

Case No. 2014-1761

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**Supreme Court  
of the State of Ohio**

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STATE OF OHIO *ex rel.*  
EMILIE DiFRANCO,

Relator-Appellant,

v.

CITY OF SOUTH EUCLID, OHIO, and KEITH A. BENJAMIN,

Respondents-Appellees,

and

MICHAEL P. LOGRASSO,

Appellee.

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**MERIT BRIEF OF RELATOR-APPELLANT**

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## I. INTRODUCTION

In an earlier appeal arising from this public records mandamus action, this Court held that the 2007 amendment to the Public Records Act “conditions all attorney-fee awards on the court’s [sic] having issued a judgment ordering compliance with the public-records law,” *State ex rel. DiFranco v. S. Euclid*, 183 Ohio St. 3d 367, \_\_\_ N.E.2d \_\_\_, 2014-Ohio-538 ¶¶17-18 (“*DiFranco I*”), even though earlier precedent of this Court applying the 2007 amendment specifically held that, “even if [a relator’s] mandamus claim [was] properly dismissed as moot, a claim for attorney fees in a public-records mandamus action is not rendered moot by the provision of the requested records after the case has been file.” *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 918 N.E.2d 515, 2009-Ohio-5947 ¶10 (“*Ronan I*”)(quoting and reiterating the holding in the post-2007-amendment decision in *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 902 N.E.2d 976, 2009-Ohio-590 ¶18)); accord *State ex rel. Laborers Int’l Union of N. Am., Local Union No. 500 v. Summerville*, 122 Ohio St.3d 1234, 913 N.E.2d 452, 2009-Ohio-4090 ¶8 (“we reject respondent’s contention that the 2007 amendment to R.C. 149.43 precludes attorney-fee awards in public-records mandamus cases that have been rendered moot by the post-filing disclosure of the requested records”); *State ex rel. Hardin v. Aey*, 123 Ohio St.3d 1469, 915 N.E.2d 1252, 2009-Ohio-5704 (awarding attorney fees in public records case when mandamus claim was mooted by the post-filing disclosure of the requested records); *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 938 N.E.2d 347, 2010-Ohio-5680 (“*Ronan II*”).

In dissenting with respect to that holding in the earlier appeal of this case, Justice Kennedy cautioned that such a holding “defeats the evident purpose of adding the mandatory-fee provision to the statute: ensuring an award of fees when the records custodian has unreasonably

delayed the production of records. *If no fees could be awarded unless the court had ordered a party to produce records, it would allow a public office to sit on a public-records request until a mandamus case was filed and then turn over the records before the court had a chance to issue an order. It would thereby prevent a requester from obtaining records within a reasonable time, while the public office would escape liability for attorney fees altogether, even though it would probably have violated division (C)(2)(b)(i) by failing to respond affirmatively or negatively to the request within a reasonable time.*” *DiFranco I*, 183 Ohio St. 3d 367, \_\_\_ N.E.2d \_\_\_, 2014-Ohio-538 ¶42 (Kennedy, J., concurring in part and dissenting in part)(emphasis added).

This appeal presents the question of whether public officials, now able “to sit on a public-records request until a mandamus case [is] filed and then turn over the records before the court [has] a chance to issue an order,” can escape further accountability when such public officials and their legal counsel effectuate and extend the delay in producing public records during the course of a public records mandamus case by presenting false and misleading representations and affidavits to the court.

## **II. STATEMENT OF FACTS**

On October 13, 2011, Emilie DiFranco tendered a public records request to the City of South Euclid and its clerk of council, Keith Benjamin. (Complaint ¶7; Answer ¶7.) This public records request was tendered via certified mail, (Complaint ¶8; Answer ¶8), and received by the City of South Euclid the next day, *i.e.*, October 14, 2011. (Complaint ¶9; Answer ¶9.) Two months later, after the City and Mr. Benjamin failed to response whatsoever to the public records request, *i.e.*, failed to respond affirmatively or negatively to the request, (Complaint ¶15; Answer ¶15), Ms. DiFranco commenced this original mandamus action in the Eighth District Court of Appeals on December 16, 2011. (Complaint ¶15; Answer ¶15.)

After the commencement of this action, Respondents finally responded to Ms. DiFranco's public records request. On December 20, 2011, Mr. Benjamin initially transmitted to Ms. DiFranco *some*, but not all, of the public records which she had sought. And notwithstanding the fact that this production was *a partial production* of responsive records, Respondents claimed and falsely represented to the court of appeals that this production was fully responsive to Ms. DiFranco's request. (Motion to Dismiss, at 2.) Specifically, on December 27, 2011, Respondents filed a motion to dismiss (which was signed by their legal counsel), together with the affidavit of Respondent Keith Benjamin. Within that motion and/or affidavit, Respondents and their counsel made the following false, material representations to the court of appeals:

- “[on December 20, 2011,] Mr. Benjamin had the records that were requested compiled and sent to the Relator” (Respondents’ Motion to Dismiss, at 2);
- “[Mr. Benjamin] fulfilled Relators[’] request the very next business day, December 20th” (Respondents’ Motion to Dismiss, at 2);
- that, as of December 27, 2011, the case had become moot because “Mr. Benjamin provided the requested public records” (Respondents’ Motion to Dismiss, at 3);
- “Once Mr. Benjamin became aware of the Complaint [in the present action] he fulfilled [the public records request] within twenty-four hours” (Respondents’ Motion to Dismiss, at 3-4);
- “[Relator’s] Complaint for a Writ was rendered moot under the law by Mr. Benjamin’s actions of fulfilling her request” (Respondents’ Motion to Dismiss, at 4);
- “that [Respondent Keith Benjamin] fulfilled the [public records] request of Ms. DiFranco on December 20, 2011,. . . by *sending all of the requested records to her*” (Benjamin Affidavit ¶5).

