[Cite as *Foland v. Englewood*, 2010-Ohio-1905.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

KATHERINE FOLAND, et al.	:	
Plaintiffs-Appellees/Cross-Appellants	:	C.A. CASE NO. 22940
v.	:	T.C. NO. 05 CV 3903
CITY OF ENGLEWOOD, et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellants	:	
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O P I N I O N

Rendered on the 30th day of April, 2010.

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FROELICH, J.

{¶ 1} The City of Englewood and its City Manager, Eric Smith, appeal from a judgment of the Montgomery County Court of Common Pleas, which awarded them sanctions in the amounts of $10,000 and $2,500, respectively, to be paid entirely by Plaintiffs' attorneys. Plaintiffs' attorneys, Ann Requarth and Joyce Deitering, cross-appeal. For the following reasons, the trial court's judgment will be affirmed in part, reversed in part, and remanded for further proceedings.

I

{¶ 2} In May 2005, 33 individuals who owned or used to own residences in a subdivision in the City of Clayton known as "Wenger Meadows" brought suit against the City of Englewood, Smith (in his individual and official capacities), and the developers and occupants of a retail/commercial development anchored by a Wal-Mart, which was located in Englewood. The homeowners' third amended complaint, filed on June 30, 2005, asserted claims for taking of real property without just compensation, nuisance, and fraudulent misrepresentations.

{¶ 3} In their Answer to the third amended complaint, Englewood and Smith denied the allegations and stated numerous defenses including, as their nineteenth defense, that "[t]he Plaintiffs' claims against these Defendants are not supported by good grounds, are

frivolous and are in violation of Civ.R. 11 and R.C. § 2323.51 and warrant the imposition of sanctions pursuant thereto." Further, Englewood and Smith brought counterclaims for defamation, civil conspiracy, and abuse of process, seeking no less than $25,000 and "any other relief, legal and equitable, including costs and reasonable attorneys' fees, to which they are entitled."

{¶ 4} On September 21, 2006, Englewood and Smith moved for sanctions against Plaintiffs, pursuant to Civ.R. 11 and R.C. 2323.51. On October 2, 2006, Plaintiffs dismissed their claims against Englewood; Plaintiffs indicated that there were no claims pending against Smith individually, because they had removed their claims against him in his individual capacity when they filed their third amended complaint. By this juncture, numerous other motions were pending, including motions for summary judgment on Plaintiffs' claims and Plaintiffs' motion for summary judgment on Englewood and Smith's counterclaims. On October 11, 2006, another defendant also moved for sanctions against Plaintiffs.

{¶ 5} On October 16, 2006, the trial court sustained Plaintiffs' motion for summary judgment on Englewood's and Smith's counterclaims. In a separate entry, the court also sustained the other defendants' motions for summary judgment on Plaintiffs' claims, overruled several procedural motions filed by Plaintiffs, overruled a motion by defendant Bob Evans for default [summary] judgment, and resolved another defendant's counterclaim for declaratory judgment. This second decision included Civ.R. 54(B) certification that the decision was immediately appealable. Through these decisions, all of the parties' claims had been resolved. The court did not address the pending motions for sanctions against

Plaintiffs. In November 2006, Plaintiffs filed motions for sanctions, including a motion against Englewood for filing frivolous counterclaims.

{¶ 6} On March 5, 2008, Englewood and Smith sought clarification of the status of their motions and the finality of the court's October 16, 2006, decision on their counterclaims. In June 2008, the trial court clarified that the October 2, 2006, notice of dismissal "effectively dismissed both the City of Englewood and Eric Smith (in his professional and personal capacities)," that the dismissal rendered Englewood's and Smith's motions moot, and that the instant decision and the October 16, 2006, decision on their counterclaims were final, appealable orders. The court indicated that their motion for sanctions remained pending.

{¶ 7} A hearing on the motions for sanctions was held on March 6, 2008. On August 22, 2008, the trial court sustained Englewood's and Smith's motion for sanctions and overruled the additional motions for sanctions. The court awarded attorney fees to Smith in the amount of $2,500 and to Englewood in the amount of $10,000. The awards were to be paid by Plaintiffs' attorneys. The court further held: "The Court finds that an award in excess of these amounts would be punitive toward Plaintiffs' counsel and would not represent a reasonable award of fees. The Courts finds that there is an insufficient basis to determine which of the expenses were reasonable and necessary as a result of Plaintiffs' frivolous conduct, and therefore no award of costs is made."

{¶ 8} Englewood and Smith appealed from the court's August 22, 2008, judgment, raising three assignments of error. Plaintiffs' counsel, Deitering and Requarth (collectively, "Counsel"), cross-appealed, also raising three assignments of error.

{¶ 9} Upon a preliminary review of the trial court's award of attorney fees, we noted that the trial court was presented with diametrically opposite expert testimony of two extremely experienced and competent trial attorneys – one of whom opined that *all* of Englewood's and Smith's counsel's time was spend defending the claims and one of whom opined that *none* of counsel's time was spend defending the claims. Although the trial court stated, in broad terms, that it had considered three factors in determining the amounts of its awards, we found that it was not readily apparent how the trial court reached the monetary values it awarded. We thus remanded this matter to the trial court for the limited purpose of asking the trial court to provide a more detailed statement of its bases for the fee determinations. We requested that the trial court provide, for both Englewood's and Smith's counsel, the amount of time for which the court awarded attorney fees, the rates that it used to calculate the fee awards, and the court's reasons for not awarding the full amount of attorney fees requested.

