

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

STACY GROVE,

PLAINTIFF-APPELLEE,

v.

CASE NO. 9-14-29

GAMMA CENTER, ET AL.,

DEFENDANTS-APPELLEES,
-AND-

SUDESH REDDY, M.D., ET AL,

OPINION

DEFENDANTS-APPELLANTS,

[DINSMORE & SHOHL LLP, ET AL.
APPELLANTS].

Appeal from Marion County Common Pleas Court
Trial Court No. 08-CV-0248

Judgment Affirmed

Date of Decision: March 30, 2015

APPEARANCES:

Jeff Ratliff for Appellants, Dr. Sudesh Reddy and Dr. Parminder Singh

Brian S. Sullivan for Appellants, Dinsmore & Shohl, LLP and Jan Hensel

John W. Herbert for Appellee, Muniver Kaur Singh, Personal Representative of the Estate of Indi Singh, Deceased

SHAW, J.

{¶1} Third-Party Plaintiff-Appellants Dr. Sudesh Reddy and Dr. Parminder Singh along with their former attorney and her law firm Jan Hensel and Dinsmore & Shohl (all referred to collectively as “appellants”) appeal the July 3, 2014, judgment of the Marion County Common Pleas Court awarding Third-Party Defendant-appellee Indi Singh¹ (“appellee”)² a total of \$67,259.26 in attorney fees and expenses after the trial court determined that appellants engaged in frivolous conduct against appellee.

{¶2} The facts relevant to this appeal are as follows. On March 19, 2008, Stacy Grove filed a complaint against Gamma Center, Inc.,³ Sudesh Reddy, M.D., and Parminder Singh, M.D. (referred to collectively as “defendants”).⁴ (Doc. No. 1). Grove alleged that Dr. Reddy and Dr. Singh created a hostile work environment that discriminated against the female employees, that Dr. Reddy and Dr. Singh had sexually harassed her, that Gamma Center failed to take any disciplinary action after she reported the doctors’ conduct, that her employment was terminated in retaliation for her sexual harassment complaint, and that

¹ On March 6, 2015, upon notice of death of Indi Singh, this Court ordered that Muniver Kaur Singh, personal representative of the Estate of Indi Singh be substituted for Indi Singh as appellee.

² To differentiate the two Singhs in this case, Indi Singh (or his estate) will be referred to as appellee and appellant Parminder Singh will be referred to as Dr. Singh.

³ Gamma Center was an Ohio Corporation. Its shareholders originally consisted of Dr. Reddy, Dr. Parminder Singh, and Dr. Chander Arora, who collectively owned 75% of the corporation (25% each), while appellee and Sanjeev Verma jointly owned the remaining 25%. (Doc. No. 72). The five owners comprised the Board of Directors (“the Board”).

⁴ “Defendants” is not to be confused with the collected reference to “appellants” in this case. “Appellants” does not include Gamma Center but does include Hensel and Dinsmore & Shohl.

defendants had intentionally caused her emotional distress. (*Id.*) According to Grove's complaint, she received "excellent performance evaluations in April 2006, and April 2007," but she was terminated approximately seven days after she reported the last incident of sexual harassment, on June 15, 2007. (*Id.*)

{¶3} On April 24, 2008, defendants filed their answer disputing Grove's claims. (Doc. No. 6). Defendants asserted numerous affirmative defenses and denied Grove's assertion that she was entitled to punitive damages and attorneys' fees. (*Id.*).

{¶4} On July 28, 2008, defendants filed a third-party complaint against appellee, a Gamma Center shareholder. (Doc. No. 11). Defendants alleged that appellee had failed to inform them that Grove had reported incidents of sexual harassment, and that appellee was consequently liable for breach of fiduciary duty and negligence. (*Id.*).