Additionally, also on December 27, 2011, Respondents filed an Answer (signed by their legal counsel) wherein Respondents made additional false, material representations or false legal representations to the court of appeals:

- Relator’s public records request “was fulfilled on Tuesday, December 20, 2011 at 4:23 p.m.” (Respondents’ Answer ¶15);
- “[Relator’s] request for public records was complied with on December 20, 2011 at 4:23 p.m.” (Respondents’ Answer ¶28);
- repeatedly that Relator’s claim for a writ of mandamus “is moot in that Relators request has been fulfilled by respondents” (Respondents’ Answer ¶¶31, 35, 36 & 37);
- Respondents “hav[e] fully complied with Relators request for public records” (Respondents’ Answer, prayer for relief);

Despite these numerous representations to the court of appeals that all responsive public records were provided to Ms. DiFranco as of December 20, 2011, even this Court recognized that “*the original production of documents was incomplete.*” *State ex rel. DiFranco v. S. Euclid*, 183 Ohio St. 3d 367, \_\_\_ N.E.2d \_\_\_, 2014-Ohio-538 ¶1 (emphasis added).

Confronted with these repeated false and misleading representations to the court of appeals that all responsive public records were provided to Ms. DiFranco as of December 20, 2011, Relator had to hire the expert services of Brian Johnson and incur additional legal fees in order to prove and establish the falsity of these material representations (which proved to be the only means by which Relator was ultimately, though very belatedly, able to obtain all of the public records that she had requested). Even this Court acknowledged the additional expenses incurred by Relator and the temporal delay in ultimately obtaining all of the requested public records due to the false and misleading representations to the court of appeals by Respondents and their legal counsel:

On February 8, 2012, DiFranco submitted the affidavit of Brian Johnson, a certified public accountant, who offered his conclusion that certain documents that would be responsive to DiFranco’s request must exist but had not been produced. By order dated July 3, 2012, the court of appeals required the city to address the points raised by Johnson’s affidavit, and to produce any responsive documents. Thereafter, on July 20, the city filed a certification, stating that

additional documents had been produced on June 18, and describing those documents in detail.

*DiFranco I*, 183 Ohio St. 3d 367, \_\_\_ N.E.2d \_\_\_, 2014-Ohio-538 ¶10.

Thus, throughout the proceedings below, Respondents and their counsel made numerous false representations to the court that all public records responsive to Relator’s public records request had been produced so as to wrongly claim the case had been mooted. Thus, Ms. DiFranco had to incur additional attorney fees and expenses just to establish the falsity of Respondents’ representations so as to ultimately – through, belatedly – obtain all of the public records responsive to her request.

Pursuant to the mandate of this Court following the earlier appeal, the Eighth District entered a final judgment entry on June 12, 2014. Due to the repeated false representations made by Respondents and their legal counsel throughout the course of this case, Relator filed a motion on June 30, 2014, seeking the imposition of sanctions pursuant to R.C. 2323.51 and Civ. R. 11. Ultimately, on September 17, 2014, the Eighth District denied the motion for sanctions though, in doing so, did not even address the legal basis or arguments posited by the Relator. Due to the failure of the Eighth District to consider whatsoever the actual legal and factual bases posited as justifying the imposition of sanctions herein, Relator appealed the denial of the imposition of sanctions on October 9, 2014.

### **III. LAW AND ARGUMENT**

#### **A. Sanctions Pursuant to R.C. § 2323.51**

Pursuant to R.C. § 2323.51, a court may “award ... court costs, reasonable attorney’s fees, and other reasonable expenses incurred in connection with a civil action or appeal ... to any party to the civil action or appeal who was adversely affected by frivolous conduct.” R.C. § 2323.51(B)(1). The statute specifically defines “conduct” as to include “the assertion of a claim,

defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, ... or the taking of any other action in connection with a civil action.” R.C. 2323.51(A)(1)(a). And, in turn, “frivolous conduct” is statutorily defined as including “conduct” that satisfies any of the following:

- (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, *causing unnecessary delay or a needless increase in the cost of litigation.*
- ...
- (iii) The conduct consists of allegations or other *factual contentions that have no evidentiary support* or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
- (iv) The conduct consists of *denials or factual contentions that are not warranted by the evidence* or, if specifically so identified, are not reasonably based on a lack of information or belief.

R.C. § 2323.51(A)(2)(a)(emphases added).<sup>1</sup>

As noted above, due to the repeated false representations made by Respondents and their legal counsel, Relator sought, pursuant to, *inter alia*, R.C. § 2323.51, the imposition of sanctions. As explicitly stated in Relator’s motion, the conduct which warranted such sanctions was “tender[ing] multiple false representations to [the Court] that *all* responsive republic records had been provided to Relator on December 20, 2011.” (Motion for Sanctions, at 8.) And with respect to R.C. § 2323.51, the following statutory definitions of “frivolous conduct” were specifically identified: (i) conduct “*causing unnecessary delay or a needless increase in the cost of litigation,*” R.C. § 2323.51(A)(2)(a)(i); (ii) conduct consisting of “*factual contentions that have no evidentiary support,*” R.C. § 2323.51(A)(2)(a)(iii); and (iii) conduct consisting of

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<sup>1</sup> Relator never contended before the Eighth District that the conduct of the Respondents and their counsel constituted “frivolous conduct” as defined in R.C. § 2323.51(A)(2)(a)(ii) – “not warranted under existing law , cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.”

“denials or factual contentions that are not warranted by the evidence,” R.C. § 2323.51(A)(2)(a)(iv). (Motion for Sanctions, at 5.)

