**[Cite as *Cooke v. United Dairy Farmers, Inc.*, 2006-Ohio-4365.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Reginald A. Cooke, | : | |
| Plaintiff-Appellant, | : | |
| | | No. 05AP-1307 |
| v. | : | (C.P.C. No. 99CVC06-4512) |
| United Dairy Farmers, Inc. et al., | : | (REGULAR CALENDAR) |
| Defendants-Appellees. | : | |

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O P I N I O N

Rendered on August 24, 2006

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*Moore & Yaklevich, John A. Yaklevich*, and *W. Jeffrey Moore*, for appellant.

*Vorys, Sater, Seymour and Pease LLP, Gail C. Ford,* and *Joseph R. Miller*, for appellees Larry H. James and Crabbe, Brown & James.

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

**{¶1}** Plaintiff-appellant, Reginald A. Cooke ("Cooke"), appeals from the November 9, 2005 judgment of the Franklin County Court of Common Pleas dismissing with prejudice Cooke's claims for defamation and civil conspiracy against defendants-

appellees, Larry H. James ("James") and Crabbe, Brown & James ("Crabbe, Brown"). For the following reasons, we affirm.

**{¶2}** Cooke, an attorney, filed this action for defamation and civil conspiracy against defendants, United Dairy Farmers, Inc. ("UDF"), Brian Gillan ("Gillan"), James, and Crabbe, Brown, based on statements made at a press conference regarding race discrimination cases pending against UDF in federal court. Cooke filed the underlying federal discrimination cases on behalf of Maudie Williams and her son, Michael Williams, former UDF employees who claimed that UDF terminated their employment on the basis of race. Gillan, UDF's Chief Operating Officer and legal counsel, was the primary presenter at the press conference. James, UDF's trial counsel on the discrimination cases, sat with Gillan at the presenters' table and responded to reporters' questions following Gillan's presentation. At all relevant times, James was an employee of Crabbe, Brown.

**{¶3}** In 1995, the Williamses filed claims with the Ohio Civil Rights Commission ("OCRC") alleging that UDF discharged them because of their race. During the OCRC proceedings, attorney Daniel Klos represented the Williamses. Former UDF Assistant Manager Patty Munyan ("Munyan"), who worked at the same store as the Williamses, testified in favor of the Williamses before the OCRC. After the OCRC issued its determination of probable cause, Cooke assumed legal representation of the Williamses and, in August and October 1996, filed civil actions on their behalf in federal court. Cooke intended to call Munyan as a witness on his clients' behalf in the federal cases.

**{¶4}** In March 1998, before the Williamses' cases came to trial, Munyan's boyfriend, Warren Freeman, offered to sell UDF a videotape of Munyan that he claimed

to have surreptitiously recorded (the "Munyan videotape"). According to Freeman's affidavit, he recorded the tape by hiding a video camera under dirty laundry in a laundry basket in the bedroom of the apartment where Freeman and Munyan were living. A few seconds after the ten-minute videotape begins, Munyan assumes a position on a mattress, centered in the camera's field of view, where she remains for the duration of the videotape. The camera remains level throughout, and the camera lens is not obscured by either laundry or any part of a laundry basket. Audible on the videotape are Munyan and Freeman's voices, along with auxiliary noise, apparently from a nearby television.

**{¶5}** Relevant to this case, the following exchange between Munyan and Freeman occurs on the Munyan videotape:

> MR. FREEMAN: What the hell happened anyway?
>
> MS. MUNYAN: They was saying that a supervisor – some supervisors at work where I work on Frebis were discriminating. And they weren't really, you know. [Maudie] just cause a bunch of trouble. And she talked to me and asked me to go on the Civil Rights Commission and said whatever she gets she'll split. I said okay. All I had to do is do what her and her lawyer said, and that's what I did.
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> * * *
>
> MR. FREEMAN: When do you go back to court?
>
> MS. MUNYAN: I think it's in June or July. I don't know. Then Reggie got me [this apartment] the other day and told me that – to be ready to go to court. I'm pretty sure it's in July. [They'll] go to court the only thing that's going to happen is they're going to get their money and fuck Patty. [That's how it's gonna be].
>
> * * *

> MR. FREEMAN: What are you gonna do when you go back to court?
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> MS. MUNYAN: I ain't goin' back. Fuck them. Because they don't have to if they [subpoena me]. So really I guess I got to go, but just get up there and lie like I've been lying.
>
> * * *
>
> MS. MUNYAN: Well, at the time that I did it I thought I was doing the right thing and I thought a little lie wouldn't hurt. I didn't know it was going to be all this. Because when I talked to Reggie and them about it they said, Oh, they'll settle quick. * * *
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> * * *
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> MR. FREEMAN: Why in the hell would you lie for them like that?
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> MS. MUNYAN: Money. Ain't you ever wanted money?
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> * * *
>
> MS. MUNYAN: I worked for them for eight years and then I get shit on. I didn't get nothing out of it, that's for damn sure. When she asked me to go up there to Civil Rights, she told me she'd pay me if she got anything out of it and I did it.

(Exh. 1 at 4-7.) UDF purchased the Munyan videotape from Freeman for $10,000 and, working with the public relations firm of Edward Howard & Company, held a press conference at the Hyatt on Capitol Square on June 4, 1998, to disclose the videotape's contents.

**{¶6}** At the press conference, Gillan delivered prepared remarks, played the Munyan videotape, and distributed written materials, which included a transcript of Gillan's remarks, a press release, a "Videotape Transcript" setting forth select

quotations from the Munyan videotape, and a "Fact Sheet."[1] UDF also made audio and video copies of the Munyan videotape available for press conference attendees.

**{¶7}** As set forth in the transcript of his remarks, Gillan stated:

> I am here today to share with you direct, disturbing and damaging evidence that conclusively proves several points:
>
> First, the attacks against [UDF] over the last 1 and 1/2 years are false.
>
> Second, the claims were part of an unethical and illegal scheme to get money from the company.
>
> Third, the key supporting witness for the plaintiffs is – by her own words, which you will see and hear – a liar.
>
> Fourth, it appears that the attorney who cynically helped orchestrate this campaign for his own financial gain, fanned the flames with his racial rhetoric to force the company to settle these bogus claims.
>
> Quite simply, the entire story that has been fabricated is not – and never has been – about black and white; it is – and always was – about green, the color of money.