{¶5} On September 10, 2008, appellee filed his answer. (Doc. No. 15). In his answer appellee admitted that he was a director, officer and minority shareholder of Gamma Center from October 2004 to September 2006. (*Id.*) He also admitted that Grove complained to him regarding Dr. Reddy and Dr. Singh's conduct. (*Id.*) However, appellee denied that he failed to report the allegations to Gamma Center or any of its shareholders.⁵ Appellee also asserted a counterclaim

⁵ Appellee would later indicate that he spoke privately with both Dr. Reddy and Dr. Singh about Grove's sexual harassment complaints.

alleging he was entitled to indemnification and an advance for his expenses pursuant to Gamma Center's by-laws.⁶ (*Id.*). On October 7, 2008, defendants filed their answer to appellee's counterclaim, denying that appellee was entitled to indemnification. (Doc. No. 17).

{¶6} On January 16, 2009, appellee amended his answer and counterclaim to assert that defendants had assumed the risk of their conduct. (Doc. No. 25).

{¶7} On February 24, 2009, defendants filed a third-party complaint against Sanjeev Verma, another Gamma Center shareholder. (Doc. No. 33). Defendants alleged that Verma also failed to inform them of Grove's sexual harassment report, and that Verma was liable for breach of fiduciary duty, negligence, and breach of contract.⁷ (*Id.*).

{¶8} On March 2, 2009, defendants filed an amended third-party complaint against appellee. (Doc. No. 34). Defendants included an additional count for breach of contract. (*Id.*). The breach of contract claim alleged that appellee failed to adopt a sexual harassment policy in his capacity as a manger of the operations of Gamma Center.

⁶ Gamma Center's Bylaws read, in pertinent part, "To the maximum extent permitted by Ohio law in effect from time to time, the Corporation, without requiring a preliminary determination of the ultimate entitlement to indemnification, shall indemnify and shall pay or reimburse reasonable expenses in advance of final disposition of a proceeding to * * * any individual who is a present or former director or officer of the Corporation and who is made party to the proceeding by reason of his service in that capacity * * * [.]"

⁷ It was later indicated through testimony that Grove also informed Verma of the alleged sexual harassment, specifically by Dr. Reddy. Grove apparently indicated this in her deposition. Verma denied that he was ever notified of any sexual harassment by Grove. (Aug. 24, 2011, Tr. at 128-130).

{¶9} On March 3, 2009, Verma filed his answer to defendants' third-party complaint against him. (Doc. No. 36). Verma also asserted a counterclaim, alleging that he was entitled to indemnification and an advance for his expenses pursuant to Gamma Center's by-laws. (*Id.*). On March 11, 2009, the defendants filed their answer to Verma's counterclaim. (Doc. No. 38).

{¶10} On September 30, 2009, appellee and Verma filed motions for summary judgment. (Doc. Nos. 55, 56). In arguing for summary judgment, appellee argued, *inter alia*, that appellee breached no duty, or fiduciary duty, to defendants, that no contract existed between appellee and Dr. Reddy and Dr. Singh, and that even if defendants could show that appellee breached a duty, or a fiduciary duty, they absolutely could not show that he proximately caused any injury to the defendants.⁸ (Doc. No. 55).

{¶11} Attached to appellee's summary judgment motion was an affidavit by appellee stating, *inter alia*, that he had no formal contract with Dr. Reddy and Dr. Singh to manage Gamma Center, that he had no supervisory authority over Dr. Reddy and Dr. Singh, that he could not unilaterally adopt a sexual harassment policy for Gamma Center, and that after Grove complained to him about sexual harassment, appellee spoke privately with Dr. Reddy and Dr. Singh thinking it was the best way to resolve the issue. (Doc. No. 54). Also attached to appellee's

⁸ Verma, who is not the subject of this appeal, made similar arguments focusing in part on defendants' inability to prove proximate cause. (Doc. 56).

summary judgment motion were portions of deposition transcripts from the depositions of Dr. Reddy, Dr. Singh, Dr. Arora, and Sanjeev Verma. (*Id.*) In their depositions, both Dr. Singh and Dr. Reddy denied that any conversation between them and appellee about sexual harassment ever took place. (*Id.*)

{¶12} On November 18, 2009, Grove and defendants filed a joint stipulation of dismissal pursuant to Civ.R. 41(B). (Doc. No. 62). The parties stated that they had resolved the matter, and Grove dismissed her claims against defendants. (*Id.*). However, the stipulation did not resolve the claims defendants had asserted against appellee and Verma, or the counterclaims appellee and Verma had asserted against defendants. (*Id.*).

