

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
JAMES E. PIETRANGELO, II

Relator-Appellant,

v.

CITY OF AVON LAKE, OHIO, *et al.*

Respondents-Appellees.

No. 2015-0495

On Appeal from the Ninth
District Court of Appeals
Lorain County Case No.
14CA010571

APPELLANT'S REPLY BRIEF

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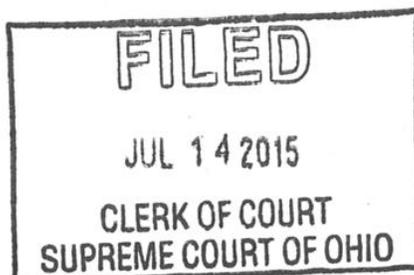
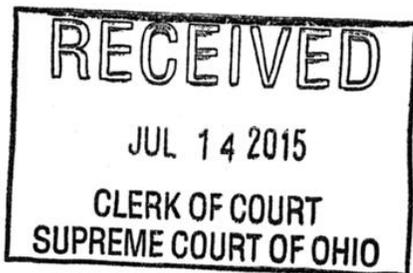


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REPLY BRIEF

Appellant James E. Pietrangelo, II (“Pietrangelo”) hereby replies to the Merit Brief (“MB”) of Appellees City of Avon Lake, Ohio, and its Law Director, Abraham Lieberman (collectively “Avon Lake”).

1. Avon Lake argues (MB at 1-2) that “Pietrangelo, who is himself an attorney, could not have failed to realize that the term ‘privileged’ [on Avon Lake’s memorandum accompanying the redacted documents released by Avon Lake to Pietrangelo] referred to the attorney-client privilege.” However, Avon Lake’s argument here has three fatal flaws. First, both R.C. 149.43(B)(3) and Avon Lake Ord. § 288.04(b)(5) required Avon Lake to provide a written “explanation, *including legal authority*, setting forth why the request was denied.” Neither the term “privileged” nor—even if one accepts Avon Lake’s argument here—the term “attorney-client privileged” is legal authority. Second, Avon Lake’s presumption does not inexorably follow from Pietrangelo’s status as an attorney. Being an attorney does not make one a mind-reader or prognosticator. For all Pietrangelo knew at the time, Avon Lake could have been asserting any one of a number of legal privileges for its redactions, especially since litigation often involves more than just the attorney-client privilege. Third and finally, a public office simply may not evade its statutory obligations by putting the burden on the requester to guess the specific basis and legal authority for redactions. Also, imposing such a burden on individuals according to their profession, education, and background—*e.g.*, attorney versus non-attorney, educated person versus un-educated person—would simply be discriminatory.

2. Avon Lake argues (MB at 2) that “[i]n his Statement of Facts [in his own merit brief], Pietrangelo for the first time complains of what he terms ‘opaque’ redaction, asserting that it is impossible to tell exactly what information was redacted in the invoices.” Avon Lake fur-

ther argues (MB at 2) that one *can* tell what information was redacted on the invoices because “[t]he descriptive headings of the information redacted (date, name, service and hours) were left intact.” However, simply neither of Avon Lake’s arguments here is true. Pietrangelo *did* previously raise his specific argument of “opaque” redaction in the case below—although he used the word “covert” instead of “opaque.” Moreover, the intact headings on the billing statements obviously did *not* reveal exactly what had been redacted. For example, the “REDACTED”s may have been in lieu of *other headings* below the intact headings. Also, one could not tell from the intact headings whether any dates, names, or hours were also included in any “service” entries, and *vice versa*.

3. Avon Lake argues (MB at 3) that Avon Lake “did not submit unredacted invoices to the Court of Appeals [upon Pietrangelo’s motion for summary judgment] for the reason that there was no genuine dispute as to the fact that Appellees had provided Pietrangelo with all portions of the invoices required to be disclosed by *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*[.]” However, Avon Lake’s argument here is completely frivolous. The very issue at hand then was whether the redacted portions of the billing statements contained anything other than information which was non-exempt under *Dawson/Anderson*. Pietrangelo had demonstrated in his motion for summary judgment that Avon Lake had redacted or withheld information on the billing statements; that public records are presumed to be non-exempt and the public office bears the burden of *proving* them exempt; and that, under *Dawson/Anderson*, dates, hours, and rates on billing statements are non-exempt information. Avon Lake was thus required, in opposition to Pietrangelo’s motion, to submit the un-redacted billing statements to the Court *in camera* to demonstrate the (purportedly) exempt nature of the redacted information.