(Exh. 5 at 1.)

**{¶8}** After playing the Munyan videotape, Gillan stated:

> It is clear from this tape that Ms. Munyan has willingly participated in a gigantic fraud against United Dairy Farmers, the judicial system, and the people of Columbus. This fraud was cast in phony racial discrimination language because she, the plaintiffs and their attorney all thought that would be an easy way to force money from the company. Had we settled the case, as we were repeatedly pressured and threatened to do, they would have gotten away with it. Today, their fraud has been unmasked.

(Exh. 5 at 4.)

[1] Gillan's oral presentation varied slightly from the written transcript distributed to press conference attendees.

**{¶9}** After the conclusion of Gillan's presentation, Gillan and James responded to reporters' questions. In response to one question, James stated that he was not accusing Cooke of anything. Later, however, James stated his belief that he had an obligation to report Cooke to the Supreme Court of Ohio Disciplinary Counsel.

**{¶10}** Statements in the written materials distributed at the press conference mirror those contained in Gillan's oral presentation. The "Fact Sheet" and the introductory paragraphs to the "Videotape Transcript" state, in part:

> * * * Munyan admits on the tape that she agreed to testify *falsely* for Michael and Maudie Williams and Cooke. In exchange for her testimony, Munyan was to receive a percentage of the money that Williams' mother and Cooke anticipated receiving in an out-of-court settlement by UDF.

(Exh. F at 4.) The press release states, in part, that the Munyan videotape "spotlights the involvement of the plaintiffs' attorney, who fanned the flames with racial rhetoric to force the company to try to settle these bogus claims." (Exh. 6 at 1.)

**{¶11}** On June 3, 1999, Cooke filed his complaint against UDF, Gillan, James, and Crabbe, Brown in the Franklin County Court of Common Pleas, alleging claims for libel, slander, and civil conspiracy.[2] In his complaint, Cooke objected to Gillan's statements at the press conference, alleging:

> 27. Gillan stated to the members of the media gathered at the event that "the attacks [against] UDF over the last 1 and 1/2 years are false" and that they "were a part of an unethical and illegal scheme to get money from the company."
>
> 28. Next Gillan stated that Cooke "cynically helped orchestrate this campaign for his own financial gain, fanned the flames with his racial rhetoric to force the company to settle these bogus claims."

[2] On April 18, 2002, Cooke amended his complaint to add claims for "negligent libel" and "negligent slander."

> 29. Gillan then falsely placed Cooke back in time to 1995, – the period when the plotting of the alleged illegal scheme between Munyan and Maudie Williams occurred. Gillan said "approximately three years ago * * * Ms. Williams and her son – who now were represented by attorney Reginald Cooke – filed charges with the Ohio Civil Rights Commission".
>
> 30. After stating that Munyan was involved in a scheme to lie for money, Gillan added that "the Williamses' attorney – Mr. Cooke – was a key part of this scheme."

Cooke also objected to James' statement that he had a professional responsibility to report Cooke to the disciplinary counsel. Cooke additionally alleged defamation based on statements in the written materials distributed at the press conference.

**{¶12}** On July 15, 1999, appellees moved the trial court to dismiss Cooke's complaint for failure to state a claim upon which relief could be granted. After the trial court denied their motions to dismiss, UDF and Gillan filed an answer to Cooke's complaint on June 2, 2000, and James and Crabbe, Brown filed an answer on June 15, 2000. In April 2001, Cooke filed a motion for partial summary judgment, UDF and Gillan filed a motion for summary judgment, and James and Crabbe, Brown filed a motion for summary judgment.

**{¶13}** On June 7, 2002, the trial court granted James' and Crabbe, Brown's motion for summary judgment on all claims, and, on June 18, 2002, the trial court filed a judgment entry, stating, pursuant to Civ.R. 54(B), that there was no just reason for delay. The trial court concluded that James' comment that he had a responsibility to report Cooke to the disciplinary counsel was a protected statement of opinion and found no evidence from which a jury could conclude that James conspired with UDF or Gillan to defame Cooke. Cooke filed a notice of appeal on July 18, 2002.

**{¶14}** On June 17, 2003, this court issued its opinion in *Cooke v. United Dairy Farmers, Inc.*, Franklin App. No. 02AP-781, 2003-Ohio-3118 ("*Cooke I*"). We agreed with the trial court that James' statement that he had an obligation to report Cooke to the disciplinary counsel expressed a constitutionally protected statement of opinion. However, in *Cooke I*, Cooke also argued that James and Crabbe, Brown were liable for defamatory statements published by UDF and Gillan because James helped organize the press conference, distributed written materials to reporters, spoke to the media, and made copies of the Munyan videotape available to the media. We recognized this as part of Cooke's defamation claim, separate and distinct from his claim of conspiracy.

**{¶15}** With respect to Cooke's argument that James was liable for defamation based on statements of UDF and Gillan, we concluded:

> Three factors here convince us that questions of fact preclude summary judgment on Cooke's defamation claim against James. * * *
>
> * * *
>
> James' participation in pre-conference discussions, combined with his filing [of a motion for sanctions in federal court] and his presence at the press conference, suggests James was aware of the substance of the press conference, agreed to the common understanding, filed a document in court reflecting the common understanding, and participated in the conference with that understanding.

Id. at ¶32, 37. Thus, because a genuine issue of material fact remained as to James' and Crabbe, Brown's liability for defamation based on statements published by UDF and Gillan, we reversed the trial court's entry of summary judgment. Nevertheless, we "readily acknowledge[d]" that Cooke may not ultimately prevail on his claims against James and Crabbe, Brown. Id. at ¶38.

**{¶16}** On remand from *Cooke I*, the trial court ruled on the remaining motions, denying Cooke's motion for partial summary judgment and granting UDF and Gillan's motion for summary judgment. The trial court concluded that UDF and Gillan's statements about Cooke during the press conference would tend to injure Cooke in his occupation and, therefore, constituted defamation per se. However, the trial court also concluded that a qualified privilege applied to the statements in question, which rebutted the inference of malice and made a showing of falsity and actual malice essential to the right of recovery. See *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244. The trial court then found that Cooke failed to present evidence that UDF and Gillan acted with actual malice and failed to present evidence of actual damages. Consequently, the trial court concluded that UDF and Gillan were entitled to summary judgment on Cooke's defamation claims. Lastly, the trial court determined that Cooke's conspiracy claim failed because, without an underlying unlawful act of defamation, Cooke could not prove a conspiracy to defame. On August 12, 2004, pursuant to Civ.R. 54(B), the trial court journalized its determination that there was no just reason for delay, and Cooke filed his second notice of appeal.