Yet, even though Relator was specific as to the conduct warranting sanctions, *i.e.*, “tender[ing] multiple false representations to [the Court] that *all* responsive republic records had been provided to Relator on December 20, 2011”, the Eighth District simply treated the issue as concerning whether Respondents “defending against the complaint for a writ of mandamus” was warranted. (Journal Entry, at 1.) And additionally, while Relator specifically cited to three statutory bases for the imposition of sanctions, *i.e.*, R.C. § 2323.51(A)(2)(a)(i), (iii) & (iv), the Eighth District did not even consider or address whatsoever the latter two, *i.e.*, R.C. § 2323.51(A)(2)(a)(iii) & (iv), and with respect to the former, *i.e.*, R.C. § 2323.51(A)(2)(a)(i), the court of appeal conveniently failed to consider the specific basis cited, *i.e.*, whether the Respondents’ conduct “caused unnecessary delay or a needless increase in the cost of litigation.”<sup>2</sup>

**Proposition of Law No. 1**

**A review of the decision of a lower court on whether to impose sanctions pursuant to R.C. 2323.51 is generally subject to abuse-of-discretion review.**

**Proposition of Law No. 2**

**When the question regarding what constitutes frivolous conduct calls for a legal determination, an appellate court is to review the frivolous conduct determination *de novo*, without reference to the trial court's decision.**

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<sup>2</sup> Additionally, the Eighth District actually addressed whether Respondents’ conduct in “defending against the complaint for a writ of mandamus” constituted “frivolous conduct” as defined in R.C. § 2323.51(A)(2)(a)(ii) even though Relator never made a contention that Respondents’ conduct was “not warranted under existing law , cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.”

**Proposition of Law No. 3**

**A decision by a trial judge is truly discretionary such that an appellate court will not substitute its judgment for that of the trial judge when the decision is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him.**

**Proposition of Law No. 4**

**When the facts or inferences from them are not in dispute and when there are few or no conflicting procedural, factual or equitable considerations, the resolution by the trial judge is a question of law or logic. In such a situation, it is the final responsibility of an appellate court to determine law and policy; and to exercise its duty to “look over the shoulder” of the trial judge and, if appropriate, substitute its judgment for that of the trial judge.**

“On appeal, [this Court] will not reverse a lower court’s decision on whether to award sanctions under R.C. 2323.51 absent a showing of an abuse of discretion.” *State ex rel. Bell v. Madison Cty. Bd. of Comm’rs*, 139 Ohio St.3d 106, \_\_\_ N.E.2d \_\_\_, 2014-Ohio-1564 ¶10 (2014). And while, in Ohio, the concept of an abuse of discretion has been “defined as more than an error of law or judgment; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable,” *e.g., Marks v. C.P. Chemical Co., Inc.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), multiple courts of appeals in this State have recognized the concept of abuse of discretion “has been applied in a somewhat rote manner by the courts without analysis of the true purpose of the appellate court’s role in the review of a trial court’s discretionary powers.” *In re Guardianship of S.H.*, 2013-Ohio-4380 ¶8 (9th Dist. 2013); *accord Diso v. Dep’t of Commerce*, 2012-Ohio-4672 ¶28 (5th Dist. 2012); *see also Hurtado v. Statewide Home Loan Company*, 167 Cal.App.3d 1019, 1022 (1985)(describing abuse of discretion standard as being “so amorphous as to mean everything and nothing at the same time and be virtually useless as an analytic tool”).

Thus, courts that have, in fact, engaged in a meaningful analysis of the concept of abuse of discretion in the context of appellate review have recognized that it cannot result in a review that is blindly deferential; instead, the facts, context and the law itself must all be considered when an appellate court assesses whether the court below abused its discretion. In *State v. Echols*, 128 Ohio App.3d 677, 716 N.E.2d 728, 1999-Ohio-245 (1st Dist.), the First District actually analyzed the concept of abuse of discretion, quoting extensively from the decision in the Arizona Supreme Court in *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983):

The term “abuse of discretion” is unfortunate. In ordinary language, “abuse” implies some form of corrupt practice, deceit or impropriety... However, in the legal context, the word “abuse” in the phrase “abuse of discretion” has been given a broader meaning. In the few cases that have attempted an analysis, the ordinary meaning of the word has been considered inappropriate and the phrase as a whole has been interpreted to apply where the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice.

... [W]e should keep some operative principles in mind. Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess.

*Echols*, 128 Ohio App.3d at 699-700 (quoting *Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983)).

And other courts of appeals in this State have also found the foregoing language from *Chapple* meaningful when such court have actually engaged in a meaningful assessment of the legal concept of abuse of discretion. See, e.g., *State ex rel. Smith v. Culliver*, 186 Ohio App.3d 534, 929 N.E.2d 465, 2010-Ohio-339 ¶21 (5th Dist. 2010)(“[a]s we noted in [*State v.*] *Firouzmandi* [,2006-Ohio-5823 (5th Dist. 2006)], an excellent analysis of the misconception surrounding the concept of ‘abuse of discretion’ was set forth by the Arizona Supreme Court sitting en banc” in *Chapple*); *Guardianship of S.H.*, 2013-Ohio-4380 ¶9 (9th Dist.)(“[a]s was noted in *Firouzmandi*,

an excellent analysis of the misconception surrounding the concept of "abuse of discretion" was set forth by the Arizona Supreme Court sitting en banc"); *State v. Elswick*, 2006-Ohio-7011 (11th Dist. 2006).

Accordingly, as the First District aptly described in *Echols* in the context of an abuse of discretion review:

[w]here...the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is [an appellate court's] final responsibility to determine law and policy and it becomes [its] duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers. This process is sometimes, unfortunately, described as a determination that the trial judge has "abused his discretion."

*Echols*, 128 Ohio App.3d at 700.