4. To justify its redaction of dates and/or hours on the billing statements, Avon Lake quotes (MB at 4) *Dawson* for the proposition that “billing records describing the services performed for clients and the time spent on those services . . . may reveal . . . strategies to be employed” However, Avon Lake ignores the crucial conjunctive there: “describing the services performed for clients *and* the time spent on those services.” Dates/hours are only potentially revealing *when* they accompany narratives. See *Anderson*, 134 Ohio St.3d at 124 (“Under the Public Records Act, insofar as these itemized attorney-billing statements contain *nonexempt information, e.g., . . . the dates the services were performed, and the hours, rate, and money charged for the services*, they should have been disclosed[.]”) (emphasis added). In the instant case, Pietrangelo did not seek—and Avon Lake withheld—narratives on the billing statements. Thus, under *Anderson*, any dates/hours by themselves (*i.e.*, excised from any narratives) had to be disclosed by Avon Lake to Pietrangelo.

5. Avon Lake argues (MB at 5) that “[i]n *Dawson*, the school district provided Dawson with summaries of the invoices for legal services noting the attorney’s name, the invoice total, and the matter involved.” However, Avon Lake’s argument here frivolously ignores that, in *Dawson*, the school district also provided dates, hours, and rates to the requester via alternate records. See *Anderson*, 134 Ohio St.3d at 126 (“This is the crucial fact that distinguishes this case from *Dawson*. Vermilion did not provide Anderson with alternate records that contain the nonexempt information from the requested attorney-billing statements[.]”).

6. Avon Lake states (MB at 5) that Pietrangelo contends that *Dawson* is “no longer good law.” However, Avon Lake’s statement is simply wrong; Pietrangelo contends no such thing. Pietrangelo contends that *Anderson* clarified *Dawson* as being consistent with *Anderson* in holding that dates, hours, and rates are non-exempt information on attorney billing statements

and must be disclosed. See Supreme Court Case No. 2015-0495, Appellant's Br. at 11-12, 26 (“[R]ather, *Anderson* explicitly clarifies *Dawson* as requiring exactly what *Anderson* required.”); Ninth Dist. Case No. 14CA010571, 11/13/14 Pet’nr.’s Merits Br. at 7 fn 4 (“Avon Lake’s principal case, *Dawson*, simply is not to the contrary, either because *Anderson* clarified *Dawson* as holding such, or because, in *Dawson*, the entity actually provided the dates, hours, and (fee) rates to the requester in alternate records—something that Avon Lake in this case did not do.”).

7. Avon Lake argues (MB at 6) that Pietrangelo’s status as a party to the ongoing skatepark litigation made dates, hours, and rates on the billing statements *more* potentially attorney-client privileged than if Pietrangelo had been merely a random member of the public requesting the documents, and thus allowed Avon Lake to withhold the dates, hours, and rates “on the side of caution.” However, Avon Lake’s argument here too is obviously specious, if not frivolous. The attorney-client privilege does not have different degrees depending upon a person’s relation to litigation. The privilege arises as to the whole world at once and to the same degree for the whole world. Moreover, under existing precedent, *Anderson*, dates, hours, and rates are clearly *not* attorney-client privileged. There was no need for caution.

8. Avon Lake argues (MB at 6) that dates, hours, and rates on the billing statements are “inextricably intertwined” with their narratives. However, Avon Lake’s argument is simply wrong, as obviously dates, hours, and rates are not inextricably intertwined with narratives. Like with the billing statements in *Anderson*, dates, hours, and rates are separate from or can be excised from narratives.