**{¶17}** On August 24, 2004, James and Crabbe, Brown filed a motion for reconsideration in the trial court, arguing that the trial court's August 12, 2004 judgment entry misstated the status of the case. James and Crabbe, Brown asserted that the summary judgment in favor of UDF and Gillan resolved Cooke's claims against all defendants. According to James and Crabbe, Brown, even if James' participation in the press conference and its preparations were sufficient to hold him liable for UDF and Gillan's statements, the trial court's conclusion that such statements did not constitute

actionable defamation foreclosed judgment against James or Crabbe, Brown. Therefore, James and Crabbe, Brown asked the trial court to enter a proposed final judgment entry, terminating Cooke's case in its entirety. Cooke opposed the motion for reconsideration, arguing that the proposed final judgment entry was contrary to this court's opinion in *Cooke I*. The trial court did not rule on the motion for reconsideration.

**{¶18}** On March 31, 2005, this court issued its opinion in *Cooke v. United Dairy Farmers, Inc.*, Franklin App. No. 04AP-817, 2005-Ohio-1539 ("*Cooke II*"), affirming summary judgment in favor of UDF and Gillan in its entirety, albeit on different grounds. We found that, with one exception, Gillan's statements at the press conference constituted protected statements of opinion. We did find that Gillan's statement that Cooke represented the Williamses when they initiated proceedings before the OCRC and, thus, when Munyan allegedly testified falsely, was a statement of fact, which was false and defamatory. However, we concluded that Cooke was a limited-purpose public figure and, thus, was required to prove actual malice. Upon review of the record, we determined that Cooke's evidence failed to establish a genuine issue of material fact as to whether UDF and Gillan acted with actual malice and failed to establish actual damages. For those reasons, we concluded that UDF and Gillan were entitled to judgment as a matter of law, and we affirmed the trial court's entry of summary judgment.[3]

[3] The Ohio Supreme Court declined to accept Cooke's appeal of *Cooke II* for review. See *Cooke v. United Dairy Farmers, Inc.*, 106 Ohio St.3d 1507, 2005-Ohio-4605 (Table). The United States Supreme Court denied Cooke's petition for writ of certiorari in *Cooke v. United Dairy Farmers, Inc.* (2006), 126 S.Ct. 1338, 164 L.Ed.2d 53 (Memorandum).

**{¶19}** On May 5, 2005, we denied a motion for reconsideration of *Cooke II*, in which Cooke argued that our *Cooke I* opinion necessarily rejected the defense arguments of opinion and lack of actual malice and was "the law of the case." Cooke had made the same basic argument in his second assignment of error in *Cooke II*, arguing that our statement in *Cooke I* that questions of fact precluded summary judgment on Cooke's defamation claim necessarily established that we rejected the argument that Cooke was unable to present evidence that defendants acted with actual malice. We overruled Cooke's second assignment of error, stating that "*Cooke I* did not ultimately establish that any conduct of any of the defendant parties did, in fact, constitute defamation." *Cooke II* at ¶42. We also concluded that *Cooke I* is not "the law of the case" on the issues of Cooke's status as a limited-purpose public figure or the existence of evidence of actual malice. Id. at ¶43. Likewise, we denied Cooke's motion for reconsideration, stating:

> We maintain that *Cooke I* solely dealt with the issue of whether there was a genuine issue of material fact supporting Cooke's contention that Larry James and his law firm could be held liable for any possible defamatory statement. *Cooke I* did not resolve whether United Dairy Farmers, Inc., and Brian Gillan could be found to have defamed Cooke.

*Cooke v. United Dairy Farmers, Inc.* (May 5, 2005), Franklin App. No. 04AP-817 (Memorandum Decision) at ¶4.

**{¶20}** On June 21, 2005, we denied a motion, filed by James and Crabbe, Brown, for limited reconsideration of our memorandum decision denying Cooke's motion for reconsideration. James and Crabbe, Brown argued that our memorandum decision misstated the *Cooke I* holding. Because James and Crabbe, Brown were not parties to

*Cooke II*, we concluded that they lacked standing to move for reconsideration of either the *Cooke II* judgment or the memorandum decision denying Cooke's motion for reconsideration. We further noted that any statements concerning the *Cooke I* holding were dicta, which did not change the outcome of Cooke's motion for reconsideration, and should not be interpreted as indicating a shift from the position articulated in *Cooke I*.

**{¶21}** On April 7, 2005, on remand from *Cooke II*, James and Crabbe, Brown filed a document captioned "Notice of Opinion and Entry of Court of Appeals in Further Support of August 24, 2004 Motion for Reconsideration and Proposed Final Judgment Entry Dismissing Claims Against Defendants Larry H. James and Crabbe, Brown & James" ("Notice of Opinion"). Consistent with the arguments first articulated in their August 24, 2004 motion for reconsideration, James and Crabbe, Brown argued that the trial court's entry granting UDF and Gillan's motion for summary judgment also operated as a dismissal of the remaining claims against James and Crabbe, Brown. The Notice of Opinion states, in part:

> * * * In agreement with this Court, the Court of Appeals has made absolutely clear that there can be no actionable conspiracy claim because Plaintiff's claims for the underlying tort of defamation fail as a matter of law. Consequently, this Court can and should formally dismiss that sole remaining claim against Larry James and Crabbe, Brown & James, terminating this matter in conformity with both this Court's July 30 Decision and the March 31, 2005 Opinion of the Court of Appeals. Accordingly, Larry James and Crabbe, Brown & James respectfully submit for the Court's approval, execution, and entry a substantially similar version of the proposed Final Judgment Entry they had previously submitted to this Court with their August 24, 2004 Motion for Reconsideration that now references the March 31, 2005 Opinion of the Court of Appeals. A copy of that proposed Final Judgment Entry is attached hereto as Exhibit B.

In the Notice of Opinion, James and Crabbe, Brown also assert that *Cooke II* forecloses any defamation claim against them based on UDF and Gillan's statements. Id. at fn. 2.