{¶ 10} On March 19, 2010, the trial court filed a supplement to its August 22, 2008, decision with the following rationale:

{¶ 11} "As stated, the Court cited *Bittner v. Tri-County Toyota, Inc.* (1991) 58 Ohio St.3d 143, for the general proposition that an award of attorneys fees must be a reasonable award. Pursuant to its inherent authority to manage its cases and discipline attorneys, the Court found that Plaintiff's counsel in this case should be sanctioned as stated. The basis for this determination was the Court's careful consideration of the evidence and factors as stated in its decision, including the submitted fee billings, although a specific calculation was not performed."

{¶ 12} We granted the parties 14 days after the filing of the trial court's supplemental decision to file simultaneous supplemental briefs. Englewood and Smith filed a joint memorandum on April 2, 2010; neither Plaintiffs nor their counsel filed a memorandum.

{¶ 13} We now turn to the merits of the parties' appeals, beginning with Counsel's cross-appeal.

II

{¶ 14} Counsel's first cross-assignment of error states:

{¶ 15} "THE TRIAL COURT ERRED IN AWARDING SANCTIONS AGAINST THE APPELLEES/CROSS APPELLANTS AFTER FINAL JUDGMENT BASED UPON A MOTION FOR SANCTIONS FILED PRIOR TO FINAL JUDGMENT WHERE THE TRIAL COURT DID NOT RESERVE THE SANCTIONS ISSUE AND THE APPELLANT DID NOT RENEW SUCH MOTION."

{¶ 16} In their first cross-assignment, Counsel argue that the trial court lacked jurisdiction to award sanctions, because it had previously entered its final judgment in the case on October 16, 2006. They claim that, because Englewood and Smith had moved for sanctions prior to the October 16, 2006, judgment, the trial court implicitly overruled the motion for sanctions when it entered judgment and the implicit denial of sanctions merged into the October 16, 2006, decisions. Thus, Counsel contend, the issue of sanctions should have been appealed at that time.

{¶ 17} Counsel support their argument with the June 11, 2009, Decision and Final Judgment Entry in a companion case, *Foland v. Englewood,* Montgomery App. No. 22849.

In that entry, we dismissed Englewood's and Smith's appeal of the October 16, 2006, decision sustaining Plaintiffs' motion for summary judgment on their counterclaims. We initially noted that the first October 16, 2006, decision (from which Englewood and Smith had appealed) was interlocutory because it did not resolve all of the claims and did not include Civ.R. 54(B) certification. In its decision filed a minute later, the court "effectively terminated the case, with the exception of resolving the issue of sanctions." This second decision included Civ.R. 54(B) certification, which we found "to be indicative of the court's intention to use this [second] order to resolve the merits of the case." We further stated: "At the same time, the trial court made clear with the inclusion of Civ.R. 54(B) certification that the appealability of this order was not to be delayed pending resolution of the sanctions issue."

{¶ 18} Addressing the issue of attorney fees directly, we commented that *International Brotherhood of Electical Workers, Local Union No. 8 v. Vaughn Industries, L.L.C*, 116 Ohio St.3d 335, 2007-Ohio-6439, supported our conclusion that the trial court's resolution of the merits of the case was appealable as of October 16, 2006. We stated:

{¶ 19} "Here, Englewood Appellants' request for sanctions pursuant to Civ.R. 11 and R.C. 2323.51 within the pleadings appear[s] to be more than a pro forma request for attorney fees. We are inclined to view such request as a separate and distinct claim for relief in the action. Therefore, pursuant to *Vaughn*, the trial court's second October 16, 2006 summary judgment order incorporating and resolving all claims between the parties except for Englewood Appellants' request for sanctions was final and appealable upon satisfying the requirements of Civ.R. 54(B)." (Internal citation omitted.)

{¶ 20} Our June 11, 2009, Decision and Final Judgment Entry in Montgomery App. No. 22849 does not support Counsels' contention that the trial court implicitly resolved the motions for sanctions in October 2006. We specifically found that the October 16, 2006, decisions did not resolve the motions for sanctions and that these motions remained for determination by the trial court. By noting that the issue of attorney fees was a "separate and distinct claim," we found that the issue of attorney fees was not part of the claims addressed by the trial court and that the October 16, 2006, decisions fully resolved the merits of those claims. Consequently, the October 16, 2006, decisions were immediately appealable due to the trial court's inclusion of Civ.R. 54(B) certification. The issue of sanctions remained pending.

