[Cite as *A.P. Lee & Co., Ltd., v. R.R. Bowler, L.L.C.*, 2015-Ohio-2535.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

A.P. Lee & Co., Ltd.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-599 (C.P.C. No. 12CV-15876)
R.R. Bowker, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
[Nanci L. Danison,	:	
Appellant].	:	

D E C I S I O N

Rendered on June 25, 2015

Ulmer & Berne LLP, *Alexander M. Andrews*, and *Christine E. Watchorn*, for appellees, R.R. Bowker, LLC, Rhonda McKendrick, Michael Olenick, and Cheryl Patrick.

Brian J. Halligan, for appellees BookMasters, Inc., Cheryl Householder, and Braden Sanders.

Nanci L. Danison, pro se.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendant-appellant, Nancy L. Danison, an attorney licensed to practice law in the state of Ohio, appeals pro se from a decision of the Franklin County Court of Common Pleas, rendered on July 17, 2014, denying her motion for sanctions against defendants-appellees, R.R. Bowker, LLC, BookMasters, Inc., Rhonda McKendrick, Michael Olenick, Cheryl Patrick, Cheryl Householder, Braden Sanders, and their respective counsel ("defendants"). Danison argues that these persons and parties frivolously leveled contempt charges against her before the trial court and that it was error

for the trial court to have denied her motion for sanctions after she was found not guilty of contempt. We overrule all Danison's assignments of error and affirm the decision of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} A number of years ago Nancy L. Danison began to, at times, spell her first name "Nanci." Some records show her first name as "Nancy" and some as "Nanci." In 1981 she married Roger Lautzenhiser. In 1985 the pair dissolved their marriage. The dissolution document does not address restoring Danison to her maiden name and both the abstract of marriage and the dissolution document are signed by Danison as "Nanci L. Danison." Thus, there is some doubt about whether Danison ever changed her surname to Lautzenhiser. It appears from the record that she has always practiced law as "Nanci Danison." When Danison made the decision to go into businesses outside of the practice of law she consulted an ethics attorney, Charles Kettlewell. In 1995, Kettlewell advised her, based on the then-existing cannons of professional ethics, that it was necessary to keep her business and legal practices separate.

{¶ 3} In a Secretary of State filing for a business that Danison founded approximately four months after receiving Kettlewell's advice in 1995, "Nanci Danison" is listed as both statutory agent and business principal. By the time Danison founded her publishing business, A.P. Lee & Co. ("A.P. Lee"), in 2007, her application of Kettlewell's advice emerged in the use of her former married name, Lautzenhiser, despite the fact that she had not been married to Roger Lautzenhiser for 22 years, and even though there is considerable ambiguity about whether she ever officially adopted Lautzenhiser's surname. "Nancy Lautzenhiser" became her business name for publishing, while "Nanci Danison" was her name in the practice of law. In founding documents for A.P. Lee filed with the Ohio Secretary of State, "Nancy Lautzenhiser" appears as a signatory business principle and "Nanci Danison" is the signatory statutory agent for service of process.[1]

{¶ 4} In 2012, A.P. Lee experienced some problems with defendants R.R. Bowker, LLC ("Bowker") and BookMasters, Inc. ("BookMasters") relating to book distribution and

[1] The record contains some exemplars, dating from 2002 through 2006, of Danison using "Lautzenhiser" (for example, on pieces of mail and when interviewing persons as part of a private investigations business). However, these uses do not appear indicative of the intentional business/law dichotomy she later claims to have employed.

the proper designation of A.P. Lee's titles in the ISBN catalog "Books in Print." Danison, using the name "Nancy Lautzenhiser," contacted employees for both companies on several dates seeking information concerning the dispute. For example, on December 10 and 11, 2012, "Lautzenhiser" wrote to an employee of Bowker, Rhonda McKendrick, to request information about how ISBN information relating to A.P. Lee's titles could have been changed. McKendrick answered the inquiries on both occasions. On December 10 and 13, 2012, "Lautzenhiser" wrote to a different employee of Bowker, Michael Olenick, requesting an explanation of why changes were made in the ISBN database about A.P. Lee's titles. Olenick answered her inquiry and stated that he personally sometimes changes ISBN information. Also on December 13, 2012, "Lautzenhiser" again wrote to McKendrick regarding distribution by Kindle (a digital book reader marketed by Amazon.com) and received a response indicating that Bowker may change ISBN information based on information received from a distributor, not merely a publisher.

{¶ 5} On December 14, 2012, Danison wrote a demand letter to Bowker's "Legal Department" as "Nanci Danison" informing Bowker that she represented A.P. Lee and using the information gained from her communications with Bowker employees to accuse Bowker of "knowingly and intentionally" changing data in the ISBN database, "Books in Print," with the result of "severe[] damage [to her] client." (Defendants' Motion to Show Cause, exhibit I.) For instance, she wrote: "One employee informed my client that he changes every publisher's genre classifications." (Defendants' Motion to Show Cause, exhibit I.) (*See also*, exhibit E, Olenick telling "Lautzenhiser" that he changes all classifications.) Following the demand letter, on December 17, 2012, Danison (writing as "Lautzenhiser" again) contacted a Bowker employee and obtained additional information about changed ISBN information. Information gained as a result of this and the other interactions between Bowker employees and "Lautzenhiser" was incorporated by Danison in a second demand letter (written as "Nanci Danison" to Bowker's corporate counsel) on December 20, 2012.