**{¶22}** The proposed Final Judgment Entry provided in part:

> In its July 30, 2004 Decision and Entry (the "July 30 Decision"), this Court granted Defendants United Dairy Farmers, Inc.'s and Brian P. Gillan's Motion for Summary Judgment in all respects and dismissed all claims against them with prejudice. That July 30 Decision was affirmed by the Tenth District Court of Appeals on March 31, 2005. Because all remaining claims against Defendants Larry James and Crabbe, Brown & James following a previous remand from the Court of Appeals on June 17, 2003 were predicated solely upon the allegedly defamatory statements of United Dairy Farmers and Gillan, the claims against James and Crabbe, Brown & James also must fail as a matter of law. Accordingly, Plaintiff's Complaint against Defendants Larry James and Crabbe, Brown & James is **dismissed with prejudice**.

**{¶23}** Cooke neither responded nor requested additional time to respond to James' and Crabbe, Brown's Notice of Opinion and request for dismissal. On November 9, 2005, seven months after James and Crabbe, Brown filed their Notice of Opinion, the trial court executed and entered the proposed final judgment entry, dismissing Cooke's complaint. On December 7, 2005, Cooke filed his third notice of appeal.

**{¶24}** Presently, Cooke asserts five assignments of error:

> Assignment of Error No. 1
>
> The Trial Court's *Sua Sponte* Dismissal With Prejudice Of Appellant's Claims Against Appellees Without Prior Notice Violated Appellant's Fourteenth Amendment Right to Due Process of Law.

> Assignment of Error No. 2
>
> Appellant Has Been Deprived of His Due Process Right To An Impartial Tribunal In This Case.
>
> Assignment of Error No. 3
>
> This Court's Decision In Cooke I Reversing Summary Judgment For the Appellees Is The Law of this Case, And The Trial Court's November 9, 2005 Judgment in Favor of the Appellees, Which Is In Direct Conflict With This Court's Opinion And Mandate In Cooke I, Is In Error.
>
> Assignment of Error No. 4
>
> The Trial Court Erred In Holding That Appellant Was A Limited Purpose Public Figure and Require[d] To Establish That Appellees Published Their Defamatory Statements With Actual Malice Where The Record Establishes That Appellant's Conduct Consisted of Representing His Clients In Conformity With All Applicable Rules Of Professional Conduct Governing Pretrial Publicity.
>
> Assignment of Error No. 5
>
> The Trial Court Erred In Ordering That Portions Of The Record Of This Action Be Sealed From Public Disclosure.

We shall address each assignment of error in turn.

**{¶25}** By his first assignment of error, Cooke contends that the trial court's November 9, 2005 judgment entry, dismissing Cooke's claims against James and Crabbe, Brown with prejudice, constituted a violation of Cooke's right to due process of law. It is undisputed that "[a] dismissal on the merits is a harsh remedy that calls for the due process guarantee of prior notice." *Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St.3d 99, 101. Cooke maintains that the trial court violated his due process rights by dismissing his claims against James and Crabbe, Brown, sua sponte, without first giving him notice of its intention to do so.

**{¶26}** In support of his first assignment of error, Cooke relies on *Mayrides v. Franklin Cty. Prosecutor's Office* (1991), 71 Ohio App.3d 381. In *Mayrides*, the plaintiff brought a replevin action against defendants, including the Franklin County Prosecutor's Office, to obtain possession of an investigative file compiled by a private investigator. The day after the plaintiff filed his complaint, the trial court dismissed the action sua sponte, without affording notice to any party. We construed the dismissal as a dismissal for failure to state a claim, pursuant to Civ.R. 12(B)(6), and stated that, although a trial court may dismiss an action on its own motion under several provisions of the Ohio Rules of Civil Procedure, it may do so "only after the affected party is given notice of the court's intention." Id. at 383. We stated that a sua sponte dismissal without notice to the parties is fundamentally unfair to litigants. Id. Therefore, we reversed the trial court's dismissal.

**{¶27}** Contrary to Cooke's assertion that *Mayrides* involved a factual scenario identical to that presented here, this appeal differs dramatically from *Mayrides*. In *Mayrides*, the trial court dismissed the plaintiff's complaint before the defendant had an opportunity to answer and before any party requested dismissal, thus denying the plaintiff any opportunity to respond to insufficiencies in his complaint or to amend his complaint. Here, Cooke's claims have been pending since 1999, and the parties have extensively briefed motions to dismiss and motions for summary judgment. The trial court rendered two thorough decisions on the parties' motions for summary judgment, and, prior to this appeal, the parties have twice argued before this court regarding the trial court's judgments. The record does not reveal any instance where the trial court denied Cooke an opportunity to respond to deficiencies in his claims or to oppose relief

requested by the defendants. Moreover, as discussed below, we find that this case does not involve a sua sponte dismissal without prior notice. Accordingly, *Mayrides* is not dispositive of this appeal.

**{¶28}** Initially, we find that the trial court did not act sua sponte in dismissing Cooke's remaining claims against James and Crabbe, Brown. "Sua sponte" is defined as "[w]ithout prompting or suggestion; on its own motion[.]" Black's Law Dictionary (7th Ed.1999) 437. Cooke argues that, when the trial court entered its final judgment, James' and Crabbe, Brown's motion for reconsideration had been rendered a nullity, and James and Crabbe, Brown had not otherwise moved for dismissal or judgment. Even if the trial court lacked authority to grant the motion for reconsideration, James and Crabbe, Brown expressly requested dismissal of Cooke's remaining claims in their Notice of Opinion. Although not captioned as a "motion," the Notice of Opinion fulfills the requirements of Civ.R. 7(B)(1) that a motion be in writing, set forth the relief or order sought, and state with particularity the grounds for the requested relief.

**{¶29}** Courts of this state have recognized that the name given to a pleading or motion is not controlling. *Lungard v. Bertram* (1949), 86 Ohio App. 392, 395. Rather, it is the substance of the pleading or motion that determines the operative effect thereof. Id. Although James and Crabbe, Brown captioned their filing "Notice of Opinion," the substance of that filing indicated that James and Crabbe, Brown were, in fact, requesting dismissal of Cooke's remaining claims against them, especially in light of the contemporaneously submitted proposed judgment entry. See *Hatton v. Hatton* (July 14, 1987), Montgomery App. No. 10309 (although captioned a "response," the substance of filing indicated that defendant was moving to dismiss for lack of subject-matter

jurisdiction). Upon review, we find that the trial court did not act sua sponte when it dismissed Cooke's remaining claims.