{¶ 21} In opposing Counsel's assignment of error, Englewood and Smith submit that we improperly applied *Vaughn* in Montgomery App. No. 22849. In essence, they argue that they should not have been required to appeal immediately from the first October 16, 2006, decision. We will not, in this case, reconsider our Decision and Final Judgment Entry in Montgomery App. No. 22849. Nevertheless, we agree with our conclusions in that case that the issue of sanctions was not resolved by the trial court in its October 16, 2006, decisions and that the issue of sanctions remained before the trial court. See *Miami Valley Hosp. v. Payson* (Dec. 7, 2001), Montgomery App. No. 18736 (stating that "voluntary dismissals do not deprive trial courts of jurisdiction to rule on motions for sanctions" because a motion for sanctions is "a demand for collateral relief.").

{¶ 22} The first cross-assignment of error is overruled.

{¶ 23} Counsels' second cross-assignment of error states:

{¶ 24} "THE TRIAL COURT ERRED IN FINDING THAT THE APPELLEES/CROSS APPELLANTS ENGAGED IN FRIVOLOUS CONDUCT AND VIOLATED OHIO R. CIV. P. 11."

{¶ 25} Counsel next claim that the trial court erred in finding that they engaged in frivolous conduct. Smith's motion for sanctions was based on Plaintiffs' claims against him in his personal capacity. Englewood sought sanctions based on Plaintiffs' assertion that the city's actions in issuing permits were proprietary in nature and negligently executed.

{¶ 26} R.C. 2323.51(B)(1) provides that a court may assess and make an award to any party in a civil action who was adversely affected by frivolous conduct. "Frivolous conduct" means the conduct of a party or that party's counsel that either:

{¶ 27} "(i) *** 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[;]

{¶ 28} "(ii) *** 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[;]

{¶ 29} "(iii) *** 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[; or]

{¶ 30} "(iv) *** 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." R.C. 2323.51(A)(2)(a).

{¶ 31} Before the court may award sanctions under R.C. 2323.51, the court must hold an evidentiary hearing to determine (1) whether particular conduct was frivolous; (2) if the conduct was frivolous, whether any party was adversely affected by it; and (3) if an award is to be made, the amount of that award. R.C. 2323.51(B)(2)(a). The hearing may be conducted on written materials or it may be an oral hearing. See *Shields v. Englewood,* 172 Ohio App.3d 620, 2007-Ohio-3165, at ¶48.

{¶ 32} Whether particular conduct is frivolous may be either a factual or a legal determination. *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46. A trial court's factual finding that a party's conduct was frivolous will not be disturbed where the record contains competent, credible evidence to support the court's determination. *In re K.A.G.-M*., Warren App. No. CA2009-04-040, 2009-Ohio-6239, at ¶17, citing *Jackson v. Bellomy*, Franklin App. No. 01AP-1397, 2002-Ohio-6495, at ¶39, ¶45. In contrast, whether a pleading is warranted under existing law or can be supported by a good-faith argument for an extension, modification, or reversal of existing law is a question of law, which is reviewed de novo. *Criner v. Urological Physicians & Surgeons, Inc.* (Dec. 15, 2000), Greene App. No. 2000-CA-28; *Tomb & Assoc., Inc. v. Wagner* (1992), 82 Ohio App.3d 363, 366.

{¶ 33} Paragraph 19 of Plaintiffs' original complaint alleged that, between 1997 and 2004, "Eric Smith personally falsely and fraudulently stated and represented to various Plaintiffs, before they built their current residences, and at other times, that only businesses such as those which were currently existing on Smith Dr. in Englewood would be allowed to locate on the site in question which was subsequently purchased by Defendants, Hoke Road Ltd and GCG Hoke Road

Ltd, and their alter ego, R. G. Properties." Plaintiffs further alleged that Smith made the statements maliciously, in bad faith, or recklessly and with the intent to deceive and defraud Plaintiffs. Plaintiffs alleged that they relied on those statements to their detriment. For this claim, Plaintiffs sought relief against Smith personally, not Englewood.

{¶ 34} Although Plaintiffs represented in their October 2, 2006, dismissal notice that their third amended complaint did not state claims against Smith in his personal capacity, the allegations against Smith in the third amended complaint are virtually identical to the original complaint. Moreover, Plaintiffs continued to request "[o]n their Third Claim for Relief against Defendant Eric Smith, for fraud and misrepresentation, an award of damages in such amounts as will be proven at trial." There was no suggestion that the relief was sought in Smith's official capacity only. The trial court later held that Plaintiffs' claims against Smith, in both his personal and official capacities, were "effectively dismissed" by Plaintiffs when they filed their October 2, 2006, notice of dismissal.

{¶ 35} At the sanctions hearing, Homeowners David Deptula, Cindy Deptula, and David Kohr testified about their contacts with Smith regarding the Wal-Mart site. Each of the individuals testified that he or she did not speak with Smith personally about the commercially-zoned property either before they purchased their lots or at any other time. The excerpted deposition testimony of Stephen Cox, which was admitted as an exhibit, indicated that Cox had spoke with Smith at one city counsel meeting, but "just said hello to him *** no deep conversation." Cox stated at his deposition that Smith had not, at any time (including between

1997 and 2004), made statements to him regarding how the now-Wal-Mart property was to be developed. The excerpts of depositions of other plaintiffs also reflect no direct conversations between Smith and those individuals regarding development of the Wal-Mart property. See Exhibits C, D, and E.