{¶ 6} On December 31, 2012, Danison (acting as counsel for A.P. Lee) filed suit against Bowker, BookMasters, and some of the employees with whom she had corresponded as "Lautzenhiser," including Olenick and McKendrick. She signed the complaint, "Nanci L. Danison." On January 28, 2013, Danison amended the complaint.

Both complaints contained allegations based on the information she obtained via inquiries made as "Lautzenhiser."

{¶ 7} On February 22, 2013, defendants moved to dismiss A.P. Lee's amended complaint for improper venue and insufficiency of service of process. On March 11, 2013, Danison filed memoranda contra on behalf of A.P. Lee, signing as "Nanci L. Danison." To support the memoranda, Danison attached an affidavit by "Nancy Lautzenhiser." Neither the "Lautzenhiser" affidavit nor any other filing before the court at that time disclosed that "Lautzenhiser" and Danison were one-and-the-same person, and the affidavit referred to Danison as if she were a separate person:

> 4. Although legal counsel is billing A.P. Lee & Co., Ltd. for her services, the company has only been able to pay a few hundred dollars toward fees already incurred * * *.

(Memorandum Contra, exhibit.)

{¶ 8} Defendants researched the name "Nancy Lautzenhiser" in an effort to gain information about who this potential witness was and discovered first, that there appeared to be no such person, and second, that "Nanci Danison" had, in the early 1980s, been married to Roger Lautzenhiser. Thus, defendants noted in their replies to Danison's memoranda and "Lautzenhiser's" affidavit that "[a]s part of an apparent pattern of intentionally omitting facts necessary to an honest understanding of the matters before this Court, Plaintiff's counsel, Nanci Danison, has failed to inform the Court that she, herself, is 'Nancy Lautzenhiser.' " (Reply Brief in Support of Motion to Dismiss, fn. 1.) In response, on March 18, 2013, Danison filed an affidavit in which she swore:

> In footnotes to both Bowker Reply Briefs, Defendants falsely accuse me of dishonesty to the Court by my "bizarre and troubling" use of names. In fact, my actions were dictated by my understanding of the law. My legal, married name is Nancy Lautzenhiser. My maiden name, and the name on my license to practice law, is Nanci Danison. I use my married name when acting as an officer of A.P. Lee & Co., Ltd. I use my maiden name when practicing law. I keep the names, roles, and businesses separate in order to make it clear that I am not practicing law through, or on behalf of, the publishing company when acting as its officer. I do this on advice of counsel in order to comply with Ohio ethics rules and laws that apply when an attorney is simultaneously practicing law and engaging in a non-law related business. My

> understanding is that I am generally prohibited by those rules from disclosing that I am an attorney when acting as an officer of A.P. Lee & Co., Ltd. My filings in this case follow the law and clearly identify when I offered evidence on uncontested matters and when I acted as advocate on behalf of my client.

(Affidavit, 2.)

{¶ 9} Defendants then filed a show cause motion asking that the trial court hold Danison in contempt, dismiss the case, and award defendants' attorney fees and costs. On April 9, 2013, pursuant to these motions, the exhibits attached thereto, and Danison's affidavits before it, the trial court ordered Danison to "appear and show cause as to why her purported conduct is not contemptuous." (Order.) Following this order, both sides filed several exhibits and other materials for the trial court to consider. Included amongst these materials were affidavits from some of the employees Danison had contacted while using the Lautzenhiser name. In their affidavits, each of these affiants swore that they had no idea that Danison was, in fact, "Lautzenhiser" and that, had they known this, they would have referred her to the company attorney.

{¶ 10} On April 30, 2013, the trial court held a hearing on the record with all parties and counsel present. No additional evidence was presented, but all sides argued concerning the written evidence that was before the trial court. Two weeks after that hearing, the trial court found that probable cause existed to believe that Danison had committed indirect criminal contempt. The alleged contempt was "indirect," because the problematic behavior occurred outside the personal knowledge of the trial judge. The trial court also deemed the contempt "criminal" because any punishment imposed would be punitive against Danison in light of past, alleged misconduct, as opposed to remedial to remedy ongoing problems. Based on this finding, the trial court ordered a new hearing for Danison to have the option and opportunity to present a defense to two charges:

> 1. That she used the name "Nancy Lautzenhiser" in e-mails to the Defendants, or either of them, at a time when she knew, or reasonably should have known, that litigation would soon be commenced against the Defendants, or either of them.
>
> 2. That she used the name "Nancy Lautzenhiser" in an affidavit filed in this case, and therefore to this Court, said name not having an existence in law, when that affidavit could reasonably be interpreted to conclude that Ms. Lautzenhiser

> had a separate and distinct identity apart from Nanci L. Danison, and that this duality of identification was not explained until it was brought into question.