**{¶30}** Even if the trial court did act sua sponte when it dismissed Cooke's remaining claims, we find no error based on lack of notice. Civ.R. 41(B)(1) expressly requires notice to the plaintiff's counsel before a trial court dismisses the plaintiff's claims: "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." As this court has explained, "Civ.R. 41(B)(1) requires that a plaintiff receive notice before the dismissal, thereby affording the plaintiff an opportunity to correct the default, or explain why the case should not be dismissed with prejudice." *Asres v. Dalton*, Franklin App. No. 05AP-632, 2006-Ohio-507, at ¶14. While the trial court here did not dismiss Cooke's claims for failure to prosecute or comply with a court order, the Ohio Supreme Court has explicitly held that the notice requirement of Civ.R. 41(B)(1) applies to all dismissals with prejudice. *Ohio Furniture Co.* at 101.

**{¶31}** In *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, the Ohio Supreme Court addressed the notice required to satisfy due process. The Supreme Court held that the notice requirement of Civ.R. 41(B)(1) is satisfied "when counsel has been informed that dismissal is a possibility and has had a reasonable opportunity to defend against dismissal." Id. at 49, citing *Logsdon v. Nichols* (1995), 72 Ohio St.3d 124, 129 (Cooke, J., concurring in part and dissenting in part). "[T]he notice required by Civ.R. 41(B)(1) need not be actual but may be implied when reasonable under the circumstances." Id. In *Quonset Hut*, the defendant's filing of a motion seeking an order

of contempt and sanctions, expressly requesting dismissal with prejudice, provided the plaintiff's counsel sufficient implied notice of the possibility of dismissal with prejudice to satisfy the requirements of due process. Id. at 48.

**{¶32}** The Ohio Supreme Court revisited this issue in *Sazima v. Chalko* (1999), 86 Ohio St.3d 151. There, the court stated that "the majority's decision in *Quonset* represents a rejection of the proposition that Civ.R. 41(B)(1) requires the trial court to expressly and unambiguously give actual notice of its intention to dismiss with prejudice" and reiterated that a defendant's filing of a motion requesting the trial court to dismiss a claim with prejudice constitutes sufficient implied notice for purposes of Civ.R. 41(B)(1). Id. at 155-156. In *Sazima*, the Supreme Court concluded that "appellant's counsel received notice under Civ.R. 41(B)(1) at the time he became aware that appellee had filed his motion requesting the court to dismiss appellant's claim with prejudice." Id. at 156. Although the Supreme Court ultimately determined that the *Sazima* trial court erred in dismissing the plaintiff's complaint, it based its decision on the plaintiff's compliance with the court's outstanding order in response to the Civ.R. 41(B)(1) notice, not on lack of such notice.

**{¶33}** Applying the guidance set forth by the Ohio Supreme Court, we reject Cooke's contention that he lacked sufficient notice of the trial court's intention to dismiss his remaining claims with prejudice. Although the trial court did not give Cooke's counsel express notice, we conclude that Cooke's counsel had at least implied notice that dismissal was a possibility and had a reasonable opportunity to defend against dismissal.

**{¶34}** James and Crabbe, Brown expressly requested the trial court to dismiss Cooke's remaining claims with prejudice, based on the trial court's grant of summary judgment in favor of UDF and Gillan, in their motion for reconsideration and Notice of Opinion. After *Cooke I*, the remaining claims against James and Crabbe, Brown were premised exclusively on UDF and Gillan's statements. Thus, James and Crabbe, Brown argued that the trial court's determination (later affirmed by this court) that UDF and Gillan's statements were not actionable required that Cooke's remaining claims against James and Crabbe, Brown fail as a matter of law. Certificates of service on the motion for reconsideration and Notice of Opinion indicate that those documents were mailed to Cooke's counsel on August 24, 2004 and April 7, 2005, respectively, and Cooke's counsel does not deny receipt of either document. Thus, pursuant to the Ohio Supreme Court's reasoning in *Quonset Hut*, Cooke's counsel received notice that dismissal with prejudice was a possibility when he became aware of James' and Crabbe, Brown's requests for such relief.

**{¶35}** In addition to having sufficient notice that dismissal with prejudice was a possibility, Cooke had ample opportunity to oppose dismissal. Cooke responded to James' and Crabbe, Brown's arguments and requests for dismissal in a memorandum in opposition to their motion for reconsideration, arguing that entry of final judgment in favor of James and Crabbe, Brown would contravene this court's mandate in *Cooke I*. In his memorandum in opposition, Cooke noted that James and Crabbe, Brown also requested an entry of final judgment in their favor at a status conference on August 21, 2004, at which time Cooke had an additional opportunity to be heard regarding the propriety of such action. Cooke had a third opportunity to respond to James' and

Crabbe, Brown's request for dismissal when James and Crabbe, Brown filed their Notice of Opinion on remand from *Cooke II*. Despite having once responded to James' and Crabbe, Brown's arguments in support of dismissal, and despite his awareness of their second request for dismissal, Cooke neither responded to the Notice of Opinion nor sought leave to do so in the seven months between its filing and the trial court's entry of final judgment. Thus, we conclude that Cooke had sufficient opportunities to explain why the trial court should not have dismissed his claims.

**{¶36}** In short, this is not a case where the plaintiff was unaware of the possibility that the trial court would dismiss his claims. Both the motion for reconsideration and Notice of Opinion afforded Cooke sufficient notice of the possibility that the trial court would dismiss his remaining claims with prejudice. Nor is this a case where the trial court denied the plaintiff an opportunity to explain why it should not dismiss his claims. Cooke set forth his arguments in opposition to dismissal in his memorandum in opposition to James' and Crabbe, Brown's motion for reconsideration. Additionally, although Cooke did not take advantage of it, he had sufficient opportunity to object to James' and Crabbe, Brown's request for dismissal upon remand. In accordance with *Quonset Hut*, we conclude that Cooke had knowledge that dismissal of his claims was a possibility and had ample opportunity to oppose dismissal. Therefore, we find that the trial court's dismissal of Cooke's claims, as requested by James and Crabbe, Brown, did not violate due process.

