[Cite as *Early v. Toledo Blade Co.*, 2013-Ohio-404.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Michael Dennis Early, et al.	Court of Appeals No. L-11-1002
Appellant/Cross-Appellee	Trial Court No. CI0199003434
v.	
The Toledo Blade Company	**DECISION AND JUDGMENT**
Appellee/Cross-Appellant	Decided: February 8, 2013

* * * * *

George C. Rogers, for appellant/cross-appellee.

Paul R. Bonfiglio, for appellee/cross-appellant.

* * * * *

YARBROUGH, J.

INTRODUCTION

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which awarded sanctions in favor of appellee/cross-appellant, The Toledo Blade

Company, and against appellant/cross-appellee attorney George Rogers ("Rogers").[1] For the reasons that follow, we reverse the decision of the trial court, in part, and affirm, in part.

Facts and Procedural Background

{¶ 2} The history of this protracted litigation began with a complaint filed on October 11, 1990, in which plaintiffs asserted defamation and invasion of privacy claims stemming from an investigative series entitled, "The Secret Files of Internal Affairs," published by appellee between June 24 and July 1, 1990. We initially note that this litigation has persisted over 23 years. Accordingly, the facts set forth below are stated as summarily as possible.

{¶ 3} On July 8, 1997, the trial court, in a 163 page judgment, granted appellee's motion for summary judgment. Thereafter, on July 29, 1997, appellee filed a motion for sanctions against Rogers. While this motion was pending in the trial court, Rogers filed a notice of appeal in this court, and we affirmed the trial court's July 8 judgment in a decision dated October 9, 1998. *Early v. The Toledo Blade*, 130 Ohio App.3d 302, 720 N.E.2d 107 (6th Dist.1998).

{¶ 4} Following our decision, Rogers filed an appeal with the Supreme Court of Ohio which was dismissed on March 3, 1999. *Early v. The Toledo Blade*, 85 Ohio St.3d 1405, 706 N.E.2d 788 (1999). Thereafter, Rogers filed a request for certiorari to the

[1] Rogers represented the twelve original plaintiffs: Michael Dennis Early, George J. Taylor, Jr., Robert R. Case, John P. Smith, Robert L. Barboza, Edwin V. Marok and Pamela J. Marok, Martin Schaber, Maryann Hodak, Linda Leichty, Jane Lewis, and Kimberly Kristoff.

United States Supreme Court, which was denied on November 1, 1999. *Early v. The Toledo Blade*, 528 U.S. 964, 120 S.Ct. 399, 145 L.Ed.2d 311 (1999).

{¶ 5} Following the denial of certiorari, appellee filed a "Notice of Disposition of Final Appeal and Request for Hearing" in which appellee sought a ruling on its previously filed motion for sanctions. Appellee sought sanctions pursuant to R.C. 2323.51 in addition to sanctions pursuant to the trial court's "inherent power to do all things necessary to the administration of justice and to protect their own powers and processes." Rogers filed a memorandum in opposition to appellee's motion on November 22, 1999. Pretrial hearings were conducted on July 6, 2000, and then the motion lingered on the trial court's docket until December 12, 2007, when a hearing was held and the trial court took the matter under advisement. Eventually, on January 28, 2009, a decision was issued in which the trial court found that Rogers' conduct during the trial court proceedings was not frivolous, but had "bled into the realm of frivolity *at the time Plaintiff appealed* summary judgment based on the information received in the Court's decision outlining the lack of sufficient evidence to pursue the claims asserted." (Emphasis added.) The court then conducted a hearing on the amount of fees to be awarded. In a judgment dated December 21, 2010, the trial court awarded fees of $163,301 to appellee, which amounted to appellee's costs to defend the appeals filed in this court, the Supreme Court of Ohio, and the United States Supreme Court. Rogers' appeal, and appellee's cross-appeal, of the trial court's January 28, 2009 and December 21, 2010 decisions and judgments are now before this court.

THE APPEAL

Rogers' Assignments of Error

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN ITS JUDGMENT ENTRIES OF JAN. 28, 2009 AND DEC. 10, 2010, IN GRANTING SANCTIONS FOR CONDUCT OF COUNSEL BEFORE THE LUCAS COUNTY COURT OF APPEALS, THE OHIO SUPREME COURT, AND THE UNITED STATES SUPREME COURT.

ASSIGNMENT OF ERROR NO. I.A.