(Order to Show Cause.)

{¶ 11} In preparation for the next hearing, Danison submitted an expert report and both sides submitted briefs. In her brief, Danison argued against the merits of the charges. Bowker largely declined to participate, once the proceeding's tenor changed from civil sanctions to criminal contempt. On July 19, 2013, the trial court held a hearing. Little in the way of relevant evidence was presented at the hearing because Danison's counsel refused to stipulate to the authenticity of documents, and witnesses were not present to authenticate them. The trial court adjourned the hearing in order to call witnesses concerning criminal contempt.

{¶ 12} Following the hearing, the trial court examined the record and found that the "Lautzenhiser" affidavit (which was written and sworn to by Danison using the "Lautzenhiser" name) had already admitted the authenticity and admissibility of most of the relevant records. Thus, the trial court set a new hearing date on the indirect criminal contempt charges against Danison.

{¶ 13} On August 29, 2013, the day before the hearing, Danison voluntarily dismissed all of A.P. Lee's claims against all defendants. The next day the hearing took place. At the hearing, the trial court noted, and Danison's attorney agreed, that the hearing was being held within the trial court's power to regulate the practice before it, and, thus, neither dismissal of the underlying action nor Bowker's failure to prosecute civil contempt dictated dismissal criminal contempt issues. Danison's counsel went on to argue orally and in a written filing (filed August 30, 2013) that, pursuant to Crim.R. 29, there was insufficient evidence before the trial court to sustain criminal contempt against Danison and that dismissal was appropriate. The trial court considered under advisement whether Danison had committed criminal contempt.

{¶ 14} On September 9, 2013, the trial court decided that, while submission of the "Lautzenhiser" affidavit may have violated some ethics rules and been misleading, it had not been submitted with intent to defraud the court. For that reason the trial court dismissed the second of two contempt allegations it had recognized as criminal contempt from the initial civil contempt allegations of the defendants.

{¶ 15} Following the trial court's decision, Danison filed another motion to dismiss the first and remaining contempt allegation against her. Her bases for dismissal were that the trial court lacked jurisdiction over the matter because Danison was not named as a party in the underlying case, because (having dismissed the underlying case) she was not representing any party, and because (having allowed her law license to expire on September 1, 2013) she was no longer an officer of the court. The trial court held another hearing on October 2, 2013 in which Danison argued the motion to dismiss on jurisdictional grounds. The trial court orally overruled Danison's jurisdictional argument against criminal contempt, but the hearing ended before Danison presented evidence in her own defense on the remaining issues when Danison had to withdraw from the hearing for health reasons.

{¶ 16} On November 22, 2013, the trial court reconvened to allow Danison to present whatever evidence she wished in her favor on the substantive merits of the remaining allegation of criminal contempt against her. At the hearing, Danison presented no evidence but argued that the failure by the trial court (or anyone else) to have made arrangements to obtain the presence of the witnesses in support of the trial court's accusation of criminal contempt, meant that affidavits by those witnesses could not be considered, lest the Confrontation Clause be violated. Thus, Danison argued, the remaining evidence was insufficient to hold Danison in criminal contempt.

{¶ 17} In a written decision on January 27, 2014, the trial court agreed with Danison that, in the absence of the necessary witnesses, the evidence was insufficient to support a conviction beyond a reasonable doubt on the first and remaining allegation. In so doing, the trial court noted that Danison had probably impermissibly communicated with persons under an assumed name without revealing that she was a lawyer for the purpose of developing evidence to use in a civil case. However, the trial court ultimately decided that, on the evidence before it, Danison's conduct did not justify a finding of criminal contempt, which requires intent:

> This Court has given careful consideration to the foregoing. In so doing, it must be remembered that this is a *contempt* proceeding, where the standard of proof is "beyond a reasonable doubt." While this Court is troubled by some of the aspects of this case, it cannot say, by that standard, that Nanci Danison acted contemptuously. * * * But at the end of the day,

> even if the question would be close under a "greater weight of the evidence" standard, that evidence does not meet the stringent standard required here. After full and careful consideration, this Court cannot say that Ms. Danison intentionally violated the pertinent ethical standards, and, therefore, finds her NOT GUILTY of the remaining count against her.

(Emphasis sic.) (Decision, 6-7.)

{¶ 18} Shortly after this result, Danison filed a pro se motion for sanctions against all defendants and their counsel based on the notion that their allegations of misconduct were frivolously filed and prosecuted. Danison's attorney withdrew. Defendants and their counsel (who had all been previously dismissed from the underlying action) filed memoranda in response; then Danison filed pro se replies. The trial court denied Danison's motion as "utterly without merit." (Entry, 1.) In doing so, the trial court stated that it "*found that there was probable cause to support a finding that Ms. Danison was guilty of contempt of court*." (Emphasis sic; footnote deleted.) It also commented: "even though the Court could not find that Ms. Danison was not [sic] guilty of contempt beyond a reasonable doubt, which was the burden of proof for this alleged indirect criminal contempt, it harbored serious concern over Ms. Danison's conduct." (Entry, 2.)