Thus, "[w]hen the question regarding what constitutes frivolous conduct calls for a legal determination,... an appellate court is to review the frivolous conduct determination de novo, without reference to the trial court's decision." *Namenyi v. Tomasello*, 2014-Ohio-4509 ¶19 (2d Dist. 2014). For in this case, the facts and inferences therefrom are not in dispute. As set forth above, in multiple filings with the court, there is no *bona fide* dispute that Respondents and their counsel repeatedly made false factual representations that Respondents had provided *all* records responsive to Relator's public records request. For as noted above, even this Court recognized that "*the original production of documents was incomplete.*" *DiFranco I*, 183 Ohio St. 3d 367, \_\_\_ N.E.2d \_\_\_, 2014-Ohio-538 ¶1 (emphasis added). Thus, the issue simply becomes whether the conduct of Respondents and their counsel in making a contrary representation to the Eighth District over the course of the ensuing seven months constitute "frivolous conduct" as defined in any one of the three division cited to by Relator. *See also Lawhorn v. McKay*, 2002-Ohio-4461

¶7 (4th Dist. 2002)”[u]sually, contempt cases are decided on appeal under an abuse of discretion standard. However, even in that context, we review a purely legal question on a *de novo* basis”).

**Proposition of Law No. 5**

**When a court fails to consider or analyze the specific conduct allegedly constituting “frivolous conduct” as defined in R.C. 2323.51, said failure rises to the level of constituting an abuse of discretion.**

**Proposition of Law No. 6**

**When a court fails to address or analyze the legal issue of whether a party’s specific conduct constitutes “frivolous conduct” as defined in R.C. 2323.51, said failure rises to the level of constituting an abuse of discretion.**

In the present appeal, because the Eighth District (which was sitting as a trial court as this action was commenced as an original action therein, *State ex rel. Woods v. Navarre*, 2009-Ohio-3217 ¶19 (6th Dist. 2009)), failed to even consider or address whether the conduct of Respondents or their counsel constituted “frivolous conduct” as explicitly defined in R.C. § 2323.51, this Court should engage in a *de novo* review as the issue herein involves a legal determination. But even under the deferential (but not blindly deferential) standard of abuse of discretion, because “[a]n abuse of discretion can flow from ‘a failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule, or even arbitrarily, as if neither by rule nor discretion,’” *Sharpe v. Director, Office of Workers’ Comp. Prog.*, 495 F.3d 125, 130 (4th Cir. 2007)(quoting *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993)), the failure of the Eighth District to even consider or address two of the specific statutory definitions of “frivolous conduct” cited to by Relator, *i.e.*, R.C. § 2323.51(A)(2)(a)(iii) & (iv), clearly rises to the level of being an abuse of discretion. *See Dickson, Carlson & Campillo v. Pole*, 83 Cal.App.4th 436, 449 (2000)(“[t]he failure to exercise discretion is an abuse of discretion”).

Yet, even though Relator was specific as to the conduct warranting sanctions, *i.e.*, repeatedly “tender[ing] multiple false representations to [the Court] that *all* responsive republic

records had been provided to Relator,” the Eighth District did not even consider or address this specific conduct engaged in by Respondents and their counsel. Similarly, the Eighth District did not even consider two of the three specific statutory definitions of “frivolous conduct” relied upon Relator as to whether sanctions were warranted under R.C. § 2323.51; and, with respect to the third statutory definitions of “frivolous conduct”, the Eighth District ignored the specific basis cited by Relator, *i.e.*, whether the Respondents’ conduct “caused unnecessary delay or a needless increase in the cost of litigation.” In directly ignoring the arguments, contentions and facts posited by Relator to justify the imposition of sanctions, the Eighth District failed to exercise any discretion. Thus, regardless of whether this Court reviews the decision of the Eighth District under an abuse of discretion standard or under a *de novo* (as the issue is purely a legal one), the decision of the Eighth District cannot stand as a matter of law.

**Proposition of Law No. 7**

**R.C. 2323.51 applies an objective standard in determining frivolous conduct, as opposed to a subjective one, such that the finding of frivolous conduct under R.C. 2323.51 is determined without reference to what the individual knew or believed.**

Finally, when consideration is given to the legal standard and requirements for warranting the imposition of sanctions pursuant to R.C. § 2323.51, the conduct of Respondents and their counsel in repeatedly making the false factual representations that Respondents had provided *all* records responsive to Relator’s public records request when Respondents had, in fact, not done so, clearly falls within the ambit of “frivolous conduct” so as to warrant sanctions under R.C. § 2323.51.

“R.C. 2323.51...applies an objective standard in determining frivolous conduct, as opposed to a subjective one, such that “[t]he finding of frivolous conduct under R.C. 2323.51 is determined without reference to what the individual knew or believed.” *Hardin v. Naughton*, 2013-Ohio-2913 ¶14 (8th Dist. 2013). Thus, “[a] motion for sanctions pursuant to R.C. 2323.51

requires a three-step analysis by the trial court: (1) whether the party engaged in frivolous conduct, (2) if the conduct was frivolous, whether any party was adversely affected by it, and (3) if an award is to be made, the amount of award.” *Tipton v. Directory Concepts, Inc.*, 2014-Ohio-1215 ¶32 (5th Dist. 2014).

A party seeking the imposition of sanctions pursuant to R.C. § 2323.51 “need prove only that the [the opposing parties’ or their counsel’s] conduct falls within one of the four categories of frivolous conduct.” *McClure v. Fischer Attached Homes*, 146 Ohio Misc.2d 57, 889 N.E.2d 602 ¶20 (Clermont Cty. C.P. 2008). As developed above, in filing an answer, a motion to dismiss and/or the supporting affidavit, the Respondents and/or their counsel clearly and undisputedly engaged in frivolous conduct as defined in R.C. § 2323.51. For in such filings, Respondents and/or their counsel made multiple representations and assertions that this action had become moot because, according to Respondents, *all* of the responsive records had been produced. As even this Court recognized, such representations were false as “the original production of documents was incomplete.” *DiFranco I*, 183 Ohio St. 3d 367, \_\_\_ N.E.2d \_\_\_, 2014-Ohio-538 ¶1 (emphasis added). Thus, in making such false representations to the Eighth District, Respondents clearly engaged in conduct that fell within the statutory definition within three of the four categories of frivolous conduct, *i.e.*, R.C. § 2323.51(A)(2)(a)(i)(“*causing unnecessary delay or a needless increase in the cost of litigation*”); R.C. § 2323.51(A)(2)(a)(iii)(“*factual contentions that have no evidentiary support*”; and R.C. § 2323.51(A)(2)(a)(iv)(“*denials or factual contentions that are not warranted by the evidence*”).