{¶13} On December 2, 2009, defendants filed their responses to appellee and Verma's motions for summary judgment. (Doc. Nos. 65, 66). On December 16, 2009, Verma filed his reply to defendants' response. (Doc. No. 68). On December 18, 2009, appellee filed his reply to defendants' response. (Doc. No. 69).

{¶14} On January 15, 2010, Gamma Center filed a "Notice of Bankruptcy and Suggestion of Stay" with the trial court. (Doc. No. 70). The notice indicated that a bankruptcy petition had been filed in the United States Bankruptcy Court for

the Northern District of Ohio, Western Division.⁹ (*Id.*) On February 26, 2010, appellee filed a response to defendants' suggestion to stay. (Doc. No. 71).

{¶15} On April 16, 2010, the trial court granted appellee and Verma's motions for summary judgment. (Doc. No. 72). The summary judgment read, in pertinent part,

Gamma Center, the corporate entity involved in this case, was formed during calendar year 2004 and was a fairly small organization. The investors were Dr. Chander Arora, Dr. Sudesh Reddy and Dr. Parminder Singh. Each physician had a 25% interest in the venture. The other 25% interest was held by Third-Party Defendants Indi Singh and Sanjeev Verma. The Plaintiff, Stacy Grove, initiated this action as a sexual harassment/hostile work environment and termination case against Gamma Center and Drs. Reddy and Parminder Singh. The doctors brought this third-party complaint against the third-party defendants alleging a breach of fiduciary duty, breach of contract and negligence.

*** * * [The trial court then cites the law applicable to determining summary judgment motions.] * * ***

Boiled down to its simplest terms, this case involves a situation where the Third-Party Plaintiffs claim that the Third-Party Defendants should have protected them from themselves. Apparently, the thought is Third-Party Defendants Verma and Indi Singh should have reported Drs. Reddy and Parminder Singh to the board of Gamma Center when the allegations brought by Ms. Grove came to light. In other words, the Third-Party Defendants should have reported the Third-Party Plaintiffs to themselves. This Court cannot accept the notion that any aspect of the Third-Party Plaintiffs' complaint is, in any way, viable. There was no breach of fiduciary duty. There is no breach of any contract. Neither Third-Party Defendant was

⁹ It appears from the record that the bankruptcy was ultimately resolved in 2014.

negligent. Neither Third-Party Defendant proximately caused any of the corporate entity's injuries. The third-party complaint of Sudesh S. Reddy and Parminder Singh is hereby dismissed with prejudice.

Further, Ohio Revised Code §1701.13(E)(3) and the Gamma Center's by-laws provide for payment of legal fees expended by the Third-Party Defendants in defense of this third-party complaint. Counsel for Sanjeev Verma and Indi Singh are directed to forward a detailed and itemized statement for their services rendered in connection with this third-party complaint to the Court for review after which a hearing, if requested, will be scheduled by the Court on the issue of attorney fees.

Costs associated with this aspect of this case are assessed to the Third-Party Plaintiffs.

(Id.)

{¶16} On April 22, 2010, Verma filed an application for attorneys' fees "in accordance with the [trial court's] order filed April 19, 2010." (Doc. No. 73).

{¶17} On May 17, 2010, Verma filed a motion for frivolous conduct sanctions against Dr. Reddy and Dr. Singh. (Doc. No. 74). Verma alleged that the claims defendants filed against him were frivolous and that the trial court should impose sanctions against them pursuant to R.C. 2323.51(B). *(Id.)*

{¶18} Also on May 17, 2010, appellee filed an application for attorneys' fees and a motion requesting sanctions for the allegedly frivolous conduct of Dr. Reddy and Dr. Singh. (Doc. No. 76). Appellee argued that he was entitled to judgment against Gamma Center for indemnification and that he was entitled to sanctions against Dr. Singh and Dr. Reddy for frivolous conduct. *(Id.)* Regarding

frivolous conduct, appellee specifically argued that he owed no duty to Dr. Reddy and Dr. Singh, that Dr. Reddy and Dr. Singh's claims for breach of contract had no factual support, and that Dr. Reddy and Dr. Singh controlled Gamma Center and were responsible for its actions, including Gamma Center's failure to indemnify him. (*Id.*)