{¶ 19} Danison now appeals the denial of her motion for sanctions.

II. ASSIGNMENTS OF ERROR

{¶ 20} Danison advances seven assignments of error:

> 1. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SANCTIONS BASED ON PROBABLE CAUSE FINDINGS THE COURT LATER REVERSED.
>
> 2. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SANCTIONS BASED ON PROBABLE CAUSE FINDINGS RENDERED WITHOUT DUE PROCESS.
>
> 3. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SANCTIONS BASED ON PROBABLE CAUSE FINDINGS THAT APPELLANT HAD NO INTENT TO DEFY THE COURT, AN ESSENTIAL ELEMENT OF THE OFFENSE.

> 4. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SANCTIONS BASED ON PROBABLE CAUSE FINDINGS IT LACKED JURISDICTION TO MAKE.
>
> 5. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SANCTIONS BASED ON PROBABLE CAUSE FINDINGS THAT DO NOT DESCRIBE ANY CONDUCT RECOGNIZED AS CONTEMPT UNDER OHIO LAW.
>
> 6. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SANCTIONS AGAINST THE BOOKMASTERS APPELLEES BECAUSE THEY ADMITTED TO THE COURT THAT THEY HAD NO GOOD GROUNDS FOR FILING A SHOW CAUSE MOTION.
>
> 7. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SANCTIONS BECAUSE THE SHOW CAUSE MOTIONS SERVED MERELY TO HARASS AND MALICIOUSLY INJURE PLAINTIFF'S COUNSEL AND CAUSED A NEEDLESS INCREASE IN EXPENSES.

{¶ 21} Danison has also filed a motion requesting that we mark this decision "not for publication" and that we order all records of both this appeal and the trial court proceeding be placed under seal. We address this below.

III. DISCUSSION

{¶ 22} As relevant to this case, frivolous conduct, according to R.C. 2323.51(A)(2), is:

> (a) Conduct * * * that satisfies any of the following:
>
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically

> so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

Parts (i), (iii), and (iv) call on a court to make factual determinations. Accordingly, our review of the trial court's decision on these grounds is pursuant to an abuse of discretion standard. *Judd v. Meszaros*, 10th Dist. No. 10AP-1189, 2011-Ohio-4983, ¶ 18-19; *Lewis v. Powers*, 2d Dist. No. 15461 (June 13, 1997). By contrast, part (ii) of R.C. 2323.51(A)(2)(a), which requires a court to determine whether a claim is warranted under existing law or a good-faith extension of the same, concerns questions of law and is to a particular set of facts. *Lable & Co. v. Flowers*, 104 Ohio App.3d 227, 233 (9th Dist.1995); *Lewis*.

{¶ 23} The assumption underlying each of Danison's assignments of error is that defendants acted frivolously by moving for a show cause hearing and then abandoning the case once it became clear the trial court was proceeding on criminal contempt charges rather than civil contempt. Thus, for the sake of clarity and brevity, we address whether each of these acts (filing the motions and abandoning their prosecution) is frivolous or sanctionable, pursuant to R.C. 2323.51, before specifically addressing Danison's varied assignments of error.

A. Whether it was Frivolous for Defendants to have Moved for a Show Cause Hearing Regarding Whether to Hold Danison in Civil Contempt and Order Dismissal of the Underlying Suit

{¶ 24} R.C. 2705.02 describes contempt of court, in relevant part, as follows:

> A person guilty of any of the following acts may be punished as for a contempt:
>
> * * *
>
> (B) Misbehavior of an officer of the court in the performance of official duties, or in official transactions[.]

{¶ 25} Violation of ethical rules is not synonymous with contempt. *See, e.g., In re LoDico*, 5th Dist. No. 2003-CA-00446, 2005-Ohio-172, ¶ 73 (noting that LoDico's conduct may have violated some ethical rules but did not constitute contempt). The Ohio

Constitution provides that the Supreme Court of Ohio has original jurisdiction to govern the ethics of its bar in the state of Ohio. Ohio Constitution, Article IV, Section 2(B)(1)(g). However, violation of an ethical rule may nonetheless tend to show that the conduct of an officer of the court was "misbehavior" as contemplated in R.C. 2705.02. *See, e.g., Garfield Heights v. Wolpert*, 122 Ohio App.3d 287, 293 (8th Dist.1997) (affirming a finding of contempt for repeated phone calls to a judge and noting that the ethics rules prohibit ex parte communications).