{¶ 36} Mr. Deptula testified at the sanctions hearing that he had spoken with Mark Brownfield, a then-Englewood employee, who conferred with Jeff Bothwell, Englewood's then-Director of Economic Development. Mr. Kohr, who purchased his lot in 2001, testified that he had talked to neighbors, the sellers of the lot, and to Englewood; at that time, he was told that the subject property was commercial, but it was expected to be developed similar to the light industrial development on Smith Drive.

{¶ 37} There was no testimony that Smith made statements regarding the Wal-Mart property in any way other than as City Manager, nor was there evidence that the homeowners relied on statements by Smith in purchasing their properties or otherwise to their financial detriment. Mr. and Mrs. Deptula and Mr. Kohr indicated that they intended and believed that Smith had been sued only in his capacity as City Manager.

{¶ 38} In their post-hearing memorandum, Plaintiffs asserted that a 1994 affidavit by Bothwell supported their (Plaintiffs') assumption that the Wal-Mart property would be developed with light industrial development similar to the east side of Hoke Road. As stated by the trial court, the affidavit was created in support of an annexation petition, and there was no evidence that Plaintiffs relied on that affidavit in alleging in the complaint that Smith in his official capacity, let alone

personally, ever said anything falsely or fraudulently concerning development of the property.

{¶ 39} In support of his motion for sanctions against Plaintiffs, Smith testified that, over the last fifteen years, he had been sued "probably a dozen or more times by Ann Requarth and Joyce Deitering both as the City of Englewood and *** myself." Smith believed that there was "a vendetta in place" and that Requarth had "accused" him "of every conceivable thing imaginable," including theft, lying, and homosexuality. Smith described a confrontation he had with Requarth in 2006.

{¶ 40} In awarding sanctions based on the allegations against Smith in his personal capacity, the trial court found that Plaintiffs' claim lacked factual and legal support and was brought for the purpose of harassment or other improper purpose. This conclusion is based on competent, credible evidence. None of the individual homeowners who testified at the sanctions hearing had had any personal conversations with Smith. The record contains no evidentiary support for the allegations that Smith, in his personal capacity (or, for that matter, in his professional capacity), maliciously and fraudulently made misleading statements to the homeowners about how the Wal-Mart property would be developed, nor is there any indication that the homeowners relied on any such statements. The homeowners' testimony indicates that it was unlikely that any evidentiary support for their allegations would be discovered. Based on Smith's testimony regarding his history with Counsel, the court could have reasonably concluded that the allegations against Smith in his personal capacity were brought merely to harass

Smith.

{¶ 41} Counsel argues that they reasonably relied on the homeowners' statements of the underlying facts in drafting their complaints. Counsel notes that the homeowners testified at the sanctions hearing that they had read and approved the complaint.

{¶ 42} We agree with Counsel that they may rely on their clients' statement of facts in drafting their pleadings. *Tomb & Assoc.,* 82 Ohio App.3d at 366. And, a party ordinarily does not engage in frivolous conduct merely because a claim is not well-grounded in fact. *State Auto Mut. Ins. Co. v. Tatone*, Montgomery App. No. 21753, 2007-Ohio-4726, at ¶9.

{¶ 43} In this case, however, it is questionable whether the complaint reflected the homeowners' recitation of the facts. Each of the homeowners at the sanctions hearing testified that he or she had not spoken personally with Smith; no other evidence or testimony on this point was offered by Counsel. Mrs. Deptula testified that her attorneys had asked her about her personal conversations with Smith or his employees before the complaint was filed, and that Counsel knew that she had never had any conversations with Smith or his employees. The Deptulas and Kohr all believed that Smith had been sued in his official capacity only.

{¶ 44} Further, even if Counsel had relied on statements by the homeowners that Smith had made representations that the Wal-Mart property would be developed similar to the nearby light industrial development, there is nothing in the record to suggest that Smith made any such statements in an individual capacity or that Counsel could have reasonably pled that Smith made such statements in an

individual capacity. All of the evidence indicates that Smith's contacts with the homeowners, if any, occurred in his capacity as City Manager of the City of Englewood. Based on the evidence before the trial court, the court did not abuse its discretion in concluding that the claims against Smith in his personal capacity were frivolous.

{¶ 45} In its motion for sanctions, the City of Englewood argued that Plaintiffs frivolously brought claims against it for nuisance and deprivation of property based on the Englewood's approval of permits and licenses associated with the commercial property's development. Englewood argued that its conduct constituted a governmental function, for which it was entitled to sovereign immunity, and that there was no good faith basis for Plaintiffs to argue that Englewood's conduct was proprietary. The trial court agreed with Englewood and found that "Plaintiffs' contention that Defendants were performing a proprietary function in issuing permits with aesthetic implications has no basis in law, and that such constituted frivilous [sic] conduct under O.R.C. 2323.51(A)(2)(a)(i)." The trial court noted that Plaintiffs had relied on "one case from Wisconsin, without reference to Ohio law."