THE TRIAL COURT ERRED IN THAT THE "ISSUE" OF COUNSEL'S CONDUCT ON APPEAL WAS NOT BEFORE IT AS SUCH "ISSUE" HAD NOT BEEN RAISED BY MOTION AS REQUIRED BY R.C. 2323.51 AND THERE WAS NO DUE PROCESS NOTICE OF SUCH "ISSUE."

ASSIGNMENT OF ERROR NO I.B.

THE TRIAL COURT ERRED IN THAT R.C. 2323.51 DOES NOT AUTHORIZE A TRIAL COURT TO AWARD SANCTIONS FOR COUNDUCT OF COUNSEL ON APPEAL OF A NON-PRISONER CIVIL ACTION.

ASSIGNMENT OF ERROR NO I.C.

THE TRIAL COURT OF THE STATE OF OHIO HAD NO JURISDICTION [to] AWARD SANCTIONS FOR COUNSEL'S CONDUCT IN THE UNITED STATE[s] SUPREME COURT.

ASSIGNMENT OF ERROR NO. I.D.

THE TRIAL COURT ERRED IN FAILING TO FIND THAT A MOTION TO AWARD SANCTIONS FOR COUNSEL'S CONDUCT ON APPEAL WAS BARRED BY R.C. 2323.51 AS NOT BEING MADE WITHIN TWENTY-ONE DAYS FOLLOWING ENTRY OF JUDGMENT BY THE APPELLATE COURT.

ASSIGNMENT OF ERROR NO I.E.

THE TRIAL COURT ERRED IN THAT IT HAD NO EVIDENCE IN THE RECORD BEFORE IT OF COUNSEL'S CONDUCT ON APPEAL.

Sanctions Under R.C. 2323.51

{¶ 6} Because Rogers' assignments of error are interrelated, they will be discussed together.

Standard of Review

{¶ 7} An R.C. 2323.51 determination to impose sanctions involves a mixed question of law and of fact. *Resources for Healthy Living, Inc. v. Haslinger*, 6th Dist. No. WD-10-073, 2011-Ohio- 1978, ¶ 26. On appeal, legal questions will be considered de

novo, while a trial court's factual determinations will not be disturbed if supported by competent, credible evidence. *Grine v. Sylvania Schools Bd. of Edn.*, 6th Dist. No. L-06-1314, 2008-Ohio-1562, ¶ 41. Ultimately, the decision whether to impose sanctions under R.C. 2323.51 rests in the sound discretion of the court and will not be reversed absent an abuse of that discretion. *State ex rel. Stryker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶ 11.

{¶ 8} The version of R.C. 2323.51(B) at issue in this appeal provides that a court in a civil action may, at any time prior to trial or within twenty-one days after entry of judgment, award attorney fees to any party adversely affected by frivolous conduct.[2] In this case, the trial court made a legal determination that R.C. 2323.51 permitted an award of attorney fees as a sanction for appellants' conduct on appeal to the Lucas County Court of Appeals, the Supreme Court of Ohio, and the United States Supreme Court. Therefore, we will employ a de novo review of the trial court's legal determination to award sanctions to appellee for defending the appeals.

[2] All of the alleged frivolous conduct occurred in the appeals pending between July 1997 and November 1999. Therefore, we will utilize the relevant version of R.C. 2323.51 as it existed before the 1996 Ohio Tort Reform Act, 146 Ohio Laws, Part II, 3867, 3974. The version which existed following the Tort Reform Act was subsequently declared unconstitutional in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999). That version was recodified by 2001 Am.Sub.S.B. No. 108, which revived the version in effect before the enactment of the Ohio Tort Reform Act.

Analysis

{¶ 9} The Supreme Court has addressed the issue of whether sanctions may be awarded for defending appeals in civil actions. In *State ex rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338, 603 N.E.2d 1017 (1992), a petition for a writ of mandamus was filed in the Tenth District Court of Appeals. The petition was denied, and the petitioner appealed to the Supreme Court of Ohio, which issued the requested writ. The unsuccessful respondent then requested the Supreme Court of Ohio to award attorney fees pursuant to R.C. 2323.51 for defense of the appeal to the Supreme Court. The Supreme Court denied the request, holding that "R.C. 2323.51 does not contemplate awarding attorney fees for defending appeals of civil actions." *Id*. at 343.