{¶ 26} When defendants filed their motion for contempt in April 2013, not all evidence had been developed. For example, Danison had not yet submitted either Mathews' or Kettlewell's opinions as explanations for her conduct. At the time they filed their motions, the record shows that evidence defendants had (as filed prior to or contemporaneously with their motions) was as follows:

- Founding documents for A.P. Lee, filed with the Ohio Secretary of State, showing two apparently different people, Nancy Lautzenhiser, Secretary/Treasurer, and Nanci L. Danison, Esq., agent for service of process;
- The filings and communications during the pendency of the lawsuit on behalf of plaintiff, A.P. Lee, by Nanci L. Danison as its attorney;
- Various documents regarding book distribution in the name of Nancy Lautzenhiser;
- Numerous communications from "Nancy Lautzenhiser" to defendants' employees requesting various actions and information, in some of which "Lautzenhiser" refers to the author of the books that A.P. Lee sells (Danison) and the owner of A.P. Lee (Danison) as if she were a separate person; see especially (referring to the "owners," and the "author" as if it were not her);
- Communications between Nanci L. Danison and corporate counsel for Bowker in the same general time-frame as the "Lautzenhiser" communications in which Danison levels accusations that appear to be based on material "Lautzenhiser" discussed with employees of defendants;

- A pair of affidavits by "Nancy Lautzenhiser" in which she refers to A.P. Lee's counsel (Danison) as if she were a separate person;
- An attorney information print-out from the Supreme Court showing "Nancy Lee Anne Danison" as a practicing attorney in the state of Ohio;
- An affidavit from Danison (submitted after defendants accused her of being "Nancy Lautzenhiser") in which she swears:

  > My legal, married name is Nancy Lautzenhiser. My maiden name, and the name on my license to practice law, is Nanci Danison. I use my married name when acting as an officer of A.P. Lee & Co., Ltd. I use my maiden name when practicing law. I keep the names, roles, and businesses separate in order to make it clear that I am not practicing law through, or on behalf of, the publishing company when acting as its officer. I do this on advice of counsel in order to comply with Ohio ethics rules and laws that apply when an attorney is simultaneously practicing law and engaging in a non-law related business.

- An abstract of a 1981 marriage document between "Nanci Lee Ann Danison" and "Roger Eugene Lautzenhiser, Jr."; and
- A separation agreement and dissolution of marriage document dated November and December 1985, entered into and signed by "Nanci L. Danison."

{¶ 27} In short, defendants possessed evidence at the time when they filed their motions that showed that Danison had acted to create the illusion that there were actually two separate people, Nanci Danison and Nancy Lautzenhiser. The only materials that suggested a problem with this illusion were either discovered by defendants without Danison's help (the marriage abstract and dissolution papers) or submitted by Danison only after the defendants accused her of misconduct (Danison's affidavit). Moreover, in light of the evidence available to defendants at the time of filing, Danison's affidavit would likely have seemed suspicious. In her affidavit, Danison claims that her legal name is actually "Nancy Lautzenhiser." Yet, the dissolution of marriage and separation agreement were entered into and signed by Nanci L. Danison. If her name had legally been "Nancy Lautzenhiser" at the time her marriage ended, the agreement would have been entered into by "Nancy Lautzenhiser," with a provision changing her last name to "Danison." *See*

R.C. 3105.16. It was reasonable to conclude that Danison never formally adopted or used the name "Lautzenhiser." Under the circumstances, this conclusion was more than reasonable when Danison began using "Lautzenhiser" to evidence separate and distinct persona for her legal and non-legal businesses. Without further information, it was not unreasonable for defendants to believe that the duality of her actions was illicit and unethical and for the purpose of gaining an impermissible advantage in litigation.

{¶ 28} At the trial level the parties and the court predominantly focused on Prof.Cond.R. 4.2:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer *knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

(Emphasis sic.) However, as is stressed by defendants in their brief, Prof.Cond.R. 4.3 is also potentially relevant:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer *knows* or *reasonably should know* that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make *reasonable* efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer *knows* or *reasonably should know* that the interests of such a person are or have a *reasonable* possibility of being in conflict with the interests of the client.

(Emphasis sic.)

{¶ 29} As the evidence existed at the time of filing, it appeared that Danison had intentionally created the illusion that she was two separate people. It also appeared that she had used this artificial, bifurcated identity to gather information from unsuspecting litigation targets in her non-lawyer persona and then, nearly simultaneously, issued demands and filed a lawsuit in her lawyer persona thereafter. Based on information available to defendants at the time of filing, it was also reasonable for defendants to suspect or even conclude that Danison knew or should have known that the individuals she contacted were represented by counsel. Either way, based on the information

available to defendants at the time they filed their motion for contempt, it was reasonable for them to suspect a violation of Prof.Cond.R. 4.2, or, in the alternative, 4.3, depending on whether or not the individual employees or agents with whom she conversed were represented by counsel. That such potential violations could reasonably be believed to exist, based on information available at the time, made legitimate defendants' actions in seeking a contempt hearing. *See also* R.C. 2323.51(A)(2)(a). No allegation is perfectly unassailable when made—it is an allegation until proved. Defendants' motions were not frivolous, and it was therefore not error for the court to have refused to grant Danison sanctions against defendants.