{¶ 46} Because the trial court's determination regarding Plaintiffs' claims against Englewood involves a question of law, we review the trial court's determination de novo.

{¶ 47} The Political Subdivision Tort Liability Act, R.C. Chapter 2744, established a three-tiered analysis to determine whether a political subdivision is immune from liability. The first tier sets forth the general rule that political

subdivisions are not liable for damages when performing either a governmental or a proprietary function. R.C. 2744.02(A)(1); *Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, at ¶11. Under the second tier, the court must determine whether one of the five statutory exceptions to immunity, set forth in R.C. 2744.02(B)(1)-(5), applies. Id. at ¶12. Third, immunity can be reinstated if the political subdivision can successfully show that one of the defenses contained in R.C. 2744.03 applies. Id.

{¶ 48} In this case, the only possible relevant exception to immunity was R.C. 2744.02(B)(2), which provides that political subdivisions are liable for injury or loss if caused by the negligent performance of acts by their employees with respect to proprietary functions.

{¶ 49} The definitions of governmental and proprietary functions are set forth in R.C. 2744.01. Stated simply, a proprietary function includes activities customarily performed by nongovernmental persons whereas governmental functions are activities that are not customarily engaged in by nongovernmental persons. "Governmental function" includes "[t]he provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures." R.C. 2744.01(C)(2)(p).

{¶ 50} Plaintiffs argue that, in issuing zoning permits, Englewood requires

compliance with local requirements that control the exterior appearance of buildings, signs, and landscaping.[1] Citing the intermediate appellate court case of *Save Elkhart Lake, Inc. v. Village of Elkhart Lake* (1993), 181 Wis.2d 778, 512 N.W.2d 202, Plaintiffs claim that "[t]hese aesthetic features do not raise any issues relating to a governmental function, and are arguably proprietary." Although Plaintiffs assert that these "aesthetic features" are proprietary in nature, their claims expressly state they arise from the issuance of zoning permits. As they articulated in their appellate brief: "It was the position of the Homeowners that Englewood and Smith were negligent in issuing the zoning permits because they failed to require that the improvements be compatible with the local residences in building materials, fencing, mounding, and landscaping."

{¶ 51} Actions taken by a political subdivision, such as Englewood, in connection with its zoning code are, by definition, a governmental function. R.C. 2744.01(C)(2)(p). We agree with the trial court that Plaintiffs' claims were not warranted under existing law and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. Accordingly, the trial court did not err in concluding that Plaintiffs' claims against Englewood were frivolous.

{¶ 52} The second cross-assignment of error is overruled.

{¶ 53} Counsels' third cross-assignment of error states:

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[1] Smith testified at the sanctions hearing that Englewood's zoning ordinance includes requirements concerning landscaping and signs, but does not require a specific exterior for a given building.

{¶ 54} "THE TRIAL COURT ERRED IN FINDING THAT THE APPELLEE/CROSS APPELLANT, JOYCE DEITERING, VIOLATED OHIO R. CIV. P. 11 BASED UPON PLEADINGS THAT SHE DID NOT SIGN."

{¶ 55} In the third cross-assignment of error, Deitering asserts that the trial court erred in imposing sanctions against her when she had not signed any of the pleadings at issue, i.e., the complaint and its amendments. She claims that sanctions under Civ.R. 11 were, therefore, inappropriate.

{¶ 56} Civ.R. 11 requires "every pleading, motion, or other document of a party" to be signed by at least one attorney of record, if the party is represented by counsel. The signature of the attorney constitutes certification that the attorney "has read the document; that to the best of the attorney's *** knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Id. If an attorney willfully violates Civ.R. 11, a trial court may impose sanctions, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing a motion under the Rule. Id.

{¶ 57} Although Deitering focuses on Civ.R. 11, the trial court awarded attorney fees under Civ.R. 11 and R.C. 2323.51. As stated above, R.C. 2323.51 authorizes sanctions for "frivolous conduct." Accordingly, Deitering need not have signed the pleadings for the court to impose sanctions against her.

{¶ 58} Upon review of the record, we find no fault with the trial court's award of attorney fees against Deitering as well as Requarth under Civ.R. 11 and R.C. 2323.51. The record reflects that Deitering acted jointly with Requarth in the prosecution of Plaintiffs' case. Deitering was a counsel of record in this action, and

her name was listed as co-counsel on the pleadings, motions, and other documents. She signed numerous documents filed with the court on behalf of Plaintiffs throughout the litigation (Civ.R. 11 speaks of other *documents*, in addition to pleadings), and there is no evidence or testimony from Deitering or otherwise that she was not aware of and did not sanction every action. As we stated in *Shields*: "Clearly, an attorney who knowingly acquiesces in the active misrepresentation of facts by his or her co-counsel to a court, without clarifying that misrepresentation to the court, can likewise be found to have engaged in frivolous conduct." *Shields* at ¶67.

{¶ 59} The third cross-assignment of error is overruled.