{¶19} On May 28, 2010, the trial court held a hearing on the applications for attorneys' fees and motions for sanctions. (Doc. No. 77). Following the hearing, the trial court granted defendants permission to file responses to Verma and appellee's applications and motions. (*Id.*)

{¶20} On June 21, 2010, defendants filed their responses to Verma and appellee's applications and motions. (Doc. Nos. 80, 81). In their responses, defendants argued that their claims were colorable. They also argued that Jan Hensel, defendants' attorney, advised the defendants that appellee had violated his fiduciary duties, breached an implied contract and negligently failed to report allegations to the Board. Defendants argued that they did not review the third-party complaint or any amendments until after they were filed by Hensel. (*Id.*)

{¶21} On July 12, 2010, Verma and appellee filed a motion requesting Civ.R. 11 sanctions against Dinsmore & Shohl and Hensel, individually, relating to their representation of Gamma Center, Dr. Reddy, and Dr. Singh. (Doc. No. 84). Verma and appellee argued that Hensel had filed a frivolous complaint

against them, and requested that the trial court order her to pay their attorneys' fees. (*Id.*). On that same day, Verma and appellee also filed their reply to the defendants' responses to their applications for attorneys' fees and motions for sanctions. (Doc. No. 85).

{¶22} On September 15, 2010, Dinsmore & Shohl and Hensel filed their response to Verma and appellee's motion for Civ.R. 11 sanctions. (Doc. No. 89). On October 4, 2010, Verma and appellee filed their reply. (Doc. No. 92).

{¶23} On August 24, 2011, the trial court held a hearing on the pending motions. (Doc. No. 101). At the hearing, the attorneys for appellee and Verma stated that they were "not going to present any additional evidence regarding liability" for sanctions and frivolous conduct. (Aug. 24, 2011, Tr. at 8). They believed that "the evidence submitted in support of the motions for summary judgment and the Motions for Sanctions [we]re sufficient as far as liability." (Tr. at 8). They did, however, state that they would "present evidence regarding attorney's fees." (*Id.*)

{¶24} At that point an attorney, S. Frederick Zeigler, testified. Zeigler had previously represented Verma in these proceedings, but was no longer his attorney. Zeigler testified that in preparation for his testimony he had "perused" the invoices from the litigation presented to him by appellee's attorney and that they "seem[ed]" to be appropriate. (Tr. at 14). Zeigler further testified that the

hourly rate of \$175.00 an hour for the work being done in this case was appropriate. (Tr. at 13). On cross-examination, Zeigler testified “that his bill looks like it’s reasonable and necessary to me. His charges looks [sic] like they’re reasonable and necessary. His hourly rate looks like it’s reasonable and necessary to me.” (Tr. at 20). John Herbert, the attorney for appellee and Verma at that time, then testified. He identified his fees and what he had charged for these proceedings.

{¶25} At the conclusion of the attorneys’ testimony, appellee and Verma rested. After appellee and Verma rested, appellants made an oral motion to dismiss Verma and appellee’s motion for sanctions. (*Id.*). Appellants argued that pursuant to a local rule, and a case from this Court, *Natl. City Bank v. Semco, Inc.*, 3d Dist. Marion No. 9-10-42, 2011-Ohio-172, appellee and Verma were required to present testimony of a disinterested attorney to establish attorneys’ fees. Defendants claimed that the attorneys who testified were not disinterested, and therefore the motion for frivolous conduct sanctions should be dismissed because any attorneys’ fees could not be established, regardless of whether the conduct was ultimately determined to be frivolous. (Aug. 24, 2011, Tr. at 39-43). The trial court indicated that it would take the matter under advisement and allow the parties to brief the matter after the hearing.