B. Whether it was Frivolous for Defendants to have Discontinued Participation in Hearings and Prosecution of the Alleged Contempt

{¶ 30} Danison's assignments of error rely on the premise that it was frivolous for defendants in the underlying case to have failed to fully prosecute their motions for contempt after filing them. However, in asserting this premise, Danison's argument misapprehends the nature of the contempt proceeding in which she found herself.

{¶ 31} There are several types of contempt: direct, indirect, civil, criminal, and summary. The fundamental distinction between direct contempt and indirect contempt lies in the location of the act of contempt—whether it takes place within the presence of the judge, or elsewhere. "A direct contempt is one committed in the presence of or so near the court as to obstruct the due and orderly administration of justice." *In re Lands*, 146 Ohio St. 589, 595 (1946). "It is said that direct contempt takes place in the presence of the court, and indirect contempt is all other contempt." *Cincinnati v. Cincinnati Dist. Council 51*, 35 Ohio St.2d 197, 202 (1973). Summary contempt is related to direct contempt and is the finding of contempt where no hearing is required by due process because the judge has personal knowledge of the contumacious act, and the act constitutes an imminent threat to the administration of justice. *In re Oliver*, 333 U.S. 257, 274-76 (1948); *Cooke v. United States*, 267 U.S. 517, 534 (1925). Finally, the answer to the question "what does the court primarily seek to accomplish by imposing sentence?" will determine whether a contempt is civil or criminal. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil

contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911).[2]

{¶ 32} Here, defendants sought a hearing on direct and indirect civil contempt. They argued in their motions that Danison (through using the name "Lautzenhiser") had directly defrauded the trial court by submitting the Lautzenhiser affidavits and had indirectly tainted the proceedings by surreptitiously obtaining evidence from litigation targets and employees of defendants shortly before filing the case. Defendants sought dismissal of the case as a remedy for injustice based on the theory that the entire case was tainted by the evidence illicitly obtained by Danison while stating she was "Lautzenhiser." They also requested attorney fees and costs for defending against Danison's litigation. On a number of occasions, defendants expressly disclaimed any interest in seeing Danison prosecuted for criminal contempt or suffering punitive sanctions.

{¶ 33} These "derivative" proceedings initiated by defendants' motions were converted from civil to criminal by the trial court which held a hearing on April 30, 2013, that it characterized as "sort of a preliminary hearing," for it to better understand positions of the parties and the nature of the conduct alleged. (Apr. 30, 2013 Tr. 3.) It was the trial court that, on May 14, 2013, announced its decision to proceed with indirect criminal contempt rather than civil contempt, causing the "sanction, should one be imposed, [to] be punitive in nature, [and thus] the charges specified in the written charge would be criminal in nature." (Decision, 14.) At that point, the proceedings essentially ceased to be on defendants' motions and were instead on the court's own initiative within its inherent authority to maintain the integrity of proceedings before it. *See* R.C. 2705.05(A). The trial court recognized this fact on the record in the next hearing on July 19:

> THE COURT: All right. I see where you're headed with this.
>
> Let me throw this out. I cannot expect counsel for the defendants to bear the costs of all of the things that you suggest. So if we're going to do it this way, and it's basically what you're -- I suppose I'd be happier wearing a belt [and]

[2] *In re Caron*, 110 Ohio Misc.2d 58 (Franklin C.P.2000), provides a detailed exposition on the law of contempt from its origins in England through its modern usage in Ohio.

suspenders -- and to do this absolutely correctly, what I would then propose to do is -- and I'm going to just check this. I want to see if this is necessary, but if you seem to imply that it is, is that the certain witnesses should be subpoenaed in here, certain witnesses should then be questioned perhaps by the Court, not in an adversarial way but in an information-seeking way and those costs would be put on as court costs, which the Court would then assess as necessary depending upon the outcome of it; either the Court would eat them or it would not.

Now, is that what you're speaking of?

DANISON'S COUNSEL: I'm not speaking to whose burden it is to bring those people in.

THE COURT: It surely isn't theirs. It surely isn't the defendant's [sic] burden.

DANISON'S COUNSEL: Well, they're the ones that started this. They filed the motion for contempt.

THE COURT: They brought it to the Court's attention, sir. If that's what's called starting something, we've got a problem here.

The Court has made a determination that there is a reason to show cause here. All right. That's not the defendants. That's me. So I am saying I want you to show cause. Now you're coming in and saying, I understand it, hey, Judge, if you want to do that, we've got to have a full adversarial hearing. Everybody's got to be subpoenaed. You've got to do this, that and the other. And I'm saying okay. Now, this is why I asked you. You're saying no, you are not admitting to the authenticity of anything; a position that I find consistent with the idea of a criminal case.

DANISON'S COUNSEL: Yes.