**{¶37}** In addition to finding that the trial court's dismissal of Cooke's remaining claims did not violate his due process rights, we find that the interplay of this court's

*Cooke I* and *Cooke II* opinions entitled James and Crabbe, Brown to judgment as a matter of law.

**{¶38}** In *Cooke I*, we reviewed the trial court's entry of summary judgment in favor of James and Crabbe, Brown. The trial court had granted summary judgment in favor of James and Crabbe, Brown after concluding that James' statement about reporting Cooke to the disciplinary counsel was a statement of opinion and concluding that the evidence regarding James' participation in the press conference did not demonstrate an issue of fact as to Cooke's conspiracy claim. Although we agreed that James' statement was a statement of opinion, we noted Cooke's argument that James was additionally liable for defamation based on the statements of UDF and Gillan. We recognized that, " '[a]s a general rule, all persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication * * *. Hence, one who requests, procures, or aids or abets, another to publish defamatory matter is liable as well as the publisher.' " *Cooke I* at ¶25, quoting *Scott v. Hull* (1970), 22 Ohio App.2d 141, 144. Because we found that genuine issues of material fact remained as to whether James' participation in the press conference rendered him liable for the statements published by UDF and Gillan, we reversed the trial court's entry of summary judgment. We did not determine that Cooke was entitled to prevail – only that genuine issues of material fact remained as to James' and Crabbe, Brown's liability for UDF and Gillan's allegedly defamatory statements. See *Cooke I* at ¶38. Thus, after *Cooke I*, the remaining claims against James and Crabbe, Brown were predicated solely upon statements published by UDF and Gillan.

**{¶39}** In *Cooke I*, we did not address the substance of UDF and Gillan's statements. We did not address or decide whether UDF and Gillan's statements constituted constitutionally protected opinion, whether such statements were subject to a qualified privilege, whether Cooke was a limited-purpose public figure, or whether the record contained evidence of actual malice. The trial court had not yet addressed any of those issues, and *Cooke I* does not represent the "law of the case" with respect thereto.

**{¶40}** By subsequently granting summary judgment in favor of UDF and Gillan, the trial court determined that UDF and Gillan's statements did not support an actionable claim for defamation. In *Cooke II*, we affirmed summary judgment in favor of UDF and Gillan. Because Cooke cannot establish a defamation claim against UDF and Gillan based on Gillan's statements, he cannot establish a defamation claim against James and Crabbe, Brown based on those same statements. Additionally, as we held in *Cooke II*, Cooke's conspiracy claim fails as a matter of law absent an actionable underlying defamation claim. See *Mitchell v. Mid-Ohio Emergency Services, L.L.C.*, Franklin App. No. 03AP-981, 2004-Ohio-5264, at ¶33 ("there must be a viable claim distinct from the conspiracy in order for the conspiracy claim to survive"). Thus, upon this court's affirmation of summary judgment in favor of UDF and Gillan, James and Crabbe, Brown were entitled to judgment as a matter of law on Cooke's remaining claims.

**{¶41}** Because the trial court's dismissal did not violate Cooke's due process rights and because James and Crabbe, Brown were entitled to judgment as a matter of law on Cooke's remaining claims, we conclude that the trial court did not err in

dismissing Cooke's claims against James and Crabbe, Brown. Cooke's first assignment of error is overruled.

**{¶42}** In his second assignment of error, Cooke contends that he has been deprived of his due process right to an impartial tribunal. Although Cooke correctly states that a fair trial in an impartial tribunal is a basic requirement of due process, *In re Murchison* (1955), 349 U.S. 133, 136, we are unpersuaded by his vague and unsubstantiated arguments that he has been deprived of this right.

**{¶43}** Cooke first relies on our statement in *Mayrides* that "a dismissal, sua sponte, and without notice to the parties * * * places the court in the role of a 'proponent rather than an independent entity.' " *Mayrides* at 383, quoting *Franklin v. Oregon, State Welfare Division* (C.A.9, 1981), 662 F.2d 1337, 1342. Cooke contends that the trial court acted as appellees' proponent by, sua sponte, entering judgment in favor of appellees. As stated above, we find that the trial court neither acted sua sponte in dismissing Cooke's remaining claims nor denied Cooke prior notice. Therefore, the statement in *Mayrides* upon which Cooke relies is inapplicable.

**{¶44}** Cooke also maintains that the trial court disposed of his claims on motion, while ignoring or misconstruing applicable facts and misapplying the law. After asking this court to take judicial notice of the political influence wielded by appellees and their legal counsel, Cooke states that "[t]he only plausible explanation for that result is that judicial obligations of impartiality have been repeatedly eclipsed by political considerations, to appellant's prejudice." Cooke also takes issue with this court's determination in *Cooke II* that all but one of Gillan's statements, upon which Cooke based his claims, were statements of opinion and with our statement that Cooke

testified that he "obtained the assistance of Reverend Jesse Jackson, a nationally-known figure whose support immediately attracted the attention of the national news media."[4] *Cooke II* at ¶34.

**{¶45}** The Ohio Supreme Court has held that an appellate court has no jurisdiction to vacate a trial court's judgment based on a claim of judicial bias. *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441-442. This court addressed a plaintiff's remedy for suspected judicial bias in *Polivka v. Cox*, Franklin App. No. 02AP-1364, 2003-Ohio-4371, where a pro se plaintiff argued that the trial judge should have removed himself because of a personal bias against the plaintiff. We stated:

> If plaintiff believed the trial judge was biased or prejudiced against him, his remedy was to file an affidavit of prejudice with the clerk of the Ohio Supreme Court. R.C. 2701.03 "provides the exclusive means by which a litigant may claim that a common pleas judge is biased and prejudiced." *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 11, 663 N.E.2d 657. Only the Chief Justice of the Ohio Supreme Court or his designee has the authority to determine a claim that a common pleas court judge is biased or prejudiced. *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441-442, 377 N.E.2d 775. Thus, an appellate court is without authority to pass upon issues of disqualification or to void a judgment on the basis that a judge should be disqualified for bias or prejudice. *Id.; State v. Ramos* (1993), 88 Ohio App.3d 394, 398, 623 N.E.2d 1336. * * *

Id. at ¶29; see, also, *Fernandez v. Ohio State Pain Control Ctr.*, Franklin App. No. 03AP-1018, 2004-Ohio-6713 (holding that a plaintiff's argument that the trial court's

[4] To clarify, Cooke did not testify that he initiated contact with Jackson. He did testify that he met with Jackson and discussed the Williamses' discrimination cases with him. He testified that Frank Hele contacted Jackson "to see if he would be able to help us with this situation." (Cooke Depo. at 58.) Cooke stated that "[i]t was my understanding that Jesse was coming in to try to negotiate and try to resolve issues, which may include settlement." (Cooke Depo. at 67-68.) Cooke also admitted commenting to the press about Jackson's effort to resolve the controversy. (Cooke Depo. at 101.) In any event, our characterization in *Cooke II* of Cooke's role in relation to Jackson's involvement did not affect our conclusion that Cooke was a limited-purpose public figure.

decisions were erroneous, based on alleged bias or prejudice, was not properly before this court, even though it was unclear whether the plaintiff was arguing that the trial judge should have disqualified himself). Here, the record does not indicate that Cooke raised a claim of prejudice or bias by filing an affidavit of prejudice with the Supreme Court pursuant to R.C. 2701.03. Based on the aforementioned authority, we find that we lack authority to assess Cooke's claim that the trial court's disposition of his claims was the result of bias and prejudice.

**{¶46}** Even if we had authority to determine Cooke's allegations of bias and prejudice, we would overrule Cooke's second assignment of error because Cooke identifies no evidence of bias or prejudice in the record. We have previously held that "[a] judge is presumed not to be biased or prejudiced, and a party alleging bias or prejudice must present evidence to overcome the presumption." *Wardeh v. Altabchi*, Franklin App. No. 03AP-1177, 2004-Ohio-4423, at ¶20, citing *In re Disqualification of Kilpatrick* (1989), 47 Ohio St.3d 605, 606, and *Eller v. Wendy's Internatl., Inc.* (2000), 142 Ohio App.3d 321, 340. " 'The existence of prejudice or bias against a party is a matter that is particularly within the knowledge and reflection of each individual judge and is difficult to question unless the judge specifically verbalizes personal bias or prejudice toward a party.' " *Wardeh* quoting *Eller.* A judge's rulings of law are legal issues, subject to appeal, and are not by themselves evidence of bias or prejudice. *Okocha v. Fehrenbacher* (1995), 101 Ohio App.3d 309, 322. Cooke identifies nothing in the record, other than the trial court's rulings on motions for summary judgment, as evidence of bias or prejudice. Those rulings were the subjects of the first two appeals to this court and do not constitute evidence that the trial court was prejudiced or biased.

Additionally, Cooke's vague and unsubstantiated accusations of improper political considerations are insufficient to overcome the presumption of judicial integrity. Accordingly, we overrule Cooke's second assignment of error.

**{¶47}** In his third assignment of error, Cooke contends that the trial court's November 9, 2005 judgment conflicts with this court's *Cooke I* opinion, which he argues is the "law of the case." According to Cooke, our reversal in *Cooke I* constituted a rejection of every argument that James and Crabbe, Brown raised in their motion for summary judgment other than the argument that James' statement about reporting Cooke to the disciplinary counsel was a statement of opinion. Thus, Cooke argues that *Cooke I* rejected James' and Crabbe, Brown's arguments that they could not be liable for UDF and Gillan's statements because such statements were expressions of opinion and because Cooke was a limited-purpose public figure and lacked evidence of actual malice. He further argues that such rejection became "the law of the case."

**{¶48}** The law of the case doctrine "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. The law of the case doctrine is a rule of practice, not a binding rule of substantive law, and it will not be applied so as to achieve unjust results. Id. The doctrine functions to compel trial courts to follow the mandates of reviewing courts. Id. Thus, where a trial court confronts substantially the same facts and issues that were involved in a prior appeal, it is bound to follow the appellate court's determination of the applicable law and may not extend or vary the appellate court's mandate. Id. at 3-4.

**{¶49}** Contrary to Cooke's arguments, the mere fact that we reviewed the trial court's grant of summary judgment de novo in *Cooke I* does not require the conclusion that we rejected arguments not considered in the first instance by the trial court and not addressed in our *Cooke I* opinion. In a de novo review, the appellate court uses the trial court's record, but reviews the evidence and the law without deference to the trial court's rulings. *Zenfa Labs, Inc. v. Big Lots Stores, Inc.*, Franklin App. No. 05AP-343, 2006-Ohio-2069, at ¶25, citing *Herakovic v. Catholic Diocese of Cleveland*, Cuyahoga App. No. 85467, 2005-Ohio-5985, at ¶13; Black's Law Dictionary (7th Ed.1999) 94. The trial court granted summary judgment on Cooke's defamation claim against James and Crabbe, Brown based solely on its conclusion that James' own statement was opinion. It did not consider the substance of UDF and Gillan's statements or the existence or lack of evidence of actual malice. In *Cooke I*, we reversed the trial court's entry of summary judgment based solely on the existence of evidence from which James and Crabbe, Brown might be held liable for statements published by UDF and Gillan. We declined to address James' and Crabbe, Brown's arguments that UDF and Gillan's statements constituted opinions or that Cooke was a limited-purpose public figure who lacked evidence of actual malice. See *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84 (where the trial court based its entry granting summary judgment exclusively on one of several arguments made in support of summary judgment, other bases for summary judgment were not properly before the appellate court).

**{¶50}** This court has twice previously addressed and rejected Cooke's arguments regarding the effect of *Cooke I* on subsequent proceedings in this case. In *Cooke II*, we stated that *Cooke I* did not ultimately establish that the conduct of any

defendant actually constituted defamation and that "*Cooke I* is not 'the law of the case' on the issue of whether Cooke is a limited-purpose public figure or on whether Cooke presented clear and convincing evidence of actual malice." *Cooke II* at ¶43. In his motion for reconsideration of *Cooke II*, Cooke again argued that, because *Cooke I* reversed the trial court's judgment, we necessarily determined that none of the defendants' statements were opinion and that such determination was "the law of the case." Denying Cooke's motion for reconsideration, we stated, "[w]e maintain that *Cooke I* solely dealt with the issue of whether there was a genuine issue of material fact supporting Cooke's contention that Larry James and his law firm could be held liable for any possible defamatory statement. *Cooke I* did not resolve whether [UDF] and [Gillan] could be found to have defamed Cooke." *Cooke II* Memorandum Decision at ¶4.

**{¶51}** Despite our prior rejections, Cooke raises the same argument a third time. For the reasons stated in *Cooke II*, we again reject Cooke's argument. In *Cooke I*, we did not address the substance of UDF and Gillan's statements, whether Cooke was a limited-purpose public figure or whether Cooke had evidence of actual malice. Thus, on remand, the trial court had no "law of the case" to follow with respect to those issues. Just as we found in *Cooke II* that the trial court's entry of summary judgment in favor of UDF and Gillan did not conflict with *Cooke I*, we presently find that the trial court's subsequent entry of final judgment in favor of James and Crabbe, Brown does not conflict with *Cooke I*. Accordingly, we overrule Cooke's third assignment of error.

**{¶52}** In his fourth assignment of error, Cooke argues that the trial court erred in holding that he was a limited-purpose public figure and was, thus, required to establish that appellees acted with actual malice. Cooke makes the policy argument that an

attorney should not be designated a limited-purpose public figure where the attorney's statements to the media do not violate the Code of Professional Responsibility. This court explicitly rejected Cooke's argument that his designation as a limited-purpose public figure was error in *Cooke II*, stating that "[t]he facts in this case demonstrate that Cooke was a limited-purpose public figure." *Cooke II* at ¶33. As stated above, we also rejected Cooke's argument that *Cooke I* is the law of the case on the issue of Cooke's limited-purpose public figure status. For the reasons stated in Cooke *II*, we again reject Cooke's argument, and we overrule Cooke's fourth assignment of error.

**{¶53}** In his fifth and final assignment of error, Cooke maintains that the trial court erred in ordering portions of the record sealed. Again, Cooke is re-arguing an issue that this court has already addressed. Cooke's fifth assignment of error is a verbatim restatement of his second assignment of error from *Cooke I*. The thrust of Cooke's argument is that the trial court erred when it granted a motion, filed by UDF and Gillan, to place five documents under seal, subject to an agreed confidentiality order. Cooke did not dispute that the documents were subject to the confidentiality agreement, but argued that the confidentiality agreement did not require the documents to be sealed, as it only prohibited use and disclosure of the documents outside of these proceedings.

**{¶54}** In *Cooke I* at ¶47, we stated:

> Defendants UDF and Gillan filed the motion to have the documents placed under seal, they are not parties to this appeal, and their case remains pending before the trial court. Defendants James and Crabbe, Brown were not parties to the motion to seal, and they are the only parties opposing this appeal. Accordingly, the second assignment of error is not properly before this court at this time, and any decision by this court at this time without giving UDF and Gillan an

> opportunity to be heard would be prejudicial to their interests. The second assignment of error is, therefore, overruled.

Here, again, James and Crabbe, Brown are the only parties opposing this appeal. Cooke's claims against UDF and Gillan were finally determined in *Cooke II*, in which Cooke did not assign error based on the trial court granting UDF and Gillan's motion to place documents under seal. For the reasons stated in *Cooke I*, coupled with Cooke's failure to raise this assignment of error in *Cooke II*, we overrule Cooke's fifth assignment of error.

**{¶55}** Lastly, we must address James' and Crabbe, Brown's motion for an award of expenses against Cooke, filed April 18, 2006, and Cooke's memorandum in opposition, filed May 26, 2006. Pursuant to App.R. 23, James and Crabbe, Brown request an award of their reasonable expenses, including attorney fees, incurred in defending this appeal, which they argue was frivolous. If a court of appeals determines that an appeal is frivolous, it may require the appellant to pay the appellee's reasonable expenses, including attorney fees and costs. App.R. 23.

**{¶56}** A frivolous appeal under App.R. 23 is essentially one that presents no reasonable question for review. *Talbott v. Fountas* (1984), 16 Ohio App.3d 226. The purpose of sanctions under App.R. 23 is to compensate the non-appealing party for the expense of having to defend a spurious appeal and to help preserve the appellate calendar for cases worthy of consideration. *Frowine v. Hubbard* (Feb. 15, 2000), Franklin App. No. 99AP-496, citing *Tessler v. Ayer* (1995), 108 Ohio App.3d 47, 58. An appeal need not be frivolous in its entirety to warrant an award of expenses under App.R. 23. See *Stuller v. Price*, Franklin App. No. 03AP-30, 2003-Ohio-6826, at ¶29

(awarding fees and costs where four of six assignments of error presented no reasonable questions for review).

**{¶57}** In the present case, we find that Cooke's arguments in his first assignment of error, while ultimately unpersuasive, presented a reasonable question for review. However, we find that Cooke's second, third, fourth, and fifth assignments of error presented no reasonable questions for review. As discussed above, Cooke's third, fourth, and fifth assignments of error merely retread arguments considered and rejected by this court in previous appeals. Cooke's restatement of arguments already rejected by this court presents no reasonable question for review. See *Tessler* (granting App.R. 23 sanctions where appellant rehashed issue previously argued). Cooke's arguments regarding judicial bias and prejudice in his second assignment of error are not only unwarranted under existing law that this court lacks authority to consider such arguments, but are also unsupported by the record. See *Riley v. Supervalu Holdings, Inc.*, Hamilton App. No. C-050156, 2005-Ohio-6998, at ¶23 (finding appeal frivolous where the plaintiff ignored clear statutory language and controlling case law). Upon review, we find this appeal was frivolous as to Cooke's second, third, fourth, and fifth assignments of error, which presented no reasonable questions for review.

**{¶58}** James and Crabbe, Brown may submit evidence by way of affidavit regarding costs, including attorney fees, incurred in this appeal, within seven days of the judgment entry herein; Cooke may submit opposing affidavits within 14 days after judgment is entered. See *Arena Produce Co. v. McMillan* (1986), 27 Ohio App.3d 384, 385. Thereafter, this court will make a finding regarding the amount of the costs and/or fees that will be assessed against Cooke.

**{¶59}** Having overruled each of Cooke's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas and grant James' and Crabbe, Brown's App.R. 23 motion for an award of expenses.

*Judgment affirmed;*
*motion for expenses granted.*

PETREE and SADLER, JJ., concur.

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