{¶ 10} In reaching its decision that attorney fees were appropriate in this case, the trial court relied on *Soler v. Evans, St. Clair & Kelsey*, 10th Dist. No. 04AP-314, 2006-Ohio-5402, ¶ 25. In *Soler*, the Tenth District determined that the trial court did not abuse its discretion by awarding attorney fees in a civil action for appellate proceedings as a sanction for frivolous conduct because the trial court determined plaintiff had no grounds to file its complaint. *Id.* at ¶ 27. The *Soler* court, relying on its previous decision in *Jackson v. Bellomy*, 10th Dist. No. 01-AP-1397, 2002-Ohio-6495, distinguished *Sowald* by "finding that the *Sowald* court was referring to the appeal of an appellate court's judgment, not to an appeal of a trial court's original judgment." *Soler* at ¶ 25; *Jackson* at ¶ 58. We are not persuaded by the Tenth District's interpretation of *Sowald*.

{¶ 11} In *Mueller v. City of Vandalia,* 2d. Dist. No. 17285, 1999 WL 197971 *3, (Mar. 31, 1999), the Second District Court of Appeals awarded a defendant reasonable attorney fees incurred in defending against a frivolous action in the trial court. The *Mueller* court also included reasonable attorney fees the defendant incurred in prosecuting his R.C. 2323.51 motion in the trial court. *Id*., citing *Ron Schneider & Assoc. v. London*, 81 Ohio St.3d 94, 689 N.E.2d 552. Relying on *Sowald*, the *Mueller* determined that "the plain language of R.C. 2323.51(B)(1) applies only to attorney fees incurred in trial court proceedings and does not authorize an award of attorney fees incurred in either prosecuting or defending an appeal." *Id.* at *2. The *Mueller* court interpreted the Supreme Court's holding in *Sowald* to mean that,

> "[F]ee awards authorized by R.C. 2323.51 are necessarily limited to trial court proceedings by division (B) of the statute, which states that 'at any time prior to the commencement of the trial in a civil action or within twenty-one days after the entry of judgment in a civil action, the court may award reasonable attorneys [sic] fees to any party to that action adversely affected by frivolous conduct." Because, per Civ.R. 58(A), "entry of judgment" occurs after and upon a Civ.R. 54(A) "judgment" of a trial court, fees incurred in an appeal from the judgment are necessarily not included.
>
> *Id.* at *2, citing *Sowald* at 343.

{¶ 12} The *Mueller* court concluded that even though the adversely affected defendant requested an award of fees incurred in prosecuting a successful appeal in the

trial court, and not at the appellate court as in *Sowald*, a similar outcome is dictated by the *Sowald* holding, and is supported by three other considerations. We agree not only with the Second District's interpretation of *Sowald*, but also with the three other considerations described in *Mueller*.

{¶ 13} First, an appeal may be meritorious, even though it is prosecuted by the party who committed the frivolous conduct in the trial court proceedings. As the *Mueller* court stated, "'the questions of whether or not a civil action is frivolous is an entirely separate question from whether or not an appeal is frivolous.'" *Id*. at *3.

{¶ 14} Second, the Supreme Court in *Sowald* analyzed former R.C. 2323.51 as it existed prior to the 1996 amendment. R.C. 2323.51 was later modified and further strengthens appellants' position. The amendments to R.C. 2323.51, effective on April 7, 2005, extended its coverage to attorney fees incurred in appeals by inmates in civil actions.[3] However, the legislature did not include "appeal" to the definition of "conduct"

[3] R.C. 2323.51(A), as amended by 2004 S 80, provides,

> (1) "Conduct" means any of the following:
>
> (a) The filing of a civil action, 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, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action;
>
> (b) The filing by an inmate of a civil action or appeal against a government entity or employee, the assertion of a claim, defense or other position in connection with a civil action of that nature or the assertion of issues of law in an appeal of that nature, or the taking of any other action in connection with a civil action or appeal of that nature.

in other civil actions as defined in R.C. 2323.51(A)(1)(a). This necessarily suggests that the General Assembly, in the applicable version of R.C. 2323.51, did not intend to allow for an award of attorney fees based on a party's conduct during an appeal, except for an inmate's appeal in a civil action. *See also Mueller* at *3.

{¶ 15} Third, the *Mueller* court took into consideration App.R. 23, which permits an award of attorney fees and expenses by an *appellate court* if an appeal is found to be frivolous. The *Mueller* court reasoned that App.R. 23 provides an independent basis for relief which "protects a party who is adversely affected at the appellate level."