THE COURT: But certainly -- okay. All right. We'll accept that.

So in other words, if this is going to proceed as such, then basically the Court is going to have to order, subpoena certain witnesses to come in and that would be assessed as court costs.

You're nodding your heads as if you agree.

> Okay. All right. Well, then, so be it.
> This hearing will be continued. The Court will issue the necessary subpoenas. The Court will ask counsel to submit, because I will need some help here, those people who you feel who are the witnesses to this, the Court will issue those subpoenas, we will then go forward with this case.

(July 19, 2013 Tr. 32-34.)

{¶ 34} Ohio has no rule, such as Fed.R.Crim.P. 42(a)(2) that requires that, in cases of criminal contempt requiring a hearing, the court should appoint a prosecutor to try the case. In fact, though it is normally improper in a criminal case for a judge to act as both prosecutor and judge, in contempt hearings, an Ohio judge is empowered by statute to do just that. R.C. 2705.05(A), provides, in relevant part: "In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge." In short, once the trial court found probable cause to believe that Danison had committed indirect criminal contempt, and once it leveled such charges against her, the hearing and the responsibility for investigating the charges ceased to be defendants' burden; it became the trial court's.[3]

{¶ 35} Danison's criticism is without merit that defendants "abandoned" an alleged duty to prosecute the contempt they alleged. Defendants' conduct in failing to prosecute that which they had no duty to prosecute is not frivolous. Moreover, any failure to call witnesses for criminal contempt, which was the trial court's responsibility, was in part due to Danison's termination for health reasons of one of the court's hearings for such a purpose. In short, any "failure" was the trial court's; however, Danison's complaints about such "failure" may have been the "saving grace" to her escaping liability for allegedly criminally contumacious conduct.

C. Danison's Assignments of Error 1 through 5 – Whether the Trial Court Erred in Denying her Motion for Sanctions Based on Erroneous Probable Cause Findings

[3] *In re Murchison*, 349 U.S. 133, 136-38 (1955), is a decision that a trial judge cannot investigate and instate a contempt charge and then, subsequently, sit as judge in the alleged contemnor's trial. *See also Cooke* at 539, noting that there is a due process right to have one's contempt charge tried before an impartial judge. However, the constitutionality of the law dictating the trial court's process is not before us, only the alleged frivolity of defendants' conduct is. Thus, we do not reach the potential constitutional question, but rather apply the law as written. *See* R.C. 1.47(A).

{¶ 36} In her first five assignments of error Danison argues three themes: first, that the evidence was insufficient to warrant a prudent man [person] in believing that she had engaged in contumacious conduct; second, that the trial court lacked jurisdiction to proceed on contempt charges against her; and third, that the hearing process denied her constitutional rights. The facts and discussion above are sufficient to cast considerable doubt on these alleged errors in the trial court's proceedings. However, even assuming, arguendo, the viability of each of these arguments, Danison still would not be entitled to relief, because Danison was ultimately found not guilty of contempt. There is no contempt conviction for us to reverse, and we cannot "correct" the fact that Danison was subject to prosecution for contempt. Nor could we award her damages (even if so inclined) for "injury." She did not seek sanctions against the actor imposing the criminal contempt proceedings against her, the trial court, nor could she have, since the trial court has immunity. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 553-54 (1967), citing *Bradley v. Fisher*, 80 U.S. 335, 347-48 (1871). Hence, even assuming the trial court wronged Danison by prosecuting her for contempt, there is neither an order to correct nor a remedy against the trial court for acting pursuant to statute to regulate the integrity of its own proceedings. R.C. 2705.05(A). More importantly, Danison never explains why the alleged mistakes of the trial court can be sanctioned as frivolous conduct by defendants.

{¶ 37} We have already explained that defendants did not act frivolously in seeking a hearing on civil contempt. The evidence they had at the time they filed their motions was sufficient to justify a reasonable inference that Danison had engaged in contumacious conduct. The legitimacy or frivolity of their motions is judged based on their intent, the available evidence, and the state of the law at the time of filing. R.C. 2323.51(A)(2)(a)(i) through (iv). No subsequent mistake by the trial court, subsequently discovered evidence, or subsequently changed law could or would retroactively render the defendants' legitimate filings frivolous. Even if Danison's criticisms of the trial court could be said to be well founded, they were not the actions of defendants against whom she seeks sanctions and penalty.

{¶ 38} Danison's first through fifth assignments of error are overruled.