Recognizing that the dearth of documents actually provided were not fully responsive to her public records request, Relator was confronted with the option of simply accepting the *noblesse oblige* of Respondents in providing selective responsive public records or seeking that

which she originally sought and that which the law required of Respondents, *i.e.*, a full and complete production of responsive public records; Relator chose the latter. But confronted with the self-serving declarations of Respondents (including an affidavit) falsely attesting to a full and complete production, Relator had to actually establish the falsity of such assertions. And, thus, only through the retention of and obtaining testimony from an expert witness was Relator able to establish the deliberate falsity of Respondents' representations. For even Respondents implicitly recognized the need for such expert testimony, as opposed to the unsupported assertions of Relator or her counsel. In an exemplar of the arrogance which they displayed towards Relator *ab initio*, Respondents specifically decried any challenge to their self-serving declarations regarding the completeness of their records production (which this Court has since recognized as being false):

Relator claims to be in some special position to "assess" whether or not the record she received is a complete production of all of the records. By making such a statement she apparently believes she is in a better position or is more knowledgeable than the city to be the determiner of the completeness of the response. Only the keeper of the public records would have the ability to know what a full and complete copy of their own records is.

Relator has sent a copy of the city's response to her records request to her attorneys for their review. The immediate logical question to this action is, for what? Relators [sic] counsel is in no better position [than] the Relator to determinate the completeness of the response.

(Respondents' Brief in Response, dtd March 16, 2012, at 2.)

Thus, Relator was clearly adversely affected by the multiple false representations made by Respondents and/or their counsel when they indicate to the Eighth District that all responsive records were produced. For the frivolous conduct of the Respondents necessitated Relator to retain an expert witness, together with attendant legal fees relating to consultation with said expert and subsequent briefing, in order for Relator to finally obtain all responsive records – for

as even the Eighth District concluded: “the passage of more than seven months between the filing of the complaint for a writ of mandamus and the delivery of all records to Difranco, constitutes an unreasonable and excessive period of time in which to provide the requested records.” (Journal Entry dtd June 12, 2014, at 4.)

Thus, under the objective standards within R.C. § 2323.51, Respondents and/or their counsel undisputedly engaged in “frivolous conduct” as result of which Relator was adversely affected so as to merit and award of attorney fees and expenses necessitated by such frivolous conduct. Accordingly, the judgment of the Eighth District should be reversed and judgment entered in favor Relator and against Respondents and/or their counsel, finding that Relator is entitled to an award of sanctions pursuant to R.C. § 2323.51.

#### **B. Sanctions Pursuant to Civ. R. 11**

Ohio R. Civ. P 11 provides that all pleadings, motions and other documents must be signed by an attorney of record or a pro se litigant. And it specifically sets forth that:

[t]he signature of an attorney ... constitutes a certificate by the attorney ... that the attorney ... has read the document; that to the best of the attorney's ... knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.... For a willful violation of this rule, an attorney ... upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule.

With respect to the application of Civ. R. 11, Relator contended that the sanctionable conduct existed when “Respondents filed an answer and a motion to dismiss (together with an affidavit) wherein they made repeated false factual representations that Respondents had provided *all* records responsive to Relator’s public records request.” (Motion for Sanctions, at 8.) And as with its rejection of sanctions pursuant to R.C. § 2323.51, the Eighth District failed to

focus upon the specific, *i.e.*, the false representations to the court in the answer and motion to dismiss, but, instead, simply considered the broader issue as being whether “the behavior of respondents’ counsel, in defending against the complaint for a writ of mandamus, involved bad faith...” (Journal Entry, at 2.)

**Proposition of Law No. 1**

**A review of the decision of a lower court on whether to impose sanctions pursuant to Civil Rule 11 is generally subject to abuse-of-discretion review.**

**Proposition of Law No. 2**

**Whether, under Civ. R. 11, a party has good grounds to assert a claim involves a legal determination, subject to a *de novo* standard of review.**

**Proposition of Law No. 3**

**A decision by a trial judge is truly discretionary such that an appellate court will not substitute its judgment for that of the trial judge when the decision is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him.**

**Proposition of Law No. 4**

**When the facts or inferences from them are not in dispute and when there are few or no conflicting procedural, factual or equitable considerations, the resolution by the trial judge is a question of law or logic. In such a situation, it is the final responsibility of an appellate court to determine law and policy; and to exercise its duty to “look over the shoulder” of the trial judge and, if appropriate, substitute its judgment for that of the trial judge.**

This Court “will not reverse a court’s decision on a Civ.R. 11 motion for sanctions absent an abuse of discretion.” *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 874 N.E.2d 510, 2007-Ohio-4789 ¶18 (2007). However, “whether a party has good grounds to assert a claim under Civ.R. 11...involves a legal determination, subject to a *de novo* standard of review.” *ABN AMRO Mortgage Group, Inc. v. Evans*, 2013-Ohio-1557 ¶14 (8th Dist. 2013); *accord Fast Property Solutions, Inc. v. Jurczenko*, 2013-Ohio-60 ¶57 (11th Dist. 2013).