III

{¶ 60} Englewood's and Smith's assignments of error will be addressed together. They state:

{¶ 61} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED COUNSEL FOR THE 33 APPELLEES TO PAY APPELLANTS $12,500.00 IN ATTORNEYS' FEES, AS OPPOSED TO THE $75,279.46 REQUESTED, WHEN THERE WAS NO COMPETENT, CREDIBLE EVIDENCE SUPPORTING AN AWARD IN SUCH REDUCED AMOUNT.

{¶ 62} "THE TRIAL COURT DID NOT APPLY THE APPROPRIATE LEGAL STANDARD WHEN DETERMINING THE REASONABLENESS OF THE ATTORNEYS' FEES TO BE AWARDED AS A RESULT OF THE APPELLEES' FRIVOLOUS CONDUCT.

{¶ 63} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND

AN INSUFFICIENT BASIS TO AWARD THE APPELLANTS' REQUESTED COSTS IN THE AMOUNT OF $9,742.17, WHICH WERE INCURRED AS A DIRECT RESULT OF THE APPELLEES' FRIVOLOUS CONDUCT."

{¶ 64} In their assignments of error, Englewood and Smith claim that the trial court used the wrong legal standard in determining the amount of attorney fees to award as a sanction and abused its discretion when it awarded less than the requested amount of attorney fees and costs.

{¶ 65} Where the trial court has found that a party has been affected by frivolous conduct, R.C. 2323.51(B) authorizes the trial court to award attorney fees, court costs, and other reasonable expenses incurred in connection with the civil action. The award of attorney fees may be equal to or less than, but may not exceed, the attorney fees that were reasonably incurred by the aggrieved party. R.C. 2323.51(B)(3). The court may order the sanction to be paid by a party, a party's counsel of record, or both. R.C. 2323.51(B)(4).

{¶ 66} The party seeking sanctions under R.C. 2323.51 bears the burden of establishing the costs incurred in connection with the frivolous conduct and reasonable attorney fees that it incurred. See *In re Verbeck's Estate* (1962), 173 Ohio St. 557, 559. Each party who may be awarded reasonable attorney fees may submit an itemized list of the legal services rendered, the time expended in rendering the services, and the fees associated with those services.[2] R.C.

[2]Prior to the 1996 amendments to R.C. 2323.51, the party seeking an award could submit an itemized list of the legal services "necessitated by the alleged frivolous conduct." Former R.C. 2323.51(B)(5). The current version of the statute substitutes the phrase "legal services rendered" for the former phrase

2323.51(B)(5)(a). The party may also submit an itemized list of costs and expenses "that were incurred in connection with the action *** and *** necessitated by the frivolous conduct ***." R.C. 2323.51(B)(5)(b). Unlike attorney fees, costs must be necessitated by the frivolous conduct.

{¶ 67} In *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, the Supreme Court of Ohio established a methodology for determining a reasonable amount of attorney fees to award. The court noted that the first step in making a fee award is "to calculate the number of hours reasonably expended on the case times an hourly fee." Id. at 145. Second, a trial court "may modify that calculation by application of the factors listed in DR 2-106(B)."[3] Id. These factors include "the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent." Id. at 145-146. Although *Bittner* was a Consumer Sales Practices Act case, its methodology has been employed in other contexts, including in determining reasonable attorney fees under R.C. 2323.51. See, e.g., *Jefferson v.*

"legal services necessitated by the alleged frivolous conduct."

[3]The Ohio Code of Professional Responsibility has been superseded by the Ohio Rules of Professional Conduct. The factors listed in DR 2-106(B) are virtually identical to the factors listed in Prof. Cond. R. 1.5(a).

Creveling, Summit App. No. 24206, 2009-Ohio-1214, at ¶33; *Grine v. Sylvania Schools Bd. of Edn*., Lucas App. No. L-06-1314, 2008-Ohio-1562, at ¶65.

{¶ 68} The decision whether to assess a penalty for frivolous conduct lies within the court's sound discretion. *Shields* at ¶73, citing *Wiltberger*, 110 Ohio App.3d at 52. Although the court has broad discretion to determine a reasonable amount of attorney fees, the basis for the trial court's determination must be ascertainable and supported by the record. See *Bittner*, 58 Ohio St.3d at 146 (stating that the trial court must state the basis for its fee award under R.C. 1345.09(F)(2) and, absent such a statement, the appellate court cannot conduct a meaningful review).

{¶ 69} In awarding attorney fees to Englewood and Smith, the court cited to *Bittner* and noted that an award of attorney fees must be reasonable. The court acknowledged that Smith and Englewood had submitted evidence of the legal expenses they had incurred. The trial court indicated that it had considered the expenses incurred by Englewood and Smith, the results they obtained in this case, and the court's prior finding that Smith, in his personal capacity, had been dismissed from the litigation on October 2, 2006. Without further explanation, the trial court awarded $10,000 to Englewood and $2,500 to Smith for attorney fees. The court found that "an award in excess of these amounts would be punitive toward Plaintiffs' counsel and would not represent a reasonable award of fees."

{¶ 70} Englewood and Smith assert that the trial court employed the wrong legal standard in awarding attorney fees. They argue that the trial court failed to calculate the number of hours reasonably expended multiplied by a reasonably

hourly fee and then adjust that amount by the factors identified in *Bittner*. They further claim that the court erroneously considered the burden that the award would have upon Counsel when it stated that an award of more than the aggregate $12,500 would be "punitive."

