

Case No. 2014-1761

**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.

REPLY BRIEF OF RELATOR-APPELLANT

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REPLY MEMORANDUM

The State of Ohio, by and through Relator Emilie DiFranco, hereby tenders the following in reply to the arguments posited by Appellants City of South Euclid and David Benjamin.

A. As one Appellee failed to file any brief, App. R. 18 allows this Court to accept Appellant’s statement of the facts and issues as correct and to reverse the judgment with respect to that Appellee if Appellant’s brief reasonably appears to sustain such action.

As this appeal involves the issue of whether sanctions should have been imposed against, *inter alios*, the attorney for the City of South Euclid, Appellant properly named that attorney, *i.e.*, Michael Lograsso, as an Appellee in the Notice of Appeal. *Cf. Evans v. Bossin*, 107 Ohio App.3d 544, 546, 669 N.E.2d 87 (1st Dist. 1995)(“[s]ince appellant lacks standing to question the imposition of sanctions against her attorney and her attorney failed to file his own notice of appeal, this assignment of error is not properly before this court”). Yet, Mr. Lograsso *qua* an appellee failed to file any brief. Instead, the Appellees’ Brief was tendered specifically only on behalf of the City of South Euclid and Keith Benjamin.

Ohio R. App. P. 18(C) provides that:

[i]f an appellee fails to file the appellee’s brief within the time provided by this rule, or within the time as extended, the appellee will not be heard at oral argument except by permission of the court upon a showing of good cause submitted in writing prior to argument; and in determining the appeal, the court may accept the appellant’s statement of the facts and issues as correct and reverse the judgment if appellant’s brief reasonably appears to sustain such action.

Thus, in considering this appeal as it relates to the imposition *vel non* of sanctions against Mr. Lograsso, this Court should, pursuant to Ohio R. App. P. 18(C), accept the facts in Appellant’s Brief and reverse the judgment below as the arguments therein “reasonably appear” to sustain doing so, both pursuant to R.C. 2323.51 and Ohio R. Civ. P. 11. At a minimum, though, because sanctions pursuant to Rule 11 “may only be imposed upon attorneys or, in certain circumstances,

pro se litigants,” *T.M. v. J.H.*, 2011-Ohio-283 ¶98 (6th Dist. 2011), application of Ohio R. App. P. 18(C) is clearly and undisputedly applicable vis-à-vis the imposition *vel non* of sanction pursuant to Rule 11 and, thus, this Court should proceed thereon based solely upon Appellant’s Brief.

B. Following reversal and remand by an appellate court, the case is taken up by the court below at the point where the reversal error occurred and then proceeds to final judgment.

Appellees, *i.e.*, the City of South Euclid and Keith Benjamin, initially contend that the motion for the imposition of sanctions pursuant to R.C. 2323.51 was untimely. (Appellees’ Brief, at 6-9.) While R.C. § 2323.51(B)(1) provides, in pertinent part, that a motion for sanctions under that section can be filed “at any time not more than thirty days after the *entry of final judgment* in a civil action” (emphasis added), Appellees essentially argue that the judgment awarding statutory damages in this case is not a “final judgment in a civil action.” Instead, Appellees contend that the only “final judgment” is the judgment which this Court actually reversed in *DiFranco I*. But in making such an argument, Appellees fail to recognize and to apply two basic and well-established principles of appellate jurisprudence.

Firstly, “a reversal of judgment on appeal nullifies the judgment below, leaving the case standing as if no judgment had been rendered.” *Burns v. Daily*, 114 Ohio App.3d 693, 704, 683 N.E.2d 1164 (11th Dist. 1996); *accord State v. Henry*, 2012-Ohio-420 ¶22 (2d Dist. 2012) (Froelich, J., concurring); *see Metropolis Night Club v. Ertel*, 104 Ohio App.3d 417, 419, 662 N.E.2d 94 (8th Dist. 1995) (finding that previous reversal of judgment meant that there was no “existing final judgment”). *And secondly*, a related and well-established principle of appellate jurisprudence provides that “[w]here a judgment is reversed for error, and remanded for further proceedings, the cause may be taken up, by the court below, at the point where the first error was