{¶26} Appellants then presented the testimony of Dr. Arora, Dr. Reddy, and Dr. Singh, along with their former attorney Jan Hensel. Dr. Reddy and Dr. Singh continued to maintain that appellee was a liar, suggested that he was “in cahoots” with Grove, that there was a “conspiracy,” and that appellee had never informed them of any sexual harassment, which they denied ever took place. (*Id.* at 81-87 118). Dr. Singh also testified that after Grove was fired, a male was hired to replace her. (Tr. at 109). Dr. Singh testified that the male was paid higher than Grove was, but Dr. Singh argued that the male had more duties than Grove. (Tr. at 109-110).

{¶27} Dr. Arora testified that he also did not believe any sexual harassment ever took place and that appellee and Grove were “making up these things.” (*Id.* at 56-57). In addition, the doctors also indicated that they were only taking actions to sue appellee based on what their attorneys’ advised.¹⁰ (Tr. at 58, 61, 64, 90, 107-108).

{¶28} Jan Hensel then testified as to her prior representation of defendants and her theory regarding how she believed appellee and Verma could have been held liable under the third-party complaints. Hensel testified that there were two Supreme Court cases that

basically say that a company has an affirmative defense to a claim of supervisor liability for sexual harassment that does not

¹⁰ Dr. Singh actually testified that he did not think he reviewed the third-party complaints prior to their being filed. (Tr. at 108).

culminate in a tangible job detriment if they can establish that they took affirmative steps to prevent and promptly correct any sexually harassing behavior, and that the Plaintiff unreasonably failed to take advantage of those measures. So based upon that case law that's why we always advise employers to have a good sexual harassment policy. It became very clear that because there was no sexual harassment policy and because Indi had not reported to the board what [Grove] alleged that she told him, the company was deprived of the opportunity to establish an affirmative defense, that they took steps to correct any sexually harassing behavior.

(*Id.* at 131).¹¹ Hensel also testified that appellee was instrumental with regard to the “retaliation” claim by Grove against defendants because

reporting is an essential element of the retaliation claim, and whenever you're faced with a retaliation claim, you want to see that there's a legitimate good faith, or legitimate business reason for the termination, and in this case there was no evidence in [Grove's] personnel file of a legitimate business reason for termination. So I was concerned that it would be difficult to defend against the retaliation claim if, in fact, [Grove] had reported it to Indi and Sanjeev and then she was terminated

¹¹ It appears the two United States Supreme Court cases referenced were *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257(1998). *Faragher* and *Ellerth* were companion cases the Supreme Court released on the same day. They indicated that employers can have an affirmative defense to liability for sexual harassment by a supervisor. In *Faragher*, the Supreme Court held,

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”

(Internal citation omitted). *Faragher* at paragraph (c) of syllabus.

The Supreme Court went on to hold, however, that, “No affirmative defense is available * * * when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. *Id.*

with no documentation of policy violations, poor work performance, things to establish a legitimate business reason.

(*Id.* at 140).

{¶29} Hensel did testify that the breach of contract claims against appellee and Verma that had been filed by Dr. Reddy and Dr. Singh should have been dismissed once defendants learned that no contract existed between them. Hensel testified that she was unable to file a dismissal herself because she was no longer defendants' attorney when that became clear. (Tr. at 136).

{¶30} When appellants finished presenting their case, they renewed their motion to dismiss the frivolous conduct sanctions based on the fact that appellee and Verma had not presented the testimony of a disinterested attorney regarding attorney's fees. The trial court set a briefing schedule for the parties at that time to address the issue of whether this Court's decision in *Semco* or the Marion County Local Rules required the testimony of a disinterested attorney to establish attorney's fees.

{¶31} On September 16, 2011, Verma and appellee filed their response to appellants' oral motion to dismiss. (Doc. No. 105). In the response, they argued that the *Semco* case did not require a disinterested attorney in these circumstances, and that the local rule was not applicable in this instance. Appellants filed their reply on September 30, 2011. (Doc. No. 108).

