

IN THE SUPREME COURT OF OHIO

CITY OF CONNEAUT, OHIO

Plaintiff-Appellant

**Appeal from the Ashtabula County
Court of Appeals,
Eleventh Appellate District**

vs

DARLENE F. BUCK, et al.,

CASE NO. 2014-A-0053

Defendant-Appellees

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JOHN AND JUDI PEASPANEN**

**John Peaspanen
378 Walnut Street
Conneaut, OH 44030
(440)265-6312
APPELLANT, PRO SE**

**Judi Peaspanen
378 Walnut Street
Conneaut, OH 44030
(440)265-6312
APPELLANT PRO SE**

**Carly I. Prather
294 Main Street, Conneaut, OH 44030
(440)593-7413
COUNSEL FOR APPELLEE, CITY OF CONNEAUT, OHIO**

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT INTEREST 1

STATEMENT OF FACTS AND CASE5

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW10

Proposition of Law No. 1

An award of attorney fees for frivolous conduct by the trial court pursuant to R.C. 2323.51 must be sustained on appeal, unless the trial court committed an abuse of discretion, constituting an unreasonable arbitrary, or unconscionable, determination of either law or fact, that there is an absence of competent, credible evidence to support. The appellate court may not bifurcate the law from the factual findings, and review them de novo, particularly where they alter the finding of fact to do so 10

Proposition of Law No. 2

A defendant is adversely affected by frivolous conduct under R.C. 2323.51, where the bringing of suit constituted frivolous conduct even where the defendant prevails on a counterclaim, which was a mandatory counterclaim, under the Ohio Rules of Civil Procedure, particularly where the grounds are, that the plaintiffs claims were entirely without merit, and the judgment on the counterclaim rejects those claims..... 12

CONCLUSION13

PROOF OF SERVICE..... 14

APPENDIX 16

Opinion of the Eleventh District Court of Appeals (June 30, 2015)

Judgment Entry of the Eleventh District Court of Appeals (June 30, 2015)

Judgment Entry of the Ashtabula Common Pleas Court
(March 22, 2010)

**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS**

As properly found by the trial court below, Appellants John and Judi Peaspanen have been frivolously subjected to litigation initiated by Plaintiff City of Conneaut despite actual knowledge and findings prior to suit by that Law Director that the City had **no claim** to Appellants' property. The trial court was in the superior position to determine whether Plaintiff City's actions before it, constituted frivolous conduct. The court was in best position to observe whether the motivations of the City involved other matters, including the possible improper assertion or efforts to obtain access to Lake Erie for other neighbors, providing a public lake access for future development for inland property, or other elements of inappropriate motivation, particularly where it was apparent by nature of the City's prosecution of the claim and its response to Appellants' motion for summary judgment that the City had no standing to assert the rights of adjoining private landowners as it sought to, which finding was affirmed by the Court of Appeals, as to standing.

In reversing the trial court as to its finding of frivolous conduct, the Court of Appeals failed to follow binding standards of review set by this Court regarding awards of attorney fees for frivolous conduct and particularly under R.C. 2323.51. The Court of Appeals ruling appears to also be in conflict with other appellate districts and less than entirely consistent with rulings of other cases and panels within its own District. It particularly treated the "abuse of discretion" standard of review required by this Court as permitting a *de novo* review of whether conduct was frivolous as a matter of law, whereas this Court and other appellate districts have

required that both law and fact conclusions of the trial court were owed deference unless found “unreasonable, arbitrary, or unconscionable”.

Indeed, the finding of frivolous conduct is inherently a mixed issue of law and fact, and the trial court that observed all of the conduct and heard all of the evidence is in the best position to determine that issue. For this reason, appellate courts are prohibited from overturning factual determinations under an extremely rigorous standard that there must be **no “competent, credible evidence”** to support its findings. Here, in the guise of finding the City’s conduct not frivolous as a matter of law, the Court of Appeals engaged in an **improper reweighing** and redetermination of fact that was actually contradicted by the uncontroverted evidence to overturn factual conclusions of the trial court that were plainly supportable by evidence.

Case law is replete with instances where Ohio’s governmental entities have sought and been awarded attorney fees against both opposing parties and counsel for bringing litigation that the charged party had **no factual basis or lawful claim** based upon reasonable investigation to assert. It is of public and great general interest that the citizens of Ohio should receive **at least equal treatment** as litigants before the courts of their state as public entities and that public entities should have at the very least the same obligation towards its citizens in subjecting them to litigation, if not greater as they hold private litigants to. To do otherwise would raise questions of due process and equal protection of the laws under both the Fifth and Fourteenth Amendments to the United States Constitution and the Bill of Rights of the Ohio Constitution.

Here the trial court found the Law Director made **no** meaningful effort to research or investigate the issue before bringing suit and had actually asserted the position for some period

investigate the issue before bringing suit and had actually asserted the position for some period of time that the City had no basis to assert its claim. Having actually observed and heard the direct testimony of that Law Director and many others on the issue of frivolous conduct, the trial court, not the appellate court, was properly positioned to determine that Plaintiff City of Conneaut had not acted in good faith in bringing its suit.

As properly noted by Judge Grendell in dissent in the ruling of the Court of Appeals below, the Court of Appeals further improperly penalized Appellants for having received relief in summary judgment on a counterclaim that they were compelled to file under the Ohio Rules of Civil Procedure. Such an application of the determination of “adversely affected” would completely vitiate the intent of the General Assembly in enacting R.C. 2323.51 and establish a future precedent that a party involuntarily compelled to participate in extended litigation with the Plaintiff and several adverse defendants, neighbors named by another party should receive no award for frivolous conduct, if it prevails, because the Plaintiff forced it to litigate. Such a determination would subject hundreds of thousands of Ohio citizens and businesses to unabated abuse of process.

The Court of Appeals further found no particular problem with Plaintiff-Appellees’ conduct despite agreeing that it had **no standing** as a jurisdictional matter to assert the claims it did on behalf of third parties in the first instance.

Appellants have been brought to the point of financial distress, been unable to retain counsel to prosecute this appeal and proceed “pro se” to represent themselves by the actions of the City of Conneaut improperly attempting to deny them the exclusive use of their private property and access to Lake Erie for the benefit of other neighbors and properties now and in

the future where the City had reason to know it had no public claim, but chose to take sides in a private property dispute. Sanctioning such overbearing conduct presents a central and indispensable issue for the preservation of a free and democratic society. Appellants ask this Court to reinstate the appropriate remedy for the City's conduct as accurately and carefully determined by the trial court, and to reverse the Court of Appeals' ruling as incompatible with this Court's determinations and the application of the law by other appellate courts.

STATEMENT OF THE FACTS

New neighbors, Tina and Milton Mueller, moved into a home next door to Appellants, John and Judi Peaspanen. The Muellers' property abutted the Appellants' driveway. When the Muellers purchased the property in the end of November 2007, they viewed an old 1896 Conneaut **Township** Plat Map that labeled the driveway, "street". Soon after, the Muellers and their attorney Brett Joseph started consulting with Law Director, Lori Lamer to try to find evidence that the driveway was a city street. They could not find any evidence and the Law Director sent a memo to the then City Manager stating that she has no evidence and therefore this is a civil matter between two neighbors and she doesn't want any part of it. The Muellers began parking in the driveway and trespassing, not only on the driveway, but all over the Peaspanens' private property to the beach. The police were called and observed the Muellers trespassing and tearing up no trespassing signs; the police would not enforce RC 2911.21 Criminal Trespassing, and said they were told not to arrest anybody by the City. The Appellants wrote a letter to the City Manager, and the Law Director asking them to enforce the RC 2911.21 and the Conneaut Codified Ordinances. The Muellers, Mr. Joseph, and the Law Director continued to meet. The Peaspanens were surprised that they wrote an emergency ordinance naming their driveway as a street-Willow Beach Lane. In late 2008 Appellants' councilman was asked to present it before council. He refused to present the ordinance when asked, and sent Appellants a copy. If it was already a street, why would there need to be an ordinance to try to make it one? Finally on August 29, 2008, the Peaspanens received a declaratory judgment lawsuit brought by Law Director Lamer on behalf of the City of Conneaut against them and neighbors, Muellers, Buck, and DelPrince, as Defendants. The Appellants were required to file an answer counterclaim and crossclaim against the positions of neighboring Defendants on

