, and that such motion was timely made under the statute, there is still a requirement of evidence

of such asserted frivolous conduct.

As shown by the Statement of Facts and the record in this case, there was simply no evidence of plaintiffs counsel's conduct, briefs, motion, or arguments made in the appellate courts. The burden of proof was upon counsel for The Toledo Blade to present evidence of such conduct for the court to consider. In this case, the trial judge DID NOT REVIEW any appellate briefs, motions, or arguments of counsel before determining that such conduct was frivolous as none were entered into evidence or the record.

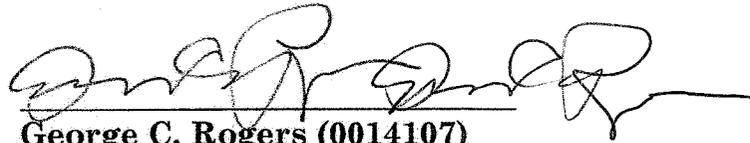
The basis of the Trial court's award of sanctions could have only been its assumption that any conceivable argument made on appeal would have been frivolous. As noted in Mueller, supra, "the question of whether or not a civil action is frivolous is an entirely separate question from whether or not an appeal is frivolous". The assumption of the Trial Court was not valid; it was required to review some evidence of what counsel actually did in any appellate proceeding prior to determining that such conduct was frivolous. The final judgment of the Trial Court was unsupported by any evidence and was properly reversed on this basis even if a motion for sanctions for appellate conduct had been made and the trial court had statutory authority to grant such a motion.

CONCLUSION

It is absolutely incredible that a trial court would render a judgment on a "issue" that had not been presented to it, for which no due process notice had been given, over which it had no jurisdiction, and that even if it had jurisdiction, the issue was time-barred, and that the court rendered such judgment without any

evidence before it, and finally failed to address in its Opinion with an argument or law, the defense raised that it had no jurisdiction. The Court of Appeals properly reversed the judgment on the least embarrassing of the issues before it.

Respectfully submitted,



George C. Rogers (0014107)
Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Appellee was mailed by U.S. Mail to David J. Coyle 1000 Jackson St. Toledo , OH 43604 on this 22nd day of April, 2013.