As developed more fully above in addressing the review of a decision of whether to impose sanctions pursuant to R.C. § 2323.51 (which is incorporated herein by reference), the abuse of discretion standard is not intended to defer blindly to a discretionary decision of a trial court. Instead, this Court needs to be mindful that “[s]omething is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess....” *Echols*, 128 Ohio App.3d at 699-700 (quoting *Chapple*, 135 Ariz. 281). But “[w]here...the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is [an appellate court’s] final responsibility to determine law and policy and it becomes [its] duty to “look over the shoulder” of the trial judge....” *Id.* at 700.

And, as with its consideration of sanctions pursuant to R.C. § 2323.51, the Eighth District in this case failed to address or even consider what actually constituted the sanctionable conduct by Respondents’ counsel in the context of Civ. R. 11, *i.e.*, filing an answer and a motion to dismiss (together with an affidavit) wherein they made repeated false factual representations that Respondents had provided *all* records responsive to Relator’s public records request.

**Proposition of Law No. 5**

**In ruling on a motion for sanctions made pursuant to Civ.R. 11, a court must consider whether the attorney signing the document (1) has read the pleading, (2) harbors good grounds to support it to the best of his or her knowledge, information, and belief, and (3) did not file it for purposes of delay.**

In ruling on a motion for sanctions made pursuant to Civ.R. 11, a court “must consider whether the attorney signing the document (1) has read the pleading, (2) harbors good grounds to support it to the best of his or her knowledge, information, and belief, and (3) did not file it for purposes of delay.” *Ceol v. Zion Indus., Inc.*, 81 Ohio App.3d 286, 290, 610 N.E.2d 1076 (9th Dist. 1992). “If any one of these requirements is not satisfied, the trial court must then determine whether ‘the violation was “willful” as opposed to merely negligent.’” *Ponder v. Kamienski*, 0, 2007-Ohio-5035 ¶36 (9th Dist. 2007)(quoting *Ceol v. Zion Indus., Inc.*, 81 Ohio App.3d at 286).

Once again, the Eighth District wrongly treated the issue as simply involving an issue concerning “the behavior of respondents’ counsel” “in defending against the complaint for a writ of mandamus”. (Journal Entry, at 2.) But Civ. R. 11 is specifically directed towards the filing of a specific document or pleading in the case. *See* Ohio R. Civ. P. 11 (“...has read *the document*; ... there is good ground to support *it*; and that *it* is not interposed for delay” (emphases added)); *see also S & S Computer Sys., Inc. v. Peng*, 2002-Ohio-2905 ¶16 (9th Dist. 2002)(“Civ.R. 11, by its terms, applies only to the attorney of record who signed the document alleged to have violated the rule, or the pro se party who signed the document if the party is not represented by an attorney” (emphases added)). And, despite Relator identifying the specific documents at issue wherein Respondents made numerous false misrepresentations, the Eighth District did not even consider or address such filings. But that is precisely what Civ. R. 11 necessitates a court to consider. In failing to even consider the specific filings at issue, the decision of the Eighth District clearly rises to the level of an abuse of discretion warranting reversal.

**Proposition of Law No. 6**

**A court abuses its discretion in summarily denying a motion for sanctions when the record clearly evidences frivolous conduct or the existence of an arguable basis for an award of sanctions**

**Proposition of Law No. 7**

**When a court fails to consider or analyze the specific conduct allegedly warranting the imposition of sanctions pursuant to Civ. R. 11, said failure rises to the level of constituting an abuse of discretion.**

The decision of the Eighth District also warrants reversal as it ignored its own precedent which held that “a trial court abuses its discretion by denying a motion for sanctions without a hearing if either the ‘record clearly evidences frivolous conduct’ or ‘an arguable basis exists for an award of sanctions.’” *Lakeview Holding (OH), L.L.C. v. Haddad*, 2013-Ohio-1796 ¶14 (8th Dist. 2013)(quoting *Bikkani v. Lee*, 2008-Ohio-3130 ¶31 (8th Dist. 2008)(“if an arguable basis exists for an award of sanctions under Civ.R. 11, a trial court must hold a hearing on the motion”)). For “a trial court abuses its discretion when it arbitrarily denies a motion for sanctions. *Id.* ¶14.

Respondents filed an answer and a motion to dismiss (together with an affidavit) wherein they made repeated false factual representations that Respondents had provided *all* records responsive to Relator’s public records request; even this Court has recognized that “*the original production of documents was incomplete.*” *DiFranco I*, 183 Ohio St. 3d 367, \_\_\_ N.E.2d \_\_\_, 2014-Ohio-538 ¶1 (emphasis added). And even after Relator tendered her expert’s affidavit on February 8, 2012, that clearly established the incompleteness of Respondents’ production, no additional records were forthcoming until over 4 months later. Clearly, the effort by Respondents’ in tendering false representations to the court of appeals was deliberately undertaken in order to frustrate and delay the production of all responsive records to Relator; no good faith basis can exist for such a filing, especially in light of the on-going delay that

occurred even after Relator tendered her expert witness' affidavit. "If there is an 'arguable basis' for the motion [for Rule 11 sanctions], then the court must conduct a hearing." *Mitchell v. Western Reserve Agency*, 2006-Ohio-2475 ¶57 (8th Dist. 2006). With respect to the filings tendered by Respondents and their counsel, there clearly was a sufficient basis to warrant the holding of a hearing as to whether sanctions were warranted under Civ. R. 11.

And as with its failure to consider the actual conduct constituting "frivolous conduct" under R.C. §2323.51, the Eighth District also failed to even consider or address the specific filings made which were grounds for sanctions pursuant to Civ. R. 11. Once again, even under the deferential (but not blindly deferential) standard of abuse of discretion, the failure of the Eighth District to consider the specific conduct at issue cannot be condoned by this Court. In directly ignoring the arguments, contentions and facts posited by Relator to justify the imposition of sanctions pursuant to Civ. R. 11, the Eighth District failed to exercise any discretion. Thus, regardless of whether this Court reviews the decision of the Eighth District under an abuse of discretion standard or under a *de novo* (as the issue is purely a legal one), the decision of the Eighth District cannot stand as a matter of law.