{¶ 16} For these reasons, we hold that the trial court erred as a matter of law in awarding attorney fees pursuant to former R.C. 2323.51 for Rogers' actions in pursuing plaintiffs' appeals of the trial court's July 8, 1997 judgment to this court, the Supreme Court of Ohio, and the United States Supreme Court. Accordingly, Rogers' first assignment of error is well-taken. To the extent that Rogers' remaining assignments of error are not addressed, they are rendered moot pursuant to App.R. 12(A)(1)(c).

CROSS-APPEAL

Appellee/Cross-Appellant's Assignments of Error

Assignment of Error 1: The Trial Court Erred in Failing to Sanction the Conduct of Appellant's [sic] Counsel that Occurred Prior to the Trial Court's July 8, 1997 Decision Granting the Blade's Motion for Summary Judgment.

{¶ 17} Appellee argues in its cross-appeal that the trial court erred in not finding Rogers' conduct in the trial court proceedings to be frivolous pursuant to R.C. 2323.51, Civ.R. 11, and by the court's "inherent power to do all things necessary to the administration of justice and to protect their own powers and processes."[4]

R.C. 2323.51

R.C. 2323.51 states, in relevant part,[5]

> (A) As used in this section:
>
> (1) "Conduct" means filing a civil action, asserting a claim, defense, or other position in connection with a civil action, or taking any other action in connection with a civil action.
>
> (2) "Frivolous conduct" means conduct of a party to a civil action or of his counsel of record that satisfies either of the following:
>
> (a) It obviously serves merely to harass or maliciously injure another party to the civil action;
>
> (b) It is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

[4] Appellee did not raise the issue of sanctions pursuant to Civ.R. 11 in its motion for sanctions in the trial court. Therefore, it will not be considered on appeal.

[5] Because the litigation commenced in 1990, we will utilize the version of R.C. 2323.51, as it then existed. 1987 Am.Sub.H.B. No. 1, effective January 5, 1988.

> (B)(1) Subject to divisions (B)(2) and (3), (C), and (D) of this section, at any time prior to the commencement of the trial in a civil action, or within twenty-one days after the entry of judgment in a civil action, the court may award reasonable attorney's fees to any party to that action adversely affected by frivolous conduct. The award may be assessed as provided in division (B)(4) of this section.

{¶ 18} In applying R.C. 2323.51, a trial court must initially determine whether an action taken by the party against whom sanctions are sought constituted frivolous conduct. If the conduct is found to be frivolous, the trial court must determine the amount of attorney fees to be awarded to the aggrieved party. *Cleveland Indus. Square, Inc. v. Dzina,* 8th Dist. Nos. 85336, 85337, 85422, 85423, 85441, 2006-Ohio-1095, ¶ 30, citing *Lable & Co. v. Flowers*, 104 Ohio App.3d 227, 232-233, 661 N.E.2d 782 (9th Dist.1995).

{¶ 19} "The question of what constitutes frivolous conduct may be either a factual determination, e.g., whether a party engages in conduct to harass or maliciously injure another party, or a legal determination, e.g., whether the claim is warranted under existing law." *Curtis v. Hard Knox Energy, Inc.*, 11th Dist. No. 2005-L-023, 2005-Ohio-6421, ¶ 15. A trial court's ruling on a motion to impose sanctions will not be disturbed on appeal absent an abuse of discretion. *Haslinger*, 6th Dist. No. WD-10-073, 2011-Ohio-1978, at ¶ 26. "The term abuse of discretion connotes more than an error of law or judgment. It implies that the court's attitude is unreasonable, arbitrary or

unconscionable." *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). However, the question of whether a pleading is warranted under existing law is a question of law and will be subject to de novo review by the appellate court. *Goff v. Ameritrust Co., N.A.*, 8th Dist. Nos. 65196 and 66016, 1994 WL 173544, *10 (May 5, 1994).

Analysis

Claims not frivolous

{¶ 20} Rogers filed the original complaint on October 11, 1990, and amended the complaint on March 11, 1991, and again on May 10, 1991. This litigation involved 37 specific claims brought by 12 plaintiffs.[6] Furthermore, by the time appellee filed its motion for summary judgment, Rogers had propounded six sets of interrogatories, five sets of requests for production of documents, and three sets of requests for admissions. Rogers had also deposed nine of appellee's employees. On March 2, 1992, following a motion to compel discovery, the trial court also sanctioned appellant in the amount of $18,981.50 for various violations of the discovery process. This litigation was clearly contentious. In the context of R.C. 2323.51(A)(2)(b), appellee submits that the trial court abused its discretion by not finding that plaintiffs' invasion of privacy and

[6] Specifically, there were eight claims for malicious defamation, six claims in negligent defamation, ten claims for invasion of privacy by publication, eight claims for false light invasion of privacy, and five general claims for invasion of privacy. The trial court dismissed appellant's false light claims in a decision dated March 11, 1991, finding that this tort was not recognized under Ohio law.

defamation claims were frivolous. We note that appellee does not specifically argue which claims it deems frivolous.