October 29, 2008. The suit alleged the City needed to find out who owned the driveway/city street to stop future disagreements between neighbors and be able to direct the police. At no time before or during the proceedings did the City have any public records or other evidence that supported its claim of a public right-a-way. Throughout this litigation, the City attempted to aid private citizens, the other defendants, the public, as well as people who owned property in the Willow Beach Plat against the Appellants to convert the private driveway into a street. The City was aiding the defendants against them and the defendants were aiding the City, therefore the other defendants were effectively Plaintiffs with the City, instead of defendants. The City worked with the Muellers, private citizens, Willow Beach Park subdivision property owners, and the public to appropriate Appellants' lakefront property. The Law Director still had **no credible evidence** it was ever a street let alone a city street. The Law Director continued to use municipal laws instead of township laws. The Law Director sent the Appellants' attorney on a "wild goose chase" requiring him to do **extensive unnecessary research**. The Law Director introduced into evidence a Limited Lien search which proved to be based on mostly false information. The Law Director did this to try to provide a way for the other defendants, the owners of the plat parcels, and the public to gain access to the appellants' lakefront property and beach. This limited lien search added roads and streets that were never there or were never in the chain of titles. The Law Director then amended her case to include only the driveway. She admitted the lien search was a mistake and said there were no roads or streets over the hill to the beach. Throughout the litigation, the Law Director attempted to aid private citizens. On July 10, 2009, the Appellants filed for summary judgment. On December 14, 2009, Plaintiff City responded it was not taking a position whether the property (driveway) is a **public or private roadway**. On March 22, 2010 the trial court ruled in favor of the Peaspanens to the ownership of the driveway. In the

Judgement Entry, the trial court wrote, “The Plaintiff City, were enjoined from interfering with Appellants’ property rights. Defendants Mueller and their predecessors were declared to have no rights in the “street” as shown on the plat map. “There is no public access from or across the lands of Willow Beach Park to Lake Erie,...the public is hereby enjoined from...interfering with the rights of ...John and Judi Peaspanen...in the area designated as a street or roadway on the plat map in volume 4, page 29, of the Ashtabula County Records of Plats which is the subject of this lawsuit.” After the motion for summary judgment was filed, the Plaintiff City took no position and all three affidavits attached to the Plaintiff’s response were stricken. (T. p. 9/2/10, pp 36, 38) Appellants then filed a motion for attorney fees. Three hearings were held for half and full days sessions **evaluating extensive evidence on frivolous conduct and attorney fees separately from the summary judgment.**

Finally on July 22, 2014, in a judgment entry the defendants Peaspanens, were awarded **\$57,062.35 on the basis that the City was frivolous.**¹ (This was \$9,767.00 short of their actual itemized attorney fees. This \$9,767.00 was the additional amount the Peaspanens were owed to obtain this attorney fees judicial decision.) Next on August 19, 2014, the City appealed the trial court’s decision of **awarding of attorney fees for frivolous conduct** to the Ohio 11th District Court of Appeals. The 11th District Court of Appeals ruled on 4 errors claimed by the City of Conneaut. By a 2-1 decision by the 3 judges, the 4 errors were ruled in this manner. “The first assignment of error lacks merit.” The City’s second and fourth assignments are rendered moot.” The City’s third assignment of error they claimed has some merit and vacated Peaspanens’ attorney fees. Therefore the Peaspanens are doing this appeal Pro Se as they have second mortgaged their home, borrowed on their 2009 cars, and maxed out their credit cards, as well as,

¹ Subsequent to this award, through the appeal, Appellants fees grew to \$86,769.00+ and resulted in Appellants being unable to retain counsel for this appeal, which is why they appear Pro Se on seeking this Courts relief.

being put in financial distress. The Peaspanens cannot at this point afford an attorney and yet they can't let this injustice stand for them and other citizens of the State of Ohio. Therefore the Peaspanens are appealing the 11th District Court of Appeals ruling to the Ohio Supreme Court.

STATEMENT OF THE CASE

After the initial pleadings were complete and Plaintiff-Appellee City provided its discovery responses, Defendants-Appellant Peaspanens filed their motion for summary judgment on October 2, 2009. (T.d. 64) Appellee City's response to the motion for summary judgment was filed on December 14, 2009 (T.d.76) and Appellants Peaspanens' response was filed December 21, 2009, (T.d. 82) The trial court granted Peaspanens' motion for summary judgment on their answer and counterclaim against the City on March 22, 2010. (T.d. 86) This constituted the first final appealable order issued by the trial court, which was not appealed by any party herein. As such, it is *res judicata* and legally determined as conclusive between parties in the same action. Black's Law Dictionary, Fifth Ed., 1979, pg. 1174.