9. Avon Lake argues (MB at 6) that the Court of Appeals’ order “provided Pietrangelo with all the information he claims he needed to make his argument that the fees charged by Koesel and Turnbull exceeded that charged by Lieberman” and “additional disclosure

would serve no legitimate purpose.” However, Avon Lake’s argument here is again frivolous. *Anderson* itself holds that the value of any non-exempt information is up to the requester—not the public office. See *Anderson*, 134 Ohio St.3d at 125 (“The city next claims that it need not provide copies of the nonexempt portions of the requested attorney-billing statements because after redacting the narrative portions that are covered by the attorney-client privilege, the remainder would be ‘meaningless.’ But there is no indication that the city’s subjective belief concerning the value of this information is true. The provision of information concerning the hours expended and rate charged for attorney services may have some value to the requester. Nor is there any exception to the explicit duty in R.C. 149.43(B)(1) for public offices to make available all information that is not exempt after redacting the information that is exempt.”). Indeed, Avon Lake again takes a legal position that was explicitly raised and rejected in *Anderson*.

10. Avon Lake argues (MB at 9) that the fact that “Pietrangelo, Appellees and the Court of Appeals all have differing views as to what portions of the billing statements were non-exempt” demonstrates that a “well-informed public office could reasonably have believed that the nonexempt portion of the billing statements could be withheld from disclosure.” However, Avon Lake’s argument here is simply a red herring. Under *Anderson*, dates, hours, and rates are clearly non-exempt. Therefore, the Court of Appeals should have awarded Pietrangelo statutory damages. The Court of Appeals’ error does not a well-informed belief make.

11. Avon Lake argues (MB at 9-10) that statutory damages are not warranted in this case because Avon Lake was entitled to use caution when dealing with information purportedly touching the attorney-client privilege, because one mistake could have led to complete waiver. However, Avon Lake’s argument here is more mis-direction. Caution was simply not warranted in this case, because there was clear precedent saying that dates, hours, and rates are *not* attor-

ney-client privileged. To allow a public office to “err on the side of caution” when caution is clearly not warranted would eviscerate R.C. 149.43, as every public office would choose to so withhold records.

12. Avon Lake argues (MB at 12) that “Pietrangelo also claimed that Appellees’ references to the attorney-work product doctrine . . . should have been stricken because billing statements do not involve the mental processes sought to be protected by that doctrine.” Avon Lake also argues (MB at 12) that the billing statements at issue *did* involve attorney work-product because they were “first directed to the Law Director and thus involved a communication between legal counsel[.]” However, Avon Lake’s argument is wrong on both counts. Pietrangelo never claimed that attorney *billing statements* cannot involve mental processes. Instead, Pietrangelo argued that “dates, hours, and (fee) rates [on attorney billing statements] are obviously *not* mental processes *nor* reflective of mental processes” without the narratives. Ninth Dist. Case No. 14CA010571, 5/12/14 Pet’nr.’s Am. Mot. to Strike at 22. Moreover, dates, hours, and rates are simply not attorney work-product protected—otherwise the Court would not have held them non-exempt in *Anderson*. The fact that Porter Wright first sent the billing statements at issue to Law Director Lieberman did not convert otherwise non-exempt information devoid of mental processes—dates, hours, and rates by themselves—to exempt information.

13. Avon Lake argues (MB at 13) that “Pietrangelo cited *Gilbert v. Summit County* . . . for the proposition that circumvention of a court’s discovery order is not a justification for refusing to produce records.” Avon Lake also argues (MB at 13) that “*Gilbert* did not involve records touching on the attorney-client relationship nor records that might otherwise be exempt from disclosure.” However, Avon Lake’s arguments are simply incorrect and more misdirection. First, to be clear, Pietrangelo, by his records request for the billing statements, did not

“circumvent,” nor did he admit he had circumvented, a discovery order in the skatepark case or any other case. He engaged an alternate but lawful process to obtain records from Avon Lake. Second, the dates, hours, and rates at issue in the instant case were clearly *not* attorney-client privileged or otherwise exempt to begin with, as already discussed above. Thus, Pietrangelo *did* stand in virtually the same if not the same relation to Avon Lake as did the plaintiff in *Gilbert* to the public office in that case.