{¶ 71} We see no indication that the court employed the wrong legal standard. The trial court correctly indicated that it was required to determine reasonable attorney fees, noted *Bittner*, and identified factors that it had considered. Although the trial court stated that an award in excess of $12,500 would be "punitive," the court did not state that it had considered the ability of Counsel to pay the sanctions. Nevertheless, even if the court had weighed the reasonableness of the award with the burden it might have on the sanctioned parties, we do not believe such a consideration is improper under R.C. 2323.51, even though that factor was not stated in *Bittner*. Considering that the trial court has first-hand knowledge of the parties' conduct and the record, it is afforded broad discretion to consider whatever factors might be relevant to the court's assessment of sanctions under R.C. 2323.51 and/or Civ.R. 11. See *Lewis v. Powers* (June 13, 1997), Montgomery App. No. 15461 (noting that, in exercising its "substantial discretion" in setting the fee award under R.C. 2323.51, the trial court could consider the culpability of the sanctioned party). Although we are not privy to the trial court's monetary calculations, the record does not support Englewood's and Smith's contention that the court failed to apply the proper legal standard. The second assignment of error is without merit.

{¶ 72} Englewood's and Smith's first assignment of error (and their

supplemental brief filed on April 2, 2010) addresses the heart of their appeal, namely that the trial court abused its discretion when it failed to fully reimburse them for their claimed attorney fees. As they stated: "*** if the trial court had truly considered the expenses incurred by Englewood and Smith and the results obtained by them, then Englewood and Smith should have been awarded full reimbursement of their fees. Englewood and Smith were fully vindicated from all allegations made against them by the Homeowners. Not a single one of the Homeowners' claims for relief succeeded."

{¶ 73} At the hearing on the motion for sanctions, Smith testified that Englewood's insurance company, Miami Valley Risk Management Agency ("MVRMA"), paid $36,638.29 to Surdyk, Dowd & Turner for professional fees and expenses in connection with this litigation. In addition, McNamee & McNamee had been retained to represent the City of Englewood and Smith for certain claims that MVRMA would not cover. Englewood had paid $48,338.34 to McNamee & McNamee for legal services and expenses in connection with those claims.

{¶ 74} Englewood and Smith supported the reasonableness of these fees and expenses with an affidavit from Jane Lynch, a local attorney with considerable experience in federal and state court, including political subdivision defense cases. Paragraph 5 of Lynch's affidavit stated the following opinions:

{¶ 75} "A. That the fee bill by Surdyk, Dowd & Turner, counsel for the City of Englewood and Eric Smith in his official capacity, which totals $36,638.29, with $6,591.45 of that expenses, was reasonable and necessary in order to defend the above captioned case.

{¶ 76} "B. That the fee bill by McNamee & McNamee, personal counsel for the City of Englewood and Eric Smith, totaling $48,383.34, with expenses of $3,150.72 were reasonable and necessary in order to defend the claims presented by plaintiffs outside of the coverage provision of the policy of insurance applicable to the City of Englewood and subject to the Reservation of Rights Notice issued by the insurer for the City of Englewood.

{¶ 77} "C. Both billing statements reflect detailed itemization of the work performed in support of each entry on the bill and shows appropriate and cost effective allocation of work divided among the partners, associates, and paralegals to the benefit of the clients.

{¶ 78} "D. The billing rates are at or below the generally accepted rates for this type of work in the Southern District of Ohio and Montgomery County, Ohio. Particularly with respect to the billing rate of McNamee & McNamee, the rate of $100.00 an hour for work performed by a partner of that firm is significantly below the generally acceptable billing rate for that work by a partner in this area. These expenses incurred were reasonable and necessary as a direct result of defending this litigation."

{¶ 79} The itemized invoices for McNamee & McNamee were attached to Lynch's affidavit, submitted as Exhibit R.

{¶ 80} In opposition to Englewood and Smith's motion for sanctions and in support of their own motion for sanctions, Plaintiffs presented the affidavit of Konrad Kuczak, a local attorney with considerable experience as a trial lawyer in federal and state court, including representing plaintiffs in at least five suits with

allegations similar to those in this case. Kuczak stated that he had reviewed McNamee & McNamee's 17 invoices, the 11 invoices by Surdyk, Dowd & Turner, and the invoices for the two other firms representing the other defendants, as well as the trial court's decision sustaining Plaintiffs' motion for summary judgment on Englewood's and Smith's counterclaims. Kuczak indicated that, without spending the necessary 6 hours to audit the bills incurred by the City of Englewood, "it appears that the bulk of the services incurred by the City of Englewood were either for services involved in claims by Englewood for its Abuse of Process, etc., which were ultimately decided against Englewood as meritless, or services which were duplicative of those provided by counsel for the remaining defendants and were thus superfluous." Kuzcak opined that "none of the services for which the City of Englewood claims sanction were reasonably incurred in the defense of the claims at bar, be they frivolous or not."

{¶ 81} As we stated in our remand decision, the trial court was presented with diametrically opposite testimony of two extremely experienced and competent trial attorneys – one of whom opined that all of Englewood's and Smith's counsel's time was spend defending the claims and one of whom opined that none of counsel's time was spend defending the claims.

{¶ 82} Based on the record, the court reasonably determined that Englewood and Smith were not entitled to the full amount of attorney fees that they claimed. Although Englewood and Smith were forced to defend frivolous claims, they also brought three counterclaims against Plaintiffs, which the trial court concluded were without merit as a matter of law. Further, the claims against Smith and Englewood

were not complex, and the trial court could have determined that the amount of time expended on this litigation was not reasonable. In short, the trial court did not abuse its discretion in awarding less than the full amount of attorney fees that Englewood and Smith sought as sanctions.

{¶ 83} Having concluded that the trial court reasonably awarded less than the approximately $75,000 that Englewood and Smith requested, we turn to whether the court abused its discretion in awarding $10,000 to Englewood and $2,500 to Smith. As stated above, the trial court identified three factors that it had considered – the expenses incurred by Englewood and Smith, the results they obtained in this case, and the court's prior finding that Smith, in his personal capacity, had been dismissed from the litigation on October 2, 2006. However, the trial court's August 22, 2008, decision did not articulate how it determined that $10,000 to Englewood and $2,500 to Smith – amounts which were substantially lower than had been requested – were appropriate awards, and it is not readily apparent how the trial court reached the monetary values it awarded. Notably, the court failed to detail the total number of hours that it considered reasonably expended by Englewood's and Smith's counsel, the hourly fee or fees it employed, and its reasons for reducing the amount of attorney fees requested by Englewood and Smith. The trial court's March 19, 2010, decision did not clarify the trial court's reasoning, other than to clarify that the court did not engage in such an analysis.

{¶ 84} In the absence of additional information concerning the court's assessment of the number of hours reasonably expended, the rates used, and the court's reasons for discounting any requested fees (which necessarily might include

some exercise of discretion by the court), we cannot ascertain the calculation of the fee award and thus cannot conclude that the trial court acted within its discretion when it awarded a total of $12,500 to Englewood and Smith. See *Bittner*, 58 Ohio St.3d at 146. Accordingly, the trial court's judgment awarding $10,000 to Englewood and $2,500 to Smith, to be paid by Counsel, will be reversed, and the matter will be remanded for a new determination of attorney fees to be awarded as sanctions.

{¶ 85} In their brief, the Homeowners assert that Englewood and Smith have not claimed as error that the trial court failed to impose sanctions against them personally, as opposed to their attorneys. They argue that, as a result, Englewood and Smith cannot seek attorney fees against them personally should the case be remanded. Englewood and Smith respond that the court may reassess its apportionment of the attorney fees award upon remand. Based on the record, the court did not abuse its discretion when it ordered that the sanctions be paid by Counsel only, and we see no basis for the trial court to reconsider this part of its decision when it redetermines attorney fees upon remand. As discussed above, the only error that we have identified is the trial court's failure to detail its calculation of the attorney fees that it awarded against Counsel, as required by *Bittner*. Our remand is thus limited to a calculation of those attorney fees.

{¶ 86} The first assignment of error is sustained.

{¶ 87} In their third assignment of error, Englewood and Smith claim that the trial court erred in failing to award costs as a sanction. As stated above, Englewood and Smith bore the burden of establishing the amount of costs that

were incurred in connection with the action and were necessitated by Counsel's frivolous conduct. Although Englewood and Smith submitted an itemized list of their expenses (as well as attorney fees), the list did not differentiate between those that were incurred as a result of the frivolous conduct and those that were not, presumably because Englewood and Smith assert that all of their expenses were necessitated by the frivolous conduct. It is apparent that the trial court rejected Englewood and Smith's claim that all of the expenses were recoverable as expenses necessitated by Plaintiffs' frivolous actions and, considering that at least some of the expenses were reasonably associated with Englewood's and Smith's counterclaims, the trial court's approach was not unreasonable. The trial court did not abuse its discretion when if found that "there is an insufficient basis to determine which of the expenses were reasonable and necessary as a result of Plaintiffs' frivolous conduct ***."

{¶ 88} The third assignment of error is overruled.

IV

{¶ 89} The trial court's judgment will be affirmed in part, reversed in part, and remanded for further proceedings. Specifically, the trial court's finding that Plaintiffs engaged in frivolous conduct, the court's order that the sanctions be paid by both of Plaintiffs' counsel, and the court's failure to award costs as a sanction are affirmed. The trial court's award of attorney fees in the amount of $10,000 to Englewood and $2,500 to Smith will be reversed, and the matter will be remanded for a new determination of the attorney fees to be awarded as sanctions against Plaintiffs' counsel. On remand, the trial court may award the same sanctions of

$10,000 and $2,500 in favor of Englewood and Smith, respectively, or the court may alter its awards, provided that it justifies whatever sanctions it imposes in a manner consistent with this opinion.

. . . . . .

BROGAN, J. and GRADY, J., concur.

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