committed, and be proceeded with, as in other cases, to final judgment.” *Montgomery Cty. Comm’rs v. Carey*, 1 Ohio St. 463 (1853)(syllabus ¶1); *accord Miller v. Miller*, 114 Ohio App. 234, 237-38, 181 N.E.2d 282 (6th Dist. 1960)(“following a reversal of a judgment, it has been consistently held that the cause may be taken up by the court below at the point where the first error was committed, be proceeded with to final judgment”). Thus, a “reversal has the effect of putting the case in a posture *where no final judgment has been entered on the claim of either party.*” *Foley v. Foley*, 2006-Ohio-946 ¶36 (10th Dist. 2006)(emphasis added); *accord Wilson v. Kreusch*, 111 Ohio App.3d 47, 51, 675 N.E.2d 571 (1996)(“[t]he effect of our reversal was to reinstate the case to the trial court in a posture where no final judgment had been entered on the claim of either party”); *see Washington Mutual Bank, F.A. v. Wallace*, 2014-Ohio-5317 ¶24 (12th Dist. 2014)”[t]he effect of the Supreme Court of Ohio’s decision to reverse *Wallace I* and remand the matter to the trial court was to reinstate the case to the docket prior to the ruling on Wallace’s motion to vacate a void judgment”)

Thus, when this Court previously “reverse[d] the judgment below as to damages, and [] remand[ed] for a determination of the proper amount of damages under all the pertinent statutory criteria,” *State ex rel. DiFranco v. S. Euclid*, 138 Ohio St. 3d 367, 7 N.E.3d 1136, 2014-Ohio-538 ¶36 (“*DiFranco I*”), this case proceeded back to the Eighth District (which was sitting as the trial court in this mandamus action) and was then in the “posture where no final judgment has been entered on the claim of either party.” *Foley*, 2006-Ohio-946 ¶36. Thus, when the Eighth District made its determination of the proper amount of statutory damages and entered a judgment awarding those damages on June 12, 2014, a “final judgment in a civil action” was then entered by the trial court, *i.e.*, the Eighth District. It was at that time that the 30-day window under R.C. § 2323.51(B)(1) started to run.

For this case does not involve the effort to identify an appellate court’s decision, *i.e.*, this Court’s decision in *DiFranco I*, as constituting the “final judgment in a civil action” under R.C. § 2323.51(B)(1). For that was the argument in the two district court cases upon which Appellees rely in their effort to claim that the judgment entry by a trial court after remand does not constitute a “final judgment in a civil action”. *See Adams v. Pitorak & Coenen Invs., Ltd.*, 2013-Ohio-4102 ¶¶8 & 13 (11th Dist. 2013)(“appellant claims the motion for frivolous conduct was within the 30-day filing limit of R.C. 2323.51 because the final judgment occurred *when this court issued its decision* on June 29, 2012 ... arguing *this court’s June 29, 2012 judgment* is the final order” (emphases added);¹ *Kudukis v. Mascinskis*, 2005-Ohio-2465 ¶12 (8th Dist. 2005) (“defendants offer us no other authority (and we find none) that would support their position that a R.C. 2323.51(B)(1) motion could be filed within [the then temporal limitation of] twenty-one days *from the last appellate decision*” (emphasis added).)

And the conclusion that the motion for sanctions pursuant to R.C. 2323.51 was timely file is not only consistent with the well-established principles of appellate jurisprudence addressed above but, also, with this Court’s pronouncement in *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 763 N.E.2d 1169, 2002-Ohio-1246 (2002). In *Soler*, this Court, in addressing the

¹ Appellees also misrepresent the disposition of the earlier appeal in *Adams*. In their brief, Appellees claim that, in *Adams*, “the defendant waited until after the matter was reversed *and remanded to the trial court* (following an earlier appeal) to file a motion for sanctions.” (Appellees’ Brief, at 7 (emphasis added).) But the earlier appeal was not remanded to the trial court but, instead, judgment was actually entered by the court of appeals. *Adams v. Pitorak & Coenen Invests., Ltd.*, 2012-Ohio-3015 ¶85 (“[t]he judgment of the Geauga County Court of Common Pleas is hereby affirmed in part and reversed in part, and final judgment is rendered”). Thus, there was no remand in order for the trial court to enter a final judgment following appeal. And a review of the docket of the underlying case in *Adams* before the Geauga County Court of Common Pleas (http://www.co.geauga.oh.us/common_pleas/Docket2/ViewDkt.asp?Casein=97027264) confirms that no judgment was entered by the trial court following the disposition of the prior appeal. *See State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 974 N.E.2d 516, 2007-Ohio-4798 ¶¶8 & 10 (2007) (court can take judicial notice of judicial opinions and public records accessible from the internet).

timeliness of a motion for sanctions pursuant to R.C. § 2323.51, declared that “[an] aggrieved party also has the option of waiting until *the conclusion of the action* to seek sanctions” meaning “within [the then statutory time limitation of] twenty-one days of *the last judgment rendered in the case.*” *Id.* at 436 (emphases added). Because of the reversal and remand directed by this Court in *DiFranco I*, the conclusion of this action before the trial court and the last judgment rendered in this case by the trial court occurred on June 12, 2014, when the Eighth District entered judgment awarding statutory damages.

Well-established principles of appellate jurisprudence clearly establish that the final judgment in the court below was entered on June 12, 2014. Thus, the motion for sanctions pursuant to R.C. § 2323.51 was timely filed on June 30, 2014.

C. Appellees attempt to conflate an appellate court’s review of factual matters versus legal determinations or conclusions so as to have this Court blindly ignore the errors below.

In attempting to have this Court universally apply an abuse of discretion standard on every aspect of this case – including legal conclusions based on undisputed facts – Appellees essentially call upon this Court to serve nothing more than an illusory role, essentially deferring blindly to whatever the court below may have done and to ignore this Court’s duty. For “it is the function of [an] appellate court to correct legal errors committed by the trial court.” *Newell v. White*, 2006-Ohio-637 ¶14 (4th Dist. 2006). For while the “ultimate decision whether to impose sanctions for frivolous conduct...remains wholly within the trial court’s discretion,” *Wheeler v. Best Emp. Fed. Credit Union*, 2009-Ohio-2139 ¶11 (8th Dist. 2009), “[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); accord *Castlebrook*,

Ltd. v. Dayton Properties Ltd. Partnership, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2d Dist. 1992)(“[a] trial court's purely legal determination will not be given the deference that is properly accorded to the trial court with regard to those determinations that are within its discretion”). For abuse of discretion “does not mean... that a reviewing court cannot correct a trial court’s misinterpretation of the law.” *Slowbe v. Slowbe*, 2004-Ohio-2411 ¶45 (8th Dist. 2004)

Because “[w]hether conduct is frivolous is a question of law that an appellate court independently reviews.” *Burchett v. Larkin*, 192 Ohio App.3d 418, 949 N.E.2d 516, 2011-Ohio-684 ¶22 (4th Dist. 2011), the assessment of whether the Appellees actions in repeatedly and undisputedly making false, material representations in various filings with the court below (over the course of several months) constituted “frivolous conduct” as defined by R.C. 2323.51 is clearly a legal question subject to *de novo* review.

D. Appellees, like the court of appeals, conveniently ignore that the legal standard is whether specific conduct constitutes “frivolous conduct” as defined in R.C. 2323.51, and not whether the general conduct of the entire action was warranted.

In denying the motion for sanctions, the Eighth District failed to focus upon the specific conduct constituting “frivolous conduct” as explicitly defined in R.C. § 2323.51(A)(2)(a), *i.e.*, the false representations to the court in the answer and motion to dismiss that all records responsive to Ms. DiFranco’s public records request had been provided, but, instead, simply considered the broader and generic issue as being whether Respondents’ “defending against the complaint for a writ of mandamus” was warranted. (Journal Entry, at 1.) Thus, while Relator specifically relied upon three explicit statutory definitions for what actually constitutes “frivolous conduct”, *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."