## **CONCLUSION**

"Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance." *Kish v. Akron*, 109 Ohio St.3d 162, 846 N.E.2d 811, 2006-Ohio-1244 ¶16 (2006). Thus, "[t]he rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore, anyone may inspect such records at any time." *Dayton Newspapers, Inc. v. Dayton*, 45 Ohio St.2d 107, 109, 341 N.E.2d 576 (Ohio 1976).

As the history of this case has demonstrated, certain public officials can and do deliberately frustrate and undermine efforts by citizen to have access to their records, *i.e.*, the people's records. In *Kish*, this Court recognized that "the right of access to government records is a hollow one if records are not preserved for review." *Kish*, 109 Ohio St.3d 162, 846 N.E.2d 811, 2006-Ohio-1244 ¶18. An extension of this proposition is also true – the right of access to government records is a hollow one if public officials can delay or postpone the ability of citizens to have timely access to such records.

Yet, in light of this Court's decision in *DiFranco I*, public officials now find encouragement to delay or postpone the ability of citizens to have timely access to such records. For under *DiFranco I*, when public officials take umbrage at citizens who step forward to serve as watchdogs on their government, those public officials can sit idly by and force such citizens to incur the expenses and burdens of litigation in order to obtain that to which the citizens were entitled *ab initio*. Of course, that assumes the citizen-watchdog has the financial means to actually pursue such litigation; the alternative is to simply concede victory to the obstructionism of the public officials who refuse to produce public records.

But when a citizen-watchdog does pursue litigation in order to obtain that to which he or she is already legally entitled to obtain, will public officials now find encouragement from this Court to undermine and further delay such litigation and the ultimate production of public records, as well as causing the citizen-watchdog to incur additional expenses. For, in this case, if Respondents and their legal counsel can submit with impunity false and misleading representations and affidavits to a court, those public officials who do take umbrage at citizen-watchdogs will be given yet another arrow in their quiver by which to undermine, frustrate and delay the public's access to their own records. As the facts herein and the inferences therefrom

are not in dispute and there are few or no conflicting procedural, factual or equitable considerations, the resolution of the issue before this Court is one of law or logic. And such law and logic dictate that sanctions were, in fact, warranted against Respondents and their legal counsel for the false and misleading representations and affidavits they tendered herein.

Accordingly, the judgment of the court below should be reversed and judgment entered in favor of the Relator-Appellant.

Respectfully submitted,

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*Attorneys for Relator*

#### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing will be served upon the following via regular mail on the 1st day of December 2014:

Michael P. Lograsso  
Law Director, City of South Euclid  
1349 South Green Road  
South Euclid, Ohio 44121

/s/ Curt C. Hartman

## APPENDIX

Case No. \_\_\_\_\_ 14-1761

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**Supreme Court  
of the State of Ohio**

---

STATE OF OHIO *ex rel.* EMILIE DiFRANCO,

Relator-Appellant,

v.

CITY OF SOUTH EUCLID, OHIO, and KEITH A. BENJAMIN,

Respondents-Appellees,

and

MICHAEL P. LOGRASSO,

Appellee.

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**NOTICE OF APPEAL OF RELATOR-APPELLANT EMILIE DiFRANCO**

**APPEAL OF RIGHT (CASE ORIGINATING IN COURT OF APPEALS)**

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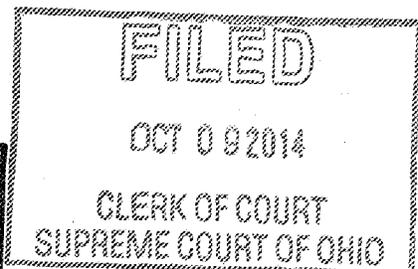
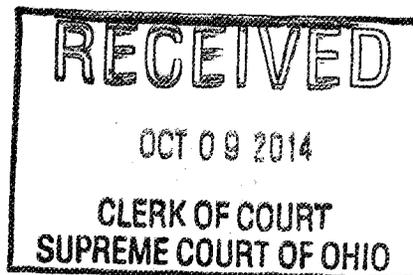
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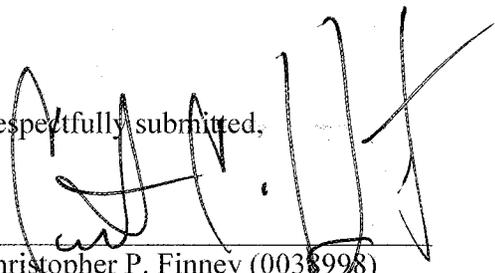
*Counsel for Appellees City of South Euclid, Ohio,  
and Keith A. Benjamin*



**NOTICE OF APPEAL**

Relator-Appellant Emilie DiFranco, on relation and behalf of the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the journal entry of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered on September 17, 2014, in *State ex rel. DiFranco v. City of South Euclid, Ohio, et al.*, Case No. CA-11-97713. Attached hereto is a copy of the Journal Entry wherein the Court of Appeals denied the imposition of sanctions against the designated Appellees herein.

Respectfully submitted,



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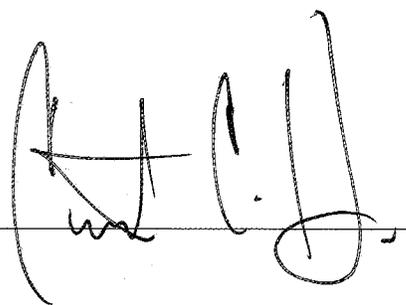
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*Attorney for Relator-Appellant  
Emilie DiFranco*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing will be served, via e-mail, upon the following on the 6th day of October 2014

Michael P. Lograsso  
Law Director, City of South Euclid  
1349 South Green Road  
South Euclid, Ohio 44121



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# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Andrea Rocco, Clerk of Courts

S/O EX REL., EMILIE DIFRANCO

Relator

COA NO.  
97713

ORIGINAL ACTION

-vs-

CITY OF SOUTH EUCLID, OHIO, ET AL.