Upon Appellants Peaspanens' motion for attorney fees filed April 21, 2010 (T.d. 88), memorandum in oppositions were filed by Muellers(T.d. 98) and Appellee City on June 8, 2010. (T.d.107). Thereafter, the trial court awarded judgment in the amount of \$57,062.35 to Appellants Peaspanens and against Appellee City (T.d. 140), which is the judgment appealed herein(T.d. 145). And lastly, Appellants Peaspanens' filed their notice of cross appeal on August 27, 2014.

Appellee City was granted a stay of execution of the subject judgment pending the resolution of this appeal and cross-appeal. (T.d.149)

The Court of Appeals, Eleventh Appellate District, in a divided panel, reversed the finding of frivolous conduct and award of attorney fees and reversed and remanded the case as to

that award, affirming the remainder of the Court of Common Pleas decision. Judge Grendell dissented and would have affirmed the trial court. From that decision, Peaspanens appeal.

ARGUMENT

Proposition of Law No. 1

An award of attorney fees for frivolous conduct by the trial court pursuant to R.C. 2323.51 must be sustained on appeal unless the trial court committed an abuse of discretion, constituting an unreasonable, arbitrary or unconscionable determination of either law or fact that there is a absence of competent, credible evidence to support, and the appellate court may not bifurcate the law from the factual findings and review them de novo, particularly where they alter the findings of fact to do so.

The trial court, which had robust opportunity to observe the positions and conduct of the parties, found that the City of Conneaut had done no meaningful investigation prior to bringing suit, had opined in writing before bringing suit that there was no basis for a claim of a public right of way across Appellants' land to the shores of Lake Erie, and had when the issue was fully joined asserted the rights of third party property owners and not itself on which it had no standing. This Court and other courts have consistently and fully recognized that the court before which frivolous conduct occurs is in a superior position to a reviewing court to determine whether the offending party had at the time of assertion a justifiable legal claim and justiciable facts. Thus, the standard of review for determinations awarding or denying awards under R.C. 2323.51 has unambiguously required finding "abuse of discretion", consisting of "unreasonable, arbitrary, or unconscionable" findings by the trial court. *State ex rel. Bell v. Madison County Bd. of Comm'rs.*, 2014-Ohio-1564 ¶10; *State ex rel. Cudrus v. Ohio Pub. Emps. Retirement Sys.*, 2010-Ohio-5770 ¶28.

However, the Court of Appeals below found that it could bifurcate the "mixed issues of law and fact" and examine whether Plaintiff City of Conneaut had a colorable legal claim on a "de novo" basis, in the process re-weighting facts and finding facts that are contravened by the record to determine that the City did not have to investigate prior to suit and had an arguable

case that just turned out to have no evidentiary support later. Aside from deviating from the standard of adherence to the factual findings of the trial court unless there is **no** competent credible evidence to support it, the Court of Appeals did not give the deference required by this Court to the trial court's determination. *State ex rel Striker v Cline*, 2011-Ohio-5350 ¶11. This Court has required reviewing courts to find more than an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983); *State v. Adams*, 62 Ohio St.2d 151, 157(1980) *State v. Adams* cited with approval *Steiner v. Custer*. Ohio St. 448 (1940), where the court said:

"The meaning of the term 'abuse of discretion' in relation to the present controversy connotes something more than an error of law or of judgment. Black's Law Dictionary, 2d Ed., 11. Such term has been defined as 'a view or action 'that no conscientious judge, acting intelligently, could honestly have taken.'" *Long v. George*, [296 Mass. 574](#), 579, [7 N.E.2d 149](#), 151." *Id.* at 451

Where a comparable issue arose, a unanimous Supreme Court of Ohio observed:

"Additionally, we observe that the risk of a motion for sanctions under the statute is one that an attorney should anticipate when filing a complaint. We have no desire to cause a chilling effect on the duty of counsel to vigorously represent their clients. Counsel, however, must balance that duty with their concomitant obligation to the bar, the court, and their client to perform responsibly "within the bounds of the law." See Canon 7; EC 7-1. **When a trial court has determined that reasonable inquiry by a party's counsel of record should reveal the inadequacy of a claim, a finding that the counsel of record has engaged in frivolous conduct is justified, as is an award, made within the statutory guidelines, to any party adversely affected by the frivolous conduct."** *Ron Scheiderer & Assoc. v. London*, 1998 –Ohio453, 81 Ohio St.3d 94, 97-98 (1998) emphasis supplied)