{¶ 21} Before a court may impose R.C. 2323.51 sanctions in a case like this, the court must find that the conduct "is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." R.C. 2323.51(A)(2)(b). This court, in interpreting the current version of R.C. 2323.51 has determined that filing a complaint without evidentiary support does not become frivolous conduct under the law when no evidentiary support is uncovered by investigation or discovery. The conduct is frivolous only when the expectation of finding such evidence is not reasonable. *See Haslinger*, 6th Dist. No. WD-10-073, 2011-Ohio-1978, at ¶ 31.

Invasion of Privacy Claims

{¶ 22} Regarding the invasion of privacy claims, appellee argues,

> The invasion of privacy claims were barred for the fundamental reason that those claims were based on publications obtained from public records, and the United States Supreme Court had made clear in 1989 that no such claims arise where a newspaper published truthful information of public significance made available to government sources.

{¶ 23} By way of background, the trial court, prefaced a 25-page postscript contained within its award of summary judgment, by stating,

> The "Secret Files" series, to be sure, marked a sharp journalistic departure for The Blade, venturing as it did into the thicket of investigative reporting. The series was the immediate product of a determined and laudible effort to define what constituted public records in Ohio. For this reason alone, the series is significant.

{¶ 24} Despite this initial praise, the trial court also opined in its postscript that appellee's series "was not an unqualified success when measured against a 'fairness index.'" The court noted that the series included "questionable journalistic decisions" and "plaintive claims and unprofessional puffery." The court remarked that the reporters failed to contact two officers to secure their versions of lawsuit settlements in which they were involved.[7] The court also questioned why the Willys Park sex scandal of 1971, which occurred some 19 years prior to the series, included the names and punishments of the officers involved.[8] Noting that several officers were in their mid-twenties in 1971, but at the time of the series, several of those officers were married with children, the trial court stated,

> [I]t is difficult to understand why names and punishments were printed, especially since the entire incident (including officers' names and

[7] Murray and Roe, *Police Violence: A Costly, Recurring Problem for the City*, Toledo Blade (Jun. 25, 1990) 1, 6-7.

[8] Murray and Roe, *How a Sex Scandal Led to Internal Affairs*, Toledo Blade (Jun. 24, 1990) D2.

punishments) was reported on the pages of The Blade contemporaneous to the incident and sanctions. This decision was not the stuff of Pulitzers.

{¶ 25} Finally, the court questioned the journalistic decision to disclose the names of the former wives of Officer Donald Lewis who were the victims of his abusive behavior and subsequently privacy plaintiffs to the lawsuit. The series also printed the names of two female officers who were victims of Officer Brian Vasquez' violence. The court noted that the names of four other victims of Officer Vasquez who were not officers were not disclosed. The trial court cited several other examples of the questionable journalistic tactics employed by appellee in this series.

{¶ 26} In its decision denying sanctions, the trial court acknowledged that many, not all, of the invasion of privacy claims were negated by appellee's public records defense, grounded in R.C. Chapter 149, the Ohio Public Records Act. The trial court also noted that the information gathered by appellee in its investigative series came from records that had been previously kept confidential based on a "duly negotiated union contract provision then in effect." The trial court thus reasoned that "it would appear that the Plaintiffs had every reason, at the time [of the complaint], to allege that their rights of privacy had been invaded." Upon review, we find that the trial court did not abuse its discretion in not finding that the invasion of privacy claims were frivolous.

Defamation Claims

{¶ 27} As to the legitimacy of plaintiffs' defamation claims, appellee argues that the claims were deficient because "no reasonable reader could have interpreted the articles in the fashion alleged by Plaintiffs." In further support of this argument, appellee brings to our attention that the trial court determined that five of the claimed defamatory statements were not actionable as a matter of law, and five other claims failed because they simply were not "of and concerning" the plaintiff who claimed to have been defamed.

{¶ 28} After a thorough review of the extensive record provided on appeal, we cannot find that the trial court's attitude was unreasonable, arbitrary or unconscionable by holding that the defamation claims brought against appellee were not frivolous.