Respondent

MOTION NO. 476226

Date 09/17/2014

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## Journal Entry

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Relator's motion for the imposition of sanctions, as premised upon R.C. 2323.51 and Civ.R. 11, is denied. R.C. 2323.51 permits this court to award sanctions in a civil action, when a party engages in frivolous conduct. Original actions are civil in nature and thus are subject to R.C. 2323.51. Cf. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, 797 N.E.2d 982. Frivolous conduct is defined as behavior that serves merely to harass or maliciously injure another party to the civil action or is employed for another improper purpose. R.C. 2323.51(A)(2)(a)(i). Frivolous conduct is also defined as the filing of a claim or defense that is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law. R.C. 2323.51(A)(2)(a)(ii). Cf. *State ex rel. Ohio Dept. Of Health v. Sowald*, 65 Ohio St.3d 338, 1992-Ohio-1, 603 N.E.2d 1017; *State ex rel. Naples v. Vance*, Mahoning App. No. 02-CA-181. Based upon the procedural history of this original action, we cannot find that the behavior of the respondents, in defending against the complaint for a writ of mandamus, was designed to harass or maliciously injure the relator. We further find that the conduct of the respondents, in defending against the complaint for a writ of mandamus, was warranted under existing law. Thus, the conduct of the respondents in defending against the complaint for a writ of mandamus was not frivolous and sanctions pursuant to R.C. 2323.51 are not warranted.

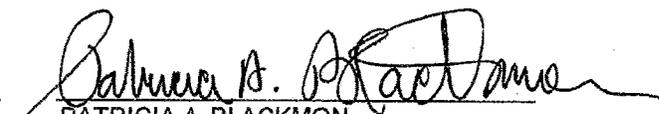
In addition, Civ.R. 11 provides in pertinent part: "The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; \* \* \* For a willful violation of this rule, an attorney or pro se party, upon motion of a party may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule \* \*



\*.” The imposition of a sanction, pursuant to Civ.R. 11, mandates the application of a subjective bad-faith standard by requiring that any violation must be willful. *State ex rel. Dreamer*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510. The United States Supreme Court has opined that the purpose of Fed.R.Civ.P. 11, which is similar to Civ.R. 11, is to curb the abuse of the judicial system which results from baseless filings that burden the courts and individuals with needless expense and delay. *Cooter & Gell v. Hartmarx Corp.* (1990), 496 U.S. 384, 110 S.Ct. 2247, 110 L.Ed.2d 359. The United States Supreme Court has also held that the specter of Rule 11 sanctions encourages a civil litigant to “stop, think and investigate more carefully before serving and filing papers.” *Id.* Once again, based upon the procedural history of this original action in mandamus, we cannot find with certainty that the behavior of the respondents’ counsel, in defending against the complaint for a writ of mandamus, involved bad faith to support the relator’s claim that the counsel’s actions “[were] deliberately undertaken in order to frustrate and delay the production of all responsive records” to the relator. Accordingly, the respondent has failed to demonstrate that sanctions must be granted pursuant to R.C. 2323.51 or Civ.R. 11.

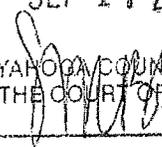
Presiding Judge SEAN C. GALLAGHER, Concurs

Judge EILEEN A GALLAGHER, Concurs

  
PATRICIA A. BLACKMON  
Judge

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CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
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2014 SEP 17 10:58 AM CUYAHOGA COUNTY CLERK

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Andrea Rocco, Clerk of Courts

S/O EX REL., EMILIE DIFRANCO

Relator

COA NO.  
97713

ORIGINAL ACTION

-vs-

CITY OF SOUTH EUCLID, OHIO, ET AL.

Respondent

MOTION NO. 476226

Date 09/17/2014

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## Journal Entry

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Relator's motion for the imposition of sanctions, as premised upon R.C. 2323.51 and Civ.R. 11, is denied. R.C. 2323.51 permits this court to award sanctions in a civil action, when a party engages in frivolous conduct. Original actions are civil in nature and thus are subject to R.C. 2323.51. Cf. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, 797 N.E.2d 982. Frivolous conduct is defined as behavior that serves merely to harass or maliciously injure another party to the civil action or is employed for another improper purpose. R.C. 2323.51(A)(2)(a)(i). Frivolous conduct is also defined as the filing of a claim or defense that is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law. R.C. 2323.51(A)(2)(a)(ii). Cf. *State ex rel. Ohio Dept. Of Health v. Sowald*, 65 Ohio St.3d 338, 1992-Ohio-1, 603 N.E.2d 1017; *State ex rel. Naples v. Vance*, Mahoning App. No. 02-CA-181. Based upon the procedural history of this original action, we cannot find that the behavior of the respondents, in defending against the complaint for a writ of mandamus, was designed to harass or maliciously injure the relator. We further find that the conduct of the respondents, in defending against the complaint for a writ of mandamus, was warranted under existing law. Thus, the conduct of the respondents in defending against the complaint for a writ of mandamus was not frivolous and sanctions pursuant to R.C. 2323.51 are not warranted.

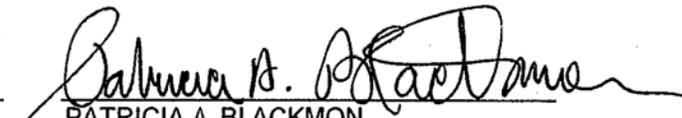
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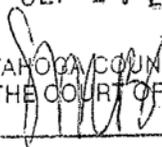
Presiding Judge SEAN C. GALLAGHER, Concur

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