Appellees continue this effort to ignore the explicit statutory definitions of "frivolous conduct" and, instead, repeatedly attempt to make the present appeal about a broad and more generic issue of whether "[a]ny alleged mistake by South Euclid in not producing a particular document" rises "to the level of egregious misconduct." (Appellees' Brief, at 14; *see also* Appellees' Brief, at 13 ("[t]here is no such egregious misconduct here"); Appellees' Brief, at 17 ("[t]here simply is no egregious, overzealous, or unjustifiable misconduct"). But as statutory definitions set forth specific conduct that constitute "frivolous conduct" by which sanctions may be imposed, the statutory definitions provide the legal standard by which a court is to assess whether "frivolous conduct" occurred, not some nebulous and non-statutory concept of whether general opposition to a lawsuit was warranted or whether certain conduct unrelated to the putatively sanctionable conduct was egregious.

E. Appellees ignore the well-established legal principle that a court only speaks through its journal entry.

In response to the failure of the Eighth District in its Journal Entry denying the imposition of sanctions to even cite, reference or discuss two of the three statutory bases specifically identified by Relator to warrant the imposition of sanction, *i.e.*, R.C. § 2323.51(A)(2)(a)(iii) & (iv), Appellees would have this Court ignore the explicit language within that Journal Entry. Instead, Appellees contend that the rationale and analysis of the court below should encompass consideration of these two divisions defining "frivolous conduct" even though the Journal Entry did not address or consider these two statutory definitions.²

² In making such an argument, Appellees also take a partial sentence in the Journal Entry out of context when they contend "the Journal Entry specifically states the conduct of the

But the argument of the Appellees is in direct conflict with the well-established principle that “[a] court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum.” *State v. Osie*, 140 Ohio St.3d 131, 16 N.E.3d 588, 2014-Ohio-2966 ¶83 (2014)(quoting *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953)(syllabus ¶1)). Now, Appellees would allow an exception to this well-established principle by allowing guesswork and speculation to supplement the written word of a court of record. The Journal Entry is clear as to what the Eighth District considered and didn’t consider, as well as the basis for its ultimate disposition. Besides wrongfully ignoring the specific conduct constituting the frivolous or sanctionable conduct, the Eighth District did not even consider whether the criteria in within the statutory definitions contained in R.C. § 2323.51(A)(2)(a)(iii) & (iv) were satisfied.

F. At the motion stage with respect to whether to impose sanctions pursuant to Rule 11, Appellees incorrectly posit that such sanctions are warranted must be proven indisputably at the motion stage before any hearing.

In attempting to justify the failure of the Eighth District to even order a hearing on whether Attorney Lograsso’s conduct in presenting false and misleading representations and affidavits to the court warranted sanctions under Civ. R. 11, Appellees (but not Attorney Lograsso)³ argue that the entire merits of the intent and knowledge of opposing counsel in

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.” (Appellees’ Brief, at 15.) Firstly, the issue never was whether Appellees’ conduct “in defending against the complaint for a writ of mandamus” warranted sanctions; it was much narrower, *i.e.*, presenting false and misleading representations and affidavits to the court. Additionally, the context of the selective quote by Appellees was the concluding sentence (starting with “thus”) after the Eighth District addressed specifically the definitions in R.C. § 2323.51(A)(2)(a)(i) & (ii).

³ As noted above, pursuant to Ohio App. R. 18(C), as Attorney Lograsso failed to submit a brief, in considering this aspect of the Appellees’ brief as it relates to the imposition *vel non* of sanctions, this Court should, pursuant to Ohio R. App. P. 18(C), accept the facts in Appellant’s Brief and reverse the judgment below as the arguments therein “reasonably appear” to sustain doing so, both pursuant to R.C. 2323.51 and Ohio R. Civ. P. 11.

tendering any filing to a court must be indisputably established at the motion stage. But as developed in Appellant's Brief and unrefuted by Appellees, case law simply requires a party seeking the imposition of sanctions pursuant to Rule 11 to establish, at the motion stage, "an 'arguable basis'" for the imposition of sanctions. At that time, a hearing must be held at which the elements concerning the attorney's actual knowledge can be developed through testimony and cross-examination.

CONCLUSION

As developed in the Appellant's Merit Brief, as well as above, the judgment of the court below should be reversed and judgment entered in favor of the Relator-Appellant.

Respectfully submitted,

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