14. Avon Lake states (MB at 13) that “[i]n Affirmative Defense Paragraph 5 [wherein Appellees scandalously accused Plaintiff of harassing litigation in the skatepark litigation], Appellees [merely] attempted to set forth the situation with which they were faced when the request for copies of the legal invoices was submitted by Pietrangelo.” However, Avon Lake’s justification here is itself frivolous. Whatever situation in the skatepark case Avon Lake had allegedly faced at the time of Pietrangelo’s records request was simply *irrelevant* to the merits issue in the mandamus case of whether Avon Lake had lawfully complied with Pietrangelo’s request.

Avon Lake also states (MB at 13) that “[t]he voluminous court filings listed in Affirmative Defense Paragraph 5 on their face clearly provided Appellees with justification for making the claims in that paragraph, as did a total of over \$75,000 paid by the City up to that time to outside counsel to respond to each of the numerous filings.” Avon Lake further states there that “[a] review of the trial court’s docket in the Injunction Case indicates that the filings have greatly expanded (as have the legal fees incurred by the City).” However, Avon Lake’s statements here are further scandalous, not to mention frivolous, assertions which this Court should severely punish. Whether Pietrangelo engaged in vexatious litigation or not in the skatepark case has/had no organic relevance to whether Avon Lake lawfully withheld the dates, hours, and rates at issue in

the instant case.¹ Moreover, Pietrangelo clearly did *not* engage in vexatious conduct in the skatepark case. Again, Avon Lake itself has never even moved in the skatepark case for sanctions against Pietrangelo for alleged vexatious conduct, nor has the trial court in that case ever unilaterally imposed such sanctions on Pietrangelo. And “expansive” and costly litigation by itself was/is simply not evidence of vexatious litigation.

Avon Lake also states (MB at 13-14) that “Pietrangelo also complained of Appellees’ reference to matters in the Injunction Case, claiming that the Injunction Case was not related to the instant case.” Avon Lake further states (MB at 14): “However, such a claim is disingenuous, since all the invoices requested by Pietrangelo related solely to the Injunction Case” However, Avon Lake is simply wrong, as clearly the mandamus case was not related to the skatepark case *on the merits*.

15. Avon Lake also argues (MB at 15) that a “motion for sanctions under R.C. 2323.51 requires a three-step analysis” However, Avon Lake’s argument here simply is in-

¹Avon Lake states (MB at 13 fn 4): “It is ironic that Pietrangelo, who complains of criticism of his conduct in the Injunction Case, felt completely free to impugn the character and integrity in general of Appellees (‘Respondents do not generally act in good faith in legal circumstances.’ Amended Motion to Strike Memo at 28).” However, what Avon Lake ignores is that Pietrangelo there was responding directly to Avon Lake’s scandalous affirmative-defense, and was legitimately demonstrating that that scandalous affirmative-defense was a *willful* violation of Rule 11 based on a pattern of misconduct by Avon Lake. See Ninth Dist. Case No. 14CA010571, 5/12/14 Am. Mot. to Strike at 30:

Whether, as a factual matter, Respondents did not provide Relator with a specific privilege or any legal authority for that privilege, and is now dissembling about not having provided Relator with that information, is important because it goes directly to whether Respondents complied with their legal duties in originally responding to Relator’s request, and whether Respondents willfully asserted their frivolous defenses in later responding to Relator’s suit. As to the latter, it confirms that Respondents do not generally act in good faith in legal circumstances.

correct. In the Ninth District, where the case below was litigated, “analysis of a claim under this statute boils down to a determination of (1) whether an action taken by the party to be sanctioned constitutes ‘frivolous conduct,’ and (2) what amount, if any, . . . necessitated by the frivolous conduct is to be awarded to the aggrieved party.” *Ceol v. Zion Indus., Inc.*, 81 Ohio App.3d 286, 291, 610 N.E.2d 1076 (9th Dist. Lorain 1992). Thus, contrary to Avon Lake’s assertion (MB at 15), Pietrangelo need not have shown “substantial evidence of frivolous conduct,” only “frivolous conduct” by Avon Lake—which Pietrangelo showed—and Pietrangelo need not have shown harm to himself beyond having to move to strike and for sanctions in the first place—which Pietrangelo also showed.