The Court of Appeals below rather created facts that had no support in the record to suggest that the City's Law Director had a colorable claim despite having previously said the City had none. The court asserts that the "official" plat map shows the street was dedicated to the City, whereas no such evidence of acceptance or "dedication" exists, and the actual plat was filed when the lands were in a township. *City of Conneaut v. Buck*, 2015-Ohio-, ¶¶ 34, 37 As Judge Grendell correctly observed in dissent, the County Commissioners would have had to

resolve to accept dedication of that street for a public way to be created, yet there is no public record of any dedication either when the lands were in the township or by Conneaut once incorporated. *Id.*, ¶56

Proposition of Law No. 2

A defendant is adversely affected by frivolous conduct under R.C. 2323.51 where the bringing of suit constituted frivolous conduct, even where the defendant prevails on a counterclaim which was a mandatory counterclaim under the Ohio Rules of Civil Procedure, particularly where the grounds are that the plaintiff's claims were entirely without merit and the judgment on the counterclaim rejects those claims.

The Court of Appeals also rejected an award of fees to Appellants because if found they were not “adversely affected” because they had received a judgment in their favor on their counterclaim. Such a rule would penalize any party required to file a mandatory counterclaim pursuant to Civil Rule 13(A) if they are the prevailing party, and is plainly contrary to the language and intent of R.C. 2323.51, much as it would be contrary to sanctions under Civil Rule 11. Further, the finding of adversity must be reviewed under the “abuse of discretion” standard mandated by this Court, which the Court of Appeals plainly and textually failed to do. *City of Conneaut v. Buck*, 2015-Ohio-2593, ¶41. Finding counterclaims or cross-claims on other claiming defendants in the same dispute and subject matter to be merely “voluntarily-filed” turns Civil Rule 13 on its head and would completely vitiate the application of R.C.2323.51. Civil Rule 13(A) left Appellants no choice but to assert their claim or lose it, and while the cross claims against co-defendant neighboring properties was technically “voluntary”, the stated purpose of the City, working in concert with some of those parties, was to compel Appellants to defend against the false claims of neighbors, which was the origin of the dispute and the prime motivating factor in the City’s false claim.

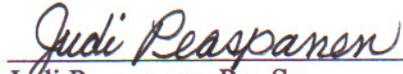
CONCLUSION

For the reasons stated above, Appellants pray this honorable Court to reverse the decision and judgment of the Ohio Court of Appeals, Eleventh District, and reinstate the judgment of the Ashtabula County Court of Common Pleas awarding fees to Appellants.

Respectfully submitted



John Peaspanen, Pro Se



Judi Peaspanen, Pro Se

Memorandum in Support of Jurisdiction of John Peaspanen and Judi Peaspanen

Appellants John Peaspanen and Judi Peaspanen hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Ashtabula Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2014-A-0053 on June 30, 2015.

This case raises questions of public and great general interest that may involve substantial constitutional elements.

Respectfully submitted



John Peaspanen, Pro Se



Judi Peaspanen, Pro Se

Certificate of Service

Appellants certify that they served copies of this certificate of service upon counsel of record and to the parties or their respective counsel of record by depositing postage prepaid in United States

Mail on this 12 day of August, 2015, addressed as follows:

Carly I. Prather, Law Director
Attorney for the Plaintiff
City of Conneaut
294 Main Street,
Conneaut, OH 44030

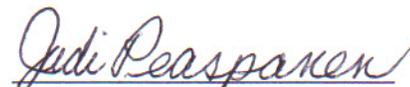
Raymond E. Buck
Darlene F. Buck
Defendants-Appellees
381 N. Avon Ave.
Wadsworth, OH 44281

Anthony DelPrince
Defendant-Appellee
1042 Lake Rd.
Conneaut, OH 44030

Brett Joseph
Attorney for Defendants-Appellees-Mueller
337 Keefus Rd.
Conneaut, OH 44030



John Peaspanen, Pro Se



Judi Peaspanen, Pro Se