{¶ 29} In its later judgment denying sanctions for frivolous conduct, the court, citing how statutory and case law analysis and legal interpretation vary from court to court, concluded that it "would hardly be predictable to determine at the onset whether a case of such magnitude as the case herein, would be found to be wholly without merit." In reaching its conclusion, the trial court reasoned that even though there was relatively little, if any chance that plaintiffs' defamation claims would have survived, "[a] scintilla of merit, however, could be meritorious nonetheless."

{¶ 30} Here, given the questionable reporting employed by appellee, in addition to the information that was at the time recently made public, we find that the trial court did not abuse its discretion when it determined that the claims were not frivolous.

{¶ 31} Appellee alternatively argues that at some point during the litigation in the trial court, plaintiffs' claims became so meritless so as to warrant voluntary dismissal or be deemed frivolous. Appellee cites *Matszuro v. Revere Rd. Synagogue*, 98 Ohio App.3d 347, 648 N.E.2d 582 (9th Dist.1994), in support of this argument. In *Matszuro*, the court determined that sanctions were warranted because the plaintiff failed to dismiss a claim until two months after discovering that it named the wrong party as the defendant. *Id*. at 353. Civ.R. 17(A) requires that a civil action must be prosecuted by the real party in interest. Appellee also relies on *State ex rel. Russell v. Shaker Heights Mun. Court*., 87 Ohio App.3d 511, 622 N.E.2d 697 (8th Dist.1994), in support of its contention that Rogers' failure to dismiss the claim constituted frivolous conduct. In *Russell*, the Eighth District upheld an award of sanctions where a pro se filed an action in prohibition in a common pleas court, and did not dismiss his action once he received the respondent's brief which pointed out the court's the lack of jurisdiction over the action. *Id*. at 513. These cases involve procedural matters which were fatal to the claims.

{¶ 32} In this case, it appears that the appellants were wrong about their theory about what constitutes actionable conduct. However, we cannot say that appellants were required to dismiss their complaint when presented with a conflicting theory of appellee's theory of actionable conduct. As the trial court noted, many of the claims were negated by R.C. 149, but not all of them. We are hard-pressed to hold that an award of summary judgment automatically entitles the winning party to an award of sanctions for failing to bring a winning claim.

{¶ 33} Accordingly, we cannot say that the trial court abused its discretion in finding that the filing and maintaining of the action in the trial court was not frivolous under R.C. 2323.51.

Conduct of Rogers Not Frivolous

{¶ 34} In its brief, appellee outlines Rogers' following behaviors as abusive and therefore sanctionable pursuant to R.C. 2323.51: 1) filing meritless oppositions to the motion for summary judgment; 2) submitting the testimony of patently unqualified experts – neither of whom the court permitted to testify; 3) forcing the Blade and its counsel to participate in a two day oral argument; and 4) filing baseless post-hearing briefs.

{¶ 35} In further support of its argument that Rogers' conduct was frivolous, appellee points to a portion of the trial court's July 8, 1997 judgment which states, "plaintiff's counsel resorted again and again to blatant misrepresentations of controlling law that were so basic and glaring they 'must be presumed to have been deliberate." Indeed, the trial court painstakingly addressed numerous errors committed by Rogers, including misspellings, typographical errors, and wrong citations. The trial court also pointed to several errors where Rogers cited to cases which stood for the opposite position for which they were cited, did not even address the issue for which the citation was used, or failed to give appropriate case history. In denying appellee's motion for sanctions for Rogers' conduct in the trial court, the court noted that Rogers' behavior was "unprofessional conduct" rather than frivolous conduct. The trial court stated,

{¶ 36} While the Court understands that litigation can be costly and time-consuming for Defendants who are ultimately found to be without liability, finding an action frivolous because a Court's decision on summary judgment pointed out what it deemed failures on the part of Plaintiffs' counsel would not bode well for litigants, who as Defendant itself stated, are entitled to broad latitude in the pursuit of legal claims.

{¶ 37} After reviewing the record in its entirety, we cannot find that the trial court abused its discretion in determining that the conduct of Rogers was not frivolous in the context of R.C. 2323.51.

{¶ 38} Accordingly, we find that appellee's assignment of error asserted in its cross-appeal is not well-taken.

CONCLUSION

{¶ 39} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is reversed, in part, and affirmed, in part. The portion of the trial court judgment which awards attorney fees to appellee is hereby vacated. It is ordered that appellee pay the court costs of this appeal and cross-appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE