COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY

JAMES J. MAYER, JR.

PLAINTIFF-APPELLEE **CASE NUMBER 3-98-29**

v.

LONNY LEE BRISTOW **O P I N I O N**

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part and reversed in part.

DATE OF JUDGMENT ENTRY: November 24, l999.

ATTORNEYS:

LONNY LEE BRISTOW
In Propria Persona
Inmate #357-921
PO BOX 45699
Lucasville, OH 45699
Appellant.

ISAAC, BRANT, LEDMAN & TEETOR
Mark Landes
Reg. #0027227
Terri B. Gregori
Reg. #0061874
Lance Chapin
Reg. #0069473
250 East Broad Street, Suite 900
Columbus, OH 43215
For Appellee.

SHAW, J. Defendant-appellant Lonny Lee Bristow appeals the August 20, 1998 order of the Crawford County Court of Common Pleas implementing certain restrictions upon his use of the prison mail system.

On June 1, 1998, plaintiff-appellee (and Richland County Prosecuting Attorney) James J. Mayer, Jr. filed a complaint in the Crawford County Common Pleas Court to have appellant declared a "vexatious litigator" pursuant to the provisions of R.C. 2323.52. During the preceding five-year period, appellant had filed numerous lawsuits in different courts directed at various Richland County officials, including appellee. Pursuant to an agreement between the parties, appellant admitted the allegations in the complaint, and was determined by the Crawford County Common Pleas Court to be a vexatious litigator in a judgment entry dated June 1, 1998.

On that same date, appellant was also remanded to the custody of the Department of Rehabilitation and Correction to serve a prison term on other matters. Despite certain prohibitions contained in the judgment entry, appellant apparently used his spare time in prison to send harassing letters, including several to the Sheriff of Richland County. In these letters, appellant stated that he would file "[h]undreds and [h]undreds" of lawsuits against Richland County officials, amongst others. Appellant's letters were brought to the attention of the trial court, and on July 30, 1998 that court issued an order stating that "the Defendant [shall] not have mail privileges at any state institution wherein he may be housed."

On August 20, 1998, "[b]ased upon practical concerns raised by the * * * Department of Rehabilitation and Correction," the trial court issued a new entry purporting to enforce its original vexatious litigator determination and "clarify[ing]" the July 30 order. The trial court's order mandated that "any mail from Lonny Lee Bristow that is addressed to any court other than to [the trial court] shall be forwarded to this Court for a determination as to its disposition." The order reasoned that "[i]n this way, defendant Bristow is assured of mail privileges to file any legal papers in this action or in his criminal matters and is further assured mail privileges to file any legal paper to institute any non-frivolous action upon motion and order of this Court." The court's order made an exception for mail addressed "to any attorney-at-law not listed * * * as a person requesting to not receive mail from Bristow," in order to assure appellant's ability "to access legal counsel or advice should he choose." Finally, the order directed that appellant was forbidden from sending mail "that is addressed to any person Bristow has harassed in the past and who does not want to receive mail from him." The court directed counsel for the plaintiff to forward a list of such persons to the Department of Rehabilitation and Correction.

On September 21, 1998, appellant forwarded a Motion for Leave to Proceed to the Crawford County Common Pleas Court, pursuant to the August 20, 1998 implementation order. In his motion, appellant sought leave to file a civil rights lawsuit in the Common Pleas Court of Richland County. The trial court

denied appellant's motion. On November 17, 1998, appellant filed an appeal from the trial court's August 20 implementation order, asserting a single assignment of error:

> **THE TRIAL COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR BY ITS AUGUST 20, 1998, JUDGMENT ENTRY AS IT DENIES THE APPELLANT ACCESS TO THE COURTS, FREEDOM OF EXPRESSION, THE RIGHT TO PRIVACY, THE RIGHT TO DUE PROCESS, AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GREIVANCES, IN VIOLATION OF THE OHIO AND UNITED STATES CONSTITUTIONS AND WRITTEN LEGISLATION THAT EXPRESSLY PROHIBITS SAID ORDER.**

We will first address appellant's argument that the trial court's order denies his access to the courts and due course of law in violation of the Ohio Constitution. Article I, Section 16 of the Ohio Constitution reads, in pertinent part:

> **All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.**

Article I, Section 16 protects the right to seek redress in Ohio's courts when one person is injured by another. See generally *Central Ohio Transit Authority v. Timson* (December 24, 1998), Franklin App. No. 98AP-509, unreported, 1998 WL 894817 at *3, citing *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466. The provision also prohibits impairment or abrogation of a common-law right or action existing at the time the Constitution was adopted without affording a

reasonable substitute for the right or action affected. See generally *Mominee v. Scherbarth*, (1986), 28 Ohio St.3d 270, 291-92 (Douglas, J., concurring). It is the primary duty of courts to sustain the Ohio Constitution's declaration of right and remedy wherever it has been wrongfully invaded. See *Kintz v. Harriger* (1919), 99 Ohio St. 240, paragraph two of the syllabus, overruled on other grounds by *Stephenson v. McCurdy* (l931), 124 Ohio St.117. Moreover, "[w]hen the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner." *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 47.

Here, appellant argues that the procedure established in the August 20, 1998 order is unconstitutional under the foregoing standard. Under the August 20 order, appellant's legal mail is forwarded directly to the Crawford County Court of Common Pleas for review under the standard established by R.C. 2323.52(F).

> **A court of common pleas that entered an order under division (D)(1) of this section shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court *unless the court of common pleas that entered that order is satisfied that the proceedings or application are not an abuse of process of the court in question and that there are reasonable grounds for the proceedings or application.*** (emphasis added).

The trial court's determination under R.C. 2323.52(F) is not appealable, see R.C. 2323.52(G), and if a person deemed a vexatious litigator proceeds in any legal

action without R.C. 2323.52(F) approval, that action is to be immediately dismissed. See R.C. 2323.52(I).

The only distinction between the procedure generally contemplated in R.C. 2323.52 and the trial court's implementation order in this case is a factual one. Because R.C. 2323.52(I) requires dismissal of unapproved actions, the statute's scheme clearly contemplates that some vexatious litigators will attempt to proceed without leave. However, because appellant is in prison, the court's order requires appellant's legal mail to be forwarded to the trial court for the R.C. 2323.52(F) determination. He is therefore literally incapable of going forward in any legal proceeding without the trial judge's approval.[1]

R.C. 2323.52 clearly establishes a procedure by which the rights of vexatious litigators to access the courts are restricted; indeed, such restriction is the very goal of the statute. Cf. *Central Ohio Transit Authority v. Timson* (December 24, 1998), Franklin App. No. 98AP-509 at *4. In turn, the trial court's implementation of the statute in this case, coupled with the express assignment of error raised by appellant clearly require this Court to analyze R.C. 2323.52 itself

[1] Appellant argues that insofar as the procedure established restricts his access to courts other than the Crawford County Court of Common Pleas, it results in a denial of his right of access and right to a remedy under the Ohio Constitution. In support of his argument appellant cites Ohio Adm. Code 5120-9-18, which vests control over mail restrictions in the Department of Rehabilitation and Corrections. Appellant contends that the trial court lacked authority to order any restrictions beyond that authorized under the Ohio Administrative Code. Specifically, appellant argues that the trial court could not order appellant's legal mail be forwarded to that court rather than the address appellant had intended to send it to. However, because the rights of prisoners to the courts are limited beyond those of other citizens, see, *e.g., Bounds v. Smith* (1977), 430 U.S. 817, we perceive no legally significant difference between the procedure contemplated under R.C. 2323.52 and that outlined in the trial court's implementation order dated August 20, 1998.

under Article I, Section 16 of the Ohio Constitution. That provision prohibits the legislature from impairing or abrogating common-law rights and actions existing at the time the Constitution was adopted without affording a reasonable substitute. Here, because the right abrogated obviously impairs appellant's direct access to the courts, a substitute for direct access must be provided "in a meaningful time and in a meaningful manner." *Id.* at *4. Accordingly, the question ultimately before this Court is whether the procedure described in R.C. 2323.52 provides a reasonable and meaningful substitute for direct access to Ohio's trial courts.[2]

> **(A) As used in this section:**
>
> **(1) "Conduct" has the same meaning as in section 2323.51 of the Revised Code.**
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> **(2) "Vexatious conduct" means conduct of a party in a civil action that satisfies any of the following: (a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action. (b) 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. (c) The conduct is imposed solely for delay.**
>
> **(3) "Vexatious litigator" means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions. "Vexatious litigator" does not**

[2] In papers filed outside the record in this case, appellant has alleged that the trial court has prevented him from proceeding in states other than Ohio. The trial court justifies this action by stating that "[a]lthough several courts in Ohio now refuse his pauper pleadings and he has been declared a vexatious litigator in Ohio, Bristow has pledged to, and now is filing his frivolous actions across the United States and in foreign countries." (Judgment Entry dated August 20, 1998, at *3). As the dissent quite correctly notes, this certainly appears to be the case. Nevertheless, we believe that basic principles of federalism and sovereignty prohibit the trial court from relying upon an Ohio statute to impede appellant's actions in any courts other than Ohio's own.

include a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio unless that person is representing or has represented self pro se in the civil action or actions.

(B) A person, the office of the attorney general, or a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation who has defended against habitual and persistent vexatious conduct in the court of claims or in a court of common pleas, municipal court, or county court may commence a civil action in a court of common pleas with jurisdiction over the person who allegedly engaged in the habitual and persistent vexatious conduct to have that person declared a vexatious litigator. The person, office of the attorney general, prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation may commence this civil action while the civil action or actions in which the habitual and persistent vexatious conduct occurred are still pending or within one year after the termination of the civil action or actions in which the habitual and persistent vexatious conduct occurred.

(C) A civil action to have a person declared a vexatious litigator shall proceed as any other civil action, and the Ohio Rules of Civil Procedure apply to the action.

(D) (1) If the person alleged to be a vexatious litigator is found to be a vexatious litigator, subject to division (D)(2) of this section, the court of common pleas may enter an order prohibiting the vexatious litigator from doing one or more of the following without first obtaining the leave of that court to proceed: (a) Instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court; (b) Continuing any legal proceedings that the vexatious litigator had instituted in the court of claims or in a court of common pleas, municipal court, or county court prior to the entry of the order; (c) Making any application, other than an application for leave to proceed under division (F) of this section, in any legal proceedings instituted by the vexatious litigator or another

person in the court of claims or in a court of common pleas, municipal court, or county court.

(2) If the court of common pleas finds a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio to be a vexatious litigator and enters an order described in division (D)(1) of this section in connection with that finding, the order shall apply to the person only insofar as the person would seek to institute proceedings described in division (D)(1)(a) of this section on a pro se basis, continue proceedings described in division (D)(1)(b) of this section on a pro se basis, or make an application described in division (D)(1)(c) of this section on a pro se basis. The order shall not apply to the person insofar as the person represents one or more other persons in the person's capacity as a licensed and registered attorney in a civil or criminal action or proceeding or other matter in a court of common pleas, municipal court, or county court or in the court of claims. Division (D)(2) of this section does not affect any remedy that is available to a court or an adversely affected party under section 2323.51 or another section of the Revised Code, under Civil Rule 11 or another provision of the Ohio Rules of Civil Procedure, or under the common law of this state as a result of frivolous conduct or other inappropriate conduct by an attorney who represents one or more clients in connection with a civil or criminal action or proceeding or other matter in a court of common pleas, municipal court, or county court or in the court of claims.

(E) An order that is entered under division (D)(1) of this section shall remain in force indefinitely unless the order provides for its expiration after a specified period of time.

(F) A court of common pleas that entered an order under division (D)(1) of this section shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court unless the court of common pleas that entered that order is satisfied that the proceedings or application are not an abuse of process of the court in question and that there are reasonable grounds for the proceedings or application. If a

person who has been found to be a vexatious litigator under this section requests the court of common pleas that entered an order under division (D)(1) of this section to grant the person leave to proceed as described in this division, the period of time commencing with the filing with that court of an application for the issuance of an order granting leave to proceed and ending with the issuance of an order of that nature shall not be computed as a part of an applicable period of limitations within which the legal proceedings or application involved generally must be instituted or made.

(G) During the period of time that the order entered under division (D)(1) of this section is in force, no appeal by the person who is the subject of that order shall lie from a decision of the court of common pleas under division (F) of this section that denies that person leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court.

(H) The clerk of the court of common pleas that enters an order under division (D)(1) of this section shall send a certified copy of the order to the supreme court for publication in a manner that the supreme court determines is appropriate and that will facilitate the clerk of the court of claims and a clerk of a court of common pleas, municipal court, or county court in refusing to accept pleadings or other papers submitted for filing by persons who have been found to be a vexatious litigator under this section and who have failed to obtain leave to proceed under this section.

(I) Whenever it appears by suggestion of the parties or otherwise that a person found to be a vexatious litigator under this section has instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from the appropriate court of common pleas to do so under division (F) of this section, the court in which the legal proceedings are pending shall dismiss the proceedings or application of the vexatious litigator.

Any constitutional analysis begins with the proposition that legislative enactments enjoy a strong presumption of constitutionality. See, *e.g., State ex rel. Jackman v. Court of Common Pleas of Cuyahoga Cty.* (1967), 9 Ohio St.2d 159, 405. It is not our duty to assess the wisdom of a statute but to determine whether it was enacted pursuant to the General Assembly's constitutional authority. See *Primes v. Tyler* (1975), 43 Ohio St.2d 195, 198.

The procedure described in the vexatious litigator statute vests complete authority to determine the validity of virtually all of a person's statewide legal actions in one trial court, see R.C. 2323.52(F), and deprives that person of any right to appeal that court's determination. R.C. 2323.52(G). Exactly what constitutes "an abuse of process" is left unresolved by the statute, as is the question of what situations might constitute "reasonable grounds" for leave to proceed.

It is also apparent from the structure of the statute that the trial court is required to make its determination prior to, and hence without, any sort of fact finding process. Thus, trial courts are left with no legal or factual guidance in determining whether reasonable grounds to proceed have been established, and because no appeal is contemplated in the statute, there is no requirement that the trial court articulate upon the record whatever factual or legal grounds may have been the basis for its decision to deny leave to proceed. As a result, summary denial would apparently be proper under the statute solely based on the trial

court's personal decision that the lawsuit is unreasonable, even if the facts alleged are true and the cause of action has merit.

In short, the statute allows a trial court to arbitrarily and summarily deny leave to proceed even *in another jurisdiction* upon a formally proper complaint that would ordinarily survive a motion to dismiss under Civ.R. 12(B)(6).

Additionally, a careful reading of the statute indicates that it directly affects a vexatious litigator's access to the courts, not merely his or her right of self-representation. Cf. *Kondrat v. Byron* (1989), 63 Ohio App.3d 495, 498. The statute's definition of "vexatious litigator" apparently includes only those who are "representing or [have] represented self pro se in the civil action or actions [sic]." R.C. 2323.52(A)(3). However, once a person is deemed a vexatious litigator, he or she is prohibited from instituting new legal proceedings without leave of court, regardless of whether the vexatious litigator is represented by counsel. See R.C. 2323.52(D)(1). By its plain terms, the statute fails to exempt the situation where a person deemed to be a vexatious litigator retains counsel for a legitimate lawsuit.[3] The person in that situation remains subject to prefiling review under R.C. 2323.52(F).[4]

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[3] The statute does purport to exempt from R.C. 2323.52(F) attorneys deemed to be "vexatious litigators" but who are acting in a representative capacity. See R.C. 2323.52(D)(1).

[4] In *Kondrat v. Byron* (1989), 63 Ohio App.3d 495, 498, the Lake County Court of Appeals reviewed the validity of an injunction restricting the appellant's ability to file pleadings in that county, and noted the significant distinction between self-representation and access to the courts:

> "**We note that only his right of self-representation is being denied, not his right of access to the courts; *Mr. Barday is still free to proceed through an attorney of his***

In sum, the statute authorizes one trial court to shut off a vexatious litigator's access to all other Ohio trial courts. While courts may certainly employ drastic measures, including prefiling orders,[5] to prevent frivolous litigation from overtaking their own dockets, we believe it is a far different matter to allow one Ohio trial court to arbitrarily prevent a litigant from pursuing any and all claims in all Ohio trial courts.

> **Apart from the necessity of a case-by-case determination of poverty, frivolity or maliciousness, a court may impose conditions upon a litigant—even onerous conditions—so long as they assist the court in making such determinations, and so long as they are, taken together, not so burdensome as to deny the litigant meaningful access to the courts.**

In Re Green (1981), 669 F.2d 779, 786; cf. *Procup v. Strickland* (1986), 792 F.2d 1069, 1070-73.

In *Central Ohio Transit Authority v. Timson* (December 24, 1998), Franklin App. No. 98AP-509, unreported, 1998 WL 894817, the Tenth District Court of

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> ***choice, and he is still free to appear 'pro se' in his own 'defense.' Thus, this injunction works no infringement on respondent's constitutional rights."***

Id., quoting *Bd. of Cty. Commrs. v. Barday* (1979), 197 Colo. 519, 522; 594 P.2d 1057, 1059 (emphasis added). We believe it to be self-evident that the injunction at issue in *Kondrat* is distinguishable from the procedure intended under R.C. 2323.52.

[5] In 1990, California enacted a statute prohibiting persons deemed to be vexatious litigants from filing any new litigation without obtaining leave of the presiding judge of the court where the litigation is to be filed. See Cal. Code Civ. Proc. 391.7, cited in *Central Ohio Transit Authority v. Timson* (December 24, 1998), Franklin App. No. 98AP-509, unreported, 1998 WL 894817 at *4. The California statute is substantially different than the one adopted by the Ohio legislature, in part because the two statutes utilize different standards. Under the California statute, filing is mandatory "if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay." Cal. Code Civ. Proc. 391.7(b). Perhaps the more significant distinction, however, is the fact that under California's rule the prefiling determination is made by a judge in the court where the filing is to occur, rather than by a trial court that may or may not have any relationship to the litigation. Notably, California's procedure survived a challenge under a provision of that state's constitution analogous to Oh. Const. Art. I Sec. 16. See *Wolfgram v. Wells Fargo Bank* (Cal.App.1997), 53 Cal. App.4th 43, 61 Cal.Rptr.2d 694.

Appeals determined that the bulk of the vexatious litigator statute is constitutional under Art. I. Sec. 16. See *id.* at *5. However, that court did strike the provisions of the statute that preclude appeal. See *id.* at *6. We agree with the Tenth District's conclusion that R.C. 2323.52(G) is unconstitutional. However, for many of the same reasons we respectfully disagree with that court's conclusions regarding the remainder of the statute. For one thing, merely allowing appeal of a trial court's decisions under R.C. 2323.52(F) does not remedy the wholly vague and arbitrary nature of the underlying determination. On the contrary, it merely forces another equally vague and arbitrary determination to be made by the court of appeals, where in most cases the appellate "record" will consist of nothing more than a single pleading, quite possibly addressing a trial court, parties, and subject matter outside the jurisdiction of the district court of appeals purporting to review it. Moreover, we fail to see how a trial court's determination under R.C. 2323.52(F) could ever be deemed an abuse of the unfettered discretion the statute apparently conveys, assuming such a standard of review, which, of course, is entirely unestablished as well.

In concluding our analysis we believe some of the concerns raised by the dissent should also be addressed. The dissent contends that it is unnecessary to address the constitutionality of R.C. 2323.52 in this case because appellant waived

the issue by consenting to the label and by failing to immediately appeal the trial court's June 1, 1998 judgment declaring him to be a vexatious litigator.[6]

We respectfully disagree. It is well established that in order to challenge the validity of a statute, the person challenging the statute generally must be able to demonstrate actual and direct injury. See generally *State ex rel.Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469-70. However, in this case any injury to appellant as a result of him being declared a vexatious litigator was merely theoretical until he was actually prevented from filing a lawsuit pursuant to R.C. 2323.52(F). Cf., e.g., *State v. Spikes* (1998), 129 Ohio App.3d 142, 145. Thus, the specific constitutional claim raised in this case was not ripe for appellate review until the trial court denied him leave to proceed. Moreover, inasmuch as R.C. 2323.52(G) explicitly states that a trial court's denial of leave to proceed is not appealable, we do not believe the application of traditional principles of waiver and preservation of appellate review urged by the dissent can in good faith be held to govern our decision, even assuming those doctrines are not in fact obviated by the express statutory prohibition of any appeal.

The dissent also argues that R.C. 2323.52 is analogous to the statute approved by the Ohio Supreme Court in *Conley v. Shearer* (1992), 64 Ohio St.3d 284. The statute discussed in that case required plaintiffs alleging malicious

[6] As the dissent observes, appellant apparently admitted to being a vexatious litigator in exchange for a plea bargain in an unrelated criminal case. While we believe such an arrangement to be highly questionable, the dissent is quite correct in pointing out that no appeal was taken from this judgment.

wrongdoing by a state employee to file a preliminary action in the Ohio Court of Claims to determine whether the employee was entitled to personal immunity and also whether the courts the courts of common pleas would have subject-matter jurisdiction over the claim alleged. However, in drawing its comparisons, the dissent overlooks several crucial differences between the statutes. First of all, unlike the trial court's decision on a motion for leave to proceed, the immunity decision occurs after a limited amount of discovery, "preferably on a motion for summary judgment." *Roe v. Hamilton Cty. Dept. of Human Serv.* (1988), 53 Ohio App.3d 120, 126, quoted in *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292. The trial court therefore has some factual record upon which its decision may be based, in stark contrast to the procedure described in R.C. 2323.52.

Furthermore, the statute approved in *Conley* did not restrict the right of plaintiffs to appeal a grant of immunity. Cf. *id.* at 286-87. Most importantly, we must point out that the statute approved in *Conley* affects only those actions filed by any plaintiff "against an officer or employee [] as defined in section 109.36 of the Revised Code," whereas the vexatious litigator statute affects lawsuits filed against *any defendant*. In short, the immunity statute limited the capacity *to be sued*, not the capacity to sue. As a result, the statute approved in *Conley* had only a limited effect on a plaintiff's access to the courts.

Finally, the dissent argues that the statute does not restrict access to the federal courts, and would reverse the judgment of the trial court only insofar as it

exceeds the scope of the statute in this respect. We agree with the dissent's construction of the statute on this issue, but we reject the suggestion that access to the federal courts is a "meaningful substitute" for access to Ohio's trial courts. It is also suggested that vexatious litigators may effectively challenge irrational decisions by the trial court through mandamus proceedings. Again, we would respectfully disagree, insofar as a mandamus action can only compel performance of specific duties which, for the reasons stated above, are entirely undefined and unreviewable under this statutory scheme. As we have observed regarding direct appeals, "[m]erely allowing appeal of a trial court's decisions under R.C. 2323.52(F) does not remedy the essentially arbitrary nature of the underlying determination. * * * [I]t merely forces another equally arbitrary determination to be made by the court of appeals." Supra, at *12-13. We believe this argument applies with equal force to the filing of original actions in Ohio's appellate courts.

In conclusion, we can easily concur with the dissent insofar as Lonny Lee Bristow appears to be exactly the type of litigant to whom R.C. 2323.52 was directed. However, unlike the dissent, we do not believe that this fact alone supersedes all other considerations in evaluating the fundamental constitutional inadequacies of the statute.

For the foregoing reasons, we now hold that the procedure established by R.C. 2323.52, the vexatious litigator statute, fails to provide a reasonable and meaningful substitute for direct access to Ohio’s trial courts. We therefore

determine that the statute is unconstitutional in its entirety as violative of Ohio Const. Art. I Sec. 16. To the extent this places our decision in conflict with the decision of the Tenth District Court of Appeals in *Central Ohio Transit Authority v. Timson* (December 24, 1998), Franklin App. No. 98AP-509, unreported, 1998 WL 894817, and with the First District Court of Appeals decision *Deters v. Briggs* (December 31, 1998), Hamilton App. No C-971033, unreported, 1998 WL 906405, discretionary appeal not allowed (1999) 85 Ohio St.3d 1460, No. 99-152, we acknowledge the conflicts and certify the same to the Ohio Supreme Court pursuant to Oh. Const. Art. IV Sec. 3(B)(4).[7]

Despite our holding today, we recognize that trial courts should have and indeed do have broad inherent authority to protect their own dockets and the integrity of their own judicial processes. Cf. *In Re Martin-Trigona* (1984), 737 F.2d 1254, 1261. The Crawford County Court of Common Pleas has such authority to institute pre-filing review procedures as to appellant's filings in that court. See *State ex rel. Richard v. Cuyahoga Cty. Bd. Of Comm.* (l995), 100 Ohio App.3d 592. Moreover, insofar as the trial court's order prevents appellant from sending letters to persons who have requested not to receive mail from him, it is clearly authorized by Ohio Adm. Code 5120-9-18.

[7] In *Deters*, the Hamilton County Court of Appeals held that R.C. 2323.52 did not violate Section 16, Article I of the Ohio Constitution, and in *Timson*, the Franklin County Court of Appeals held that only subsection (G) of the statute is violative of the Constitutional provision.

Accordingly, the trial court's order dated August 20, 1998 is sustained only to the extent that it affects those limited concerns. In all other respects, appellant's sole assignment of error is sustained, and the judgment of the Crawford County Court of Common Pleas is reversed.

Judgment affirmed in part and reversed in part.

BRYANT, P.J., concurs.

HADLEY, J., dissents.

HADLEY, J., dissents. I respectfully dissent from the majority which has gratuitously found it necessary to analyze R.C. 2323.52 and found it to be "violative of Ohio Const. Art. I Sec. 16" because the statute "fails to provide a reasonable and meaningful substitute for direct access to Ohio's trial courts."

We learned of appellant's plea agreement in *State v. Bristow* (June 1, 1998), Crawford App. No. 98 CV-82, unreported, 1999 WL 254098, wherein appellant wanted to withdraw his guilty pleas to his fourteen counts of telephone harassment because the trial court failed to advise him of his constitutional rights and to inform him of the nature of the offenses in violation of his due process rights. We said that *res judicata* barred consideration of his assignments of error because he could have raised the issues on his first appeal. In any case, we learned then that appellant had entered into a plea agreement that resulted in his stating, "* * * that I on the record would admit to being a vexatious litigator * * *."

In the present case, appellant again states that he agreed to such a classification and that as such he knew that he was to seek leave of the Crawford County Court of Common Pleas before commencing an action in any court inferior to the courts of appeals. Appellant does not contest his portion of that agreement and he did not appeal the June 1, 1998 finding that he is a vexatious litigator. See appellant's *Written Presentation in Lieu of Oral Argument*.

When appellant arrived in prison, he wrote to individuals and told them very bluntly that he was "piecing together the largest lawsuit campaign in history against the sheriff, his deputies and their families." He further stated that "I get my rock(s) off showing you that you cannot beat me, and you sure as well will never, ever stop me. Do what you must Jerry, what's coming down the pike will forever bury you, your family, your deputies and their families for the next 25 years. I have already vowed to sue you until the day they put you 6 feet under, then, I'm gonna sue your estate."

True to his word, by 1998, appellant had filed a number of lawsuits all over Ohio and the United States. In 1995, in the Northern District of Ohio, U.S. District Judge David Dowd, Jr. found as follows:

* * * **The uncontroverted evidence in the record establishes that Bristow has filed thirty-nine (39) lawsuits in this court against various defendants without paying any fees or costs due in his *in forma pauperis* status. Most of these actions are directed at Richland County officials and employees, but others include victims of his telephone harassment. * * * Bristow used filing complaints as a source of amusement to pass his time in jail at the expense of defendants and the taxpayers.**

*** * * Mr. Bristow's new-found weapon-filing meritless claims-has resulted in exorbitant expense to the named defendants and the taxpaying public. Through the abuse of the *in forma pauperis* device, Bristow attempts to make a mockery of the judicial system.**

*** * * Bristow has filed thirty-nine (39) actions arising out of the same set of facts, and through this experience, he has learned how to circumvent the pre-screening process. Although he knows he will never win a judgment, he gets revenge each time the defendants pay their attorney fees and court costs. For the cost of a stamp, Bristow has found a way to inflict his revenge on the defendants and the general taxpaying public. The only effective and fair way to curb his abuse is to take away the procedural privilege that he has twisted into a weapon.** (June 6, 1995 Memorandum Opinion and Order, Case No. 5:93 CV 2698).

In this case the trial court on July 30, 1998 imposed an order restricting appellant's mail privileges in any institution. This caused the Department of Rehabilitation and Correction some concern and the trial court followed that up with the August 20, 1998 order to clarify the previous order. It is from this order that the appeal has been taken.

The majority does not seem to have trouble with the mail restriction but has seen fit to gratuitously "analyze" R.C. 2323.52 and conclude that the appellant does not receive due process of law as a result of that statute, an issue not raised directly on appeal by appellant. Even if appellant had not consented to the vexatious litigator title and had raised the constitutional issue at this time, it is well settled that an issue first raised on appeal need not be heard.

Further, unlike the majority, appellant is not troubled by R.C. 2323.52 and states in his *Written Presentation in Lieu of Oral Argument*, "The vexatious

litigator order does not prohibit me from suing anyone. I must ask permission first."

As pointed out by the court in *Central Ohio Transit Authority v. Timson* (Dec. 24, 1998), Franklin App. No. 98AP-509, unreported, 1998 WL 894817, all legislative enactments enjoy a presumption of constitutionality. That Court also pointed out that a legislative enactment is deemed valid on due process grounds if it bears a real and substantial relation to the public health, safety, morals or general welfare and if it is not unreasonable or arbitrary.

The vexatious litigation statute is designed to prevent the abuse of the judicial system by those who persistently and habitually file lawsuits without reasonable grounds and/or otherwise engage in frivolous conduct. As such, it bears a substantial relation to the general public welfare. It is not unreasonable or arbitrary because it only applies to those who engage in harassing, unfounded lawsuits.

While legislation that abolishes or impairs "open courts" can be found to be invalid unless a reasonable substitute is provided, the procedure set forth in R.C. 2323.52 does provide for such a substitute and also provides it in a meaningful time and manner. As appellant points out, he is not precluded from bringing suit, he just must first obtain leave of court that the proposed action is not an abuse of process and that there are reasonable grounds for the lawsuit.

The 10th District Court of Appeals did not have trouble with this concept in *Timson, supra,* nor did the 1st District in *Deters v. Briggs* (December 31, 1998), Hamilton App.No. C-971033, unreported, 1998 WL906405.