{¶32} On June 12, 2012, the trial court filed its judgment entry on the matter. (Doc. No. 111). The court stated that appellee and Verma had to “prove two elements to recover their attorney fees; namely, frivolous conduct and the reasonableness of their requested fees.” (*Id.*) In analyzing the issue, the trial court held as follows,

Any exercise conducted by this Court to determine whether or not the Third-Party Plaintiffs engaged in conduct that either served to merely harass or maliciously injure the Third-Party Defendants or was not warranted under existing law and could not be supported by good-faith argument for an extension, modification or reversal of existing law, would be an exercise in futility. If this Court were to determine that the actions of the Third-Party Plaintiffs and/or their attorneys were deceitful, unethical, unprofessional, gratuitous, offensive, malicious, belittling, malevolent or unconscionable, it would serve no useful purpose because the Third-Party Defendants failed to produce testimony from a disinterested witness as to the reasonableness and necessity of the attorney fees incurred as a result of this alleged frivolous conduct.

This Court got the message from the Third District Court of Appeals in the Semco case. “Attorney fees in all matters are governed by the Rules of Professional Conduct which require proof of a reasonable fee and a consideration of the fee customarily charged in the locality for similar legal services.” Since there was no independent evidence from a disinterested attorney at the hearing on this matter regarding the amount of hours spent and the hourly rate charged, this Court has nothing before it on which to base an award of attorney fees. This Court finds specifically that Semco applies to the matters in controversy in this case and, accordingly, since there is nothing before this Court which could justify the award of attorney fees, any finding of frivolous conduct would be superfluous. This Court, therefore, overrules the remaining Motions filed by Third Party Defendants.

(*Id.*) The trial court thus sustained appellants' motion to dismiss Verma and appellee's applications for attorneys' fees and motions for sanctions, but did not specifically reach the issue of whether frivolous conduct occurred.

{¶33} On July 12, 2012, appellee filed a notice of appeal from the trial court's decision. (Doc. No. 115). Verma did not appeal the trial court's decision on that matter, and from that point forward took no part in this case.

{¶34} On appeal, appellee argued, *inter alia*, that *Semco* did not require a disinterested attorney. In *Grove v. Gamma Center, et al.*, 3d Dist. Marion No. 9-12-41, 2013-Ohio-1734, this Court reversed the trial court's decision requiring a disinterested attorney and held as follows.

After reviewing the applicable law, this Court disagrees with the trial court's conclusion that Singh cannot prevail on his motions for attorneys' fees solely because he failed to provide evidence from a disinterested witness regarding the amount of hours spent and the hourly rate charged. While we agree that whether Singh provided this evidence may be one part of the analysis, we reverse and remand this case for the trial court's consideration of the remaining factors.

Grove, ¶ 32.

{¶35} After remand, the case was assigned to a new trial judge who had succeeded the previous trial judge. On July 8, 2013, the new trial judge filed a "Notice of Hearing" indicating that a phone conference between the parties would take place on July 18, 2013, to "discuss the direction the case is to proceed in light

of the Court of Appeals' decision, including whether counsel wishes a new evidentiary hearing or if the Court is to consider the evidence previously presented." (Doc. No. 118).

{¶36} On February 3, 2014, the trial court filed an entry on frivolous conduct sanctions. In its entry, the trial court indicated that since remand, the court had held the scheduled phone conference with counsel for all parties and that

[a]ll parties declined to have a further hearing or present additional evidence. Instead, the parties agreed to allow the [trial court] to rule on the motions based on the evidence contained in the record which includes a transcript of the testimony presented at the hearing held on August 24, 2011, exhibits introduced at that hearing, and the other pleadings contained in the file.

(Doc. No. 120).

{¶37} The trial court's entry then summarized the prior proceedings in this case and the law applicable to the pending motions. Afterward, the trial court made the following findings.