D. Danison's Sixth Assignment of Error – Whether BookMasters, in Particular, Acted Frivolously in Filing a Motion to Show Cause

{¶ 39} Danison argues that BookMasters' motion to show cause, because it relies heavily on the other defendants' motion and essentially joins their arguments while contributing little new material, is baseless or frivolous. BookMasters filed its motion after the Bowker defendants, containing the same information that Bowker had at the time of filing. Not all of it was relevant to BookMasters. However, the core notion that Danison created the illusion of two separate people and communicated with targets of future litigation shortly before filing the litigation is equally germane to the claims of BookMasters. Like the other defendants, BookMasters alleged that "Lautzenhiser" "had more than 100 e-mails and communications with the BookMasters Defendants before suit was filed. Suffice it to say that she exploited the BookMasters Defendants as an undisclosed attorney finagling pre-suit discovery." (Motion to Show Cause, 3.) Danison argues that these allegations were not as well substantiated as the motion tendered by the Bowker defendants. However, whether or not a motion is well-written, detailed, and well-supported is not the measure of frivolous conduct. R.C. 2323.51(A)(2)(a)(i) through (iv). Under the circumstances, where Bowker's motion had already presented evidence of alleged contumacious conduct, BookMasters' motion was sufficient. It was neither incorrect nor an abuse of discretion for the trial court to have failed to award sanctions to Danison for BookMasters' filing.

{¶ 40} Danison's sixth assignment of error is overruled.

E. Danison's Seventh Assignment of Error – Whether Defendants' Actions Demonstrate Malice or Bad Intent

{¶ 41} Danison argues that, even if defendants' motions were not otherwise frivolous, the evidence shows that defendants interposed them for illicit purposes or with malice. Danison specifically argues that the case before the trial court did not proceed past the answer stage and yet contained a multitude of filings. However, a review of the trial court's docket shows that the underlying case ended not because of the motions defendants filed, but because Danison voluntarily dismissed her cause of action. Further, a majority of filings relating to contempt charges were filed by or on behalf of Danison to justify the literal duality of her approach to the litigation. As Danison notes, shortly into the contempt process defendants declined "to attend any further hearings or respond to pleadings." (Appellant's Brief, 58.) Clearly, defendants are responsible for relatively little

of the litigation that occurred at the trial level. Though Danison would draw a negative inference from defendants' decision not to participate in the contempt proceedings once the trial court moved in the direction of criminal contempt, as discussed above, there was a good reason for this. Accordingly, once the trial court became responsible for pursuing criminal contempt against Danison, defendants' role as investigators and prosecutors of the contempt they had initially alleged ended. R.C. 2705.05(A).

{¶ 42} Danison's seventh assignment of error is overruled.

F. Danison's Motion to Seal

{¶ 43} Danison also filed a motion in this appeal that we designate our decision "not for publication," seal the record of this appeal (and other attempted appeals in this matter), and order the trial court record sealed also. (Motion to Seal, 2-3.) Danison argues this is necessary to protect her reputation and is appropriate because she was "found innocent" of the contempt charges. (Motion to Seal, 4.)

{¶ 44} Our review of the trial court's record does not indicate that Danison was "found innocent" of contempt, except as to the second criminal contempt allegation considered by the trial court. Danison was found "not guilty" of the remaining allegation of criminal contempt based largely on the fact that the necessary witnesses did not appear to testify, and the record was therefore insufficient to meet the high "beyond a reasonable doubt" standard.

{¶ 45} Danison has requested of the trial court that it strike or seal all the documents relating to the contempt proceedings. This the trial court would not do, denying the rest of her motion for sanctions on July 17, 2014. Danison's briefs did not address this request in any assignment of error. *See* App.R. 12(A)(1) and (2). If Danison believed the trial court erred when it denied her motion to strike or seal the trial court's records relating to the contempt proceeding, her proper recourse was to appeal that matter and brief it as an assignment of error in a way that allowed appellees to take notice of the issue and to respond. She did not do this, and we hereby deny it as to the trial court records.

{¶ 46} Danison's motion also contains a request that we order sealed the records of this appeal and other appeals Danison has attempted concerning this matter. No less than other courts, we have inherent power to seal records before us in "unusual and

exceptional circumstances." *Schussheim v. Schussheim*, 137 Ohio St.3d 133, 2013-Ohio-4529, ¶ 3, 17. Danison suggests that this case presents "unusual and exceptional circumstances" in that she has an excellent reputation as an attorney and that the criminal contempt proceedings at the trial level ultimately did not result in a conviction (claiming to have been "found innocent"). (Motion to Seal, 4.)

{¶ 47} We do not find "exceptional circumstances" to exist that would convince us to grant Danison's motion to seal. Danison admits she no longer practices law. Further, by perpetuating the illusion that there were two different individuals, Nanci Danison and Nancy Lautzenhiser, the former as the attorney for the latter, it is Danison who created her own predicament. While proceedings at the trial court were lengthy and produced a significant record, it is Danison who now prolongs these proceedings and further exacerbates her situation.

{¶ 48} While this case is certainly unusual, it is not exceptional. Accordingly, we decline to exercise our inherent authority to seal the records of this case.

IV. CONCLUSION

{¶ 49} For the reasons stated herein, Danison's seven assignments of error are overruled and we affirm the decision of the Franklin County Court of Common Pleas. Danison's motion to seal the decision and court records of this proceeding and of the contempt proceedings of the trial court is denied.

Judgment affirmed.

BROWN, P.J., and TYACK, J., concur.