The procedure set forth in R.C. 2323.52 is not unlike the procedure in R.C. 2743.02 considered to be reasonable and not unconstitutional by The Ohio Supreme Court in *Conley v. Shearer* (1992), 64 Ohio St.3d 284. That statute requires one to pursue an action in the Court of Claims as a condition precedent to an action in a common pleas court against a state employee. Interestingly, speaking on immunity, that case cited Judge Learned Hand in *Gregoire v. Biddle* (C.A.2, 1949), 177 F.2d 579, 581, as follows:

The justification * * * is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

The Court in speaking concerning the public policy reasons behind the statute supporting immunity for public officials went on to quote The United States Court of Appeals for the Third Circuit from *Bauers v. Heisel* (C.A.3, 1966), 361 F.2d 581:

(1) The danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on [people] * * * who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits [which would require inordinate private record keeping*]; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal**

removal proceeding are more appropriate ways to enforce honesty and efficiency of public officers.

Thus the public policy for R.C. 2323.52 parallels the reasoning for the R.C. 2743.02 immunity statute.

The majority also finds troubling the vesting of the authority in one trial court to make the determination to proceed with a lawsuit in another jurisdiction. The majority feels that the trial courts are left with no guidance to determine what "reasonable" and other legal terms mean in making the determination on motions by a vexatious litigator to proceed with his suit and that summary denial may be subject to abuse. Obviously, The Supreme Court of Ohio did not have the same problem in *Conley v. Shearer, supra,* in finding that the Court of Claims was able to screen immunity cases as a prerequisite for the trial courts all over the State and, further, in finding that the statute is procedural in nature and thus does not violate any substantive rights.

Any abuse by a trial court would be subject to correction by an original action in appellate or federal court. The majority foresees that the record in such a case would not be reviewable as the duties of the trial court are undefined. R.C. 2323.52 clearly states that the trial court determine that the proceedings or applications are not an abuse of process and that there are reasonable grounds for the proceedings. Such terms are not totally foreign to legal practitioners and have been amenable to simple interpretations and review in the past.

The majority, like the court in *Timson, supra,* attacks the statute because of the language in (G):

(G) During the period of time that the order entered under division (D)(1) of this section is in force, no appeal by the person who is the subject of that order shall lie from a decision of the court of common pleas under division (F) of this section that denies that person leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court.

As Justice Douglas pointed out in *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 84, the United States Supreme Court has long held that a "right" to appeal is not found in the Constitution. Nor is one found in the Ohio Constitution. R.C. 2505.03 does provide that every final order may be reviewed "*unless otherwise provided by law*". And, of course, once the appellate process kicks in, litigants cannot be deprived of review by not being granted due process of law.

Section 3(B)(2) of Article IV of the Constitution of Ohio provides:

Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

R.C. 2323.52 contains language that amounts to one of those "*otherwise provided by law*" situations by providing that there is no appeal from a refusal to grant leave to a vexatious litigator who has not shown that his case is not an abuse

of process and that his cause presents reasonable grounds to proceed. Thus there is no violation of due process as found by the majority and by *Timson* because there is no "right" to appeal.

It could further even be said that the action by the trial court in determining whether to grant leave to a vexatious litigator to proceed with litigation is purely an executive or administrative action, not involving the exercise of judicial power. Such authority is akin to the discretionary determination of a prosecutor or grand jury considering the indictment process. Not being judicial in nature, the fact that there is no appeal is not violative of the Constitution. *Ohio Assn. Of Pub. Sch. Emp. v. Lorain Cty.* (1991), 72 Ohio App.3d 74.

A statute does enjoy a presumption of constitutionality and only if unconstitutionality is shown beyond a reasonable doubt can the statute be declared invalid. The majority attempts to point out weaknesses in what might not be a perfectly drafted statute but it has not shown beyond a reasonable doubt that this statute is unconstitutional.

While I do find that the statute is constitutional, I also find that the trial judge in this matter has exceeded his authority in mandating that "any mail from Lonny Lee Bristow that is addressed to any court other than to [the trial court] shall be forwarded to this Court for a determination as to its disposition." R.C. 2323.52(D)(1) reveals that a common pleas court which adjudicates a person to be a vexatious litigator may only enter an order prohibiting that person from

instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court. Thus, the order of the Crawford County Court of Common Pleas is overbroad because it prohibits a vexatious litigator from instituting a legal proceeding or action in a court other that those enumerated in the statute.

For the foregoing reasons, I respectfully dissent, and would affirm in part and reverse in part the decision of the trial court.