16. Avon Lake argues (MB at 15, 16) that “attorney fees are the only permissible sanction under R.C. 2323.51.” However, Avon Lake’s argument simply is frivolous. As Avon Lake’s own cited case *Weaver* acknowledges, “R.C. 2323.51 provides that a court may award *court costs*, reasonable attorney fees, and *other reasonable expenses*. . . .” *Weaver v. Pillar*, 2013 Ohio 1052, ¶ 18 (emphasis added). Thus, Pietrangelo obviously may be awarded court costs and reasonable expenses, just as he requested from the Ninth District. Avon Lake also argues (MB at 16) that Pietrangelo may not be awarded attorney’s fees. However, Pietrangelo didn’t ask for attorney’s fees in his motion below.

Avon Lake also argues (MB at 17) that “Pietrangelo failed to satisfy his burden to show that he was adversely affected by the challenged responses to his Petition,” and that “Pietrangelo did not quantify direct, identifiable expenses he incurred due to the challenged statements in the City’s Answer[.]” However, again, Avon Lake’s argument simply is not true. Pietrangelo *did* quantify his expenses to the Ninth District, *i.e.*, he asked, in his motion for sanctions, for his expenses, and court costs, attributable to his having to file his motion. It would have been prema-

ture for Pietrangelo to have submitted a final amount, because he was still having to litigate the issue.

Avon Lake also argues (MB at 15) that “Civ.R. 11 does not permit sanctions to be imposed upon the Assistant Law Director, since he did not sign the Answer.” However, Avon Lake’s argument is simply incorrect. Graves’ typed name appears with Law Director Lieberman’s typed name in the signature-block at the end of Avon Lake’s answer—which block is signed by someone. Thus, clearly, Graves signed the answer—either personally, or by his agent Lieberman. Cf. *Dehlendorf v. Ritchey*, 2012 Ohio 5193, ¶ 8 (10th Dist.) (for purposes of Rule 11, an attorney can be bound by an agent’s signature on a paper).

17. Lastly, Avon Lake argues (MB at 17) that “Pietrangelo’s claim that Appellees’ Answer may be punished by contempt is totally without support in the cases he cites.” However, Avon Lake’s argument again is simply wrong. *Lable & Co.* clearly refers to the “court’s inherent power” as authority to sanction. *Lable & Co. v. Flowers*, 104 Ohio App.3d 227, 232 (9th Dist. Lorain 1995). Such “inherent power” obviously includes the contempt power. See *Denovchek v. Bd. of Trumbull Cty. Commrs.*, 36 Ohio St.3d 14, 15 (1988) (“The power of contempt is inherent in a court, such power being necessary to the exercise of judicial functions.”). Moreover, under Ohio caselaw, versus the federal case Avon Lake cites, the contempt power clearly may be used to sanction frivolous conduct like scandalously or falsely accusing opposing counsel of misconduct. See *Lable & Co.*, 104 Ohio App.3d at 232 (“This court has held that there are at least three possible rationales for awarding attorney fees *for frivolous conduct*: (1) a court’s ‘inherent power to do all things necessary to the administration of justice and to protect [its] own powers and processes,’”) (emphasis added); *In re McGinty*, 30 Ohio App.3d 219,

225 (8th Dist. 1986) (contempt finding against county prosecutor upheld for, among other things, falsely accusing opposing counsel of misconduct).

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 13, 2015, a copy of the foregoing Reply Brief was served by Appellant upon Appellee by first-class U.S. Mail to (the office of) Abraham Lieberman, City of Avon Lake Law Director, 150 Avon Belden Road, Avon Lake, OH 44012, attorney for Appellees.

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