- 1. There is no statutory or case law which supports liability under these circumstances.**
- 2. If a court were to determine that liability could exist for failure to communicate knowledge of a sexual harassment report to a company, this liability would only extend to the company and not to the individual sexual harassers. This is because a company may have vicarious liability in a sexual harassment case when the company should have known about the sexual harassment being committed by its employees and failed to take appropriate action to stop the harassment. See e.g. *Faragher v. City of Boca Raton* (1998),**

118 S.Ct. 2275. However, in this case, the third-party complaint was brought not just on behalf of the company, but also on behalf of the alleged sexual harassers. [FN omitted]

- 3. Attorney Hensel agreed that the breach of contract claim should not have been brought on behalf of Dr. Reddy or Dr. Singh because, to the extent that Indi Singh had a contract, that contract was only with Gamma Center, Inc. (Tr. pp. 135-136).**
- 4. The entire basis for the third-party complaint was the allegation that Indi Singh should have taken remedial action in response to the Plaintiff's sexual harassment complaints. However, when an interrogatory was posed to the Third-Party Plaintiffs asking them to identify each remedial action Indi Singh should have taken in response to the sexual harassment claims, the Third-Party Plaintiffs objected, indicating that "This interrogatory calls for speculation and conjecture," [FN omitted] The failure to be able to identify the acts they contend Indi Singh should have taken further demonstrates the lack of good faith in pursuing this complaint.**
- 5. Third-Party Plaintiffs also could not establish proximate cause, even if they could have convinced the Court to buy their novel legal argument. Both Dr. Singh and Dr. Reddy strongly disputed that any sexual harassment took place. Additionally, Dr. Arora, the third physician/partner, testified that he did not believe that any sexual harassment took place. (Tr. pp. 59, 81, 103). As such, a majority of the Board was firmly of the position that there was no sexual harassment and no need for any remedial action. Therefore, the evidence is undisputed that even if a report had been made to the Board, it would not have affected the action taken by the company.**
- 6. The Defendants contention was that the only portion of Plaintiff's claim on which she had a significant chance of prevailing was her wrongful termination claim, and not her**

sexual harassment claim (Tr. 53, 105). It is undisputed that Indi Singh had nothing to do with Plaintiff's termination. Moreover, Indi Singh's affiliation with Gamma Center, Inc. ended nine months before Plaintiff was terminated.

(Doc. No. 120).

{¶38} Next, the trial court analyzed the refusal to indemnify appellee for his attorney fees. After quoting Gamma Center's by-laws regarding indemnification, the trial court reasoned,

In spite of the clear language of the corporate by-laws and R.C. 1701.13(E)(3), Defendant Gama [sic] Center refused to indemnify Third-Party Defendant Indi Singh for his legal fees. Counsel for Indi Singh made the request for indemnification less than a week after he was served with the third-party complaint (Plaintiff's Ex. 3). The request was denied in a letter from Attorney Hensel stating that Indy Singh did not act in good faith and because some of the claims against him were based on conduct that was "clearly outside the scope" of his duties (Plaintiff's Ex. 4). Dr. Singh and Dr. Reddy testified that they did not recall whether they had reviewed Exhibit 4 with their attorney (Tr. Pg. 94-95, 108). However, Attorney Hensel testified that she was sure that she discussed the issue with the Doctors and they "agreed 100%" with not paying Third-Party Defendant Indi Singh's attorney fees (Tr. Pg. 143-144).

The claimed reasons for the failure to indemnify Third-Party Defendant Indi Singh for attorney fees cannot be supported from a review of the Third-Party Complaint. The Third-Party Complaint makes no allegation that the Third-Party Defendant Singh acted in bad faith. Rather, it alleges a breach of fiduciary duties and breach of contract. Further, since the entire theory of liability against Third-Party Defendant Singh is based on his alleged failure to fulfill his duties as a shareholder, officer, and director of Gam[m]a Center, as well as his alleged failure to adopt the appropriate polices in connection with his contract to manage the office of Gamma Center, it is impossible to fathom

how Attorney Hensel could, in good faith, assert that the allegations against Third-Party Defendant Singh were “outside the scope of Mr. Singh’s duties to Gamma Center and its shareholders.”

(Id.)

{¶39} Based on the reasoning on these two issues, the trial court found that the third-party complaint filed against appellee by Hensel and Dinsmore & Shohl on behalf of Dr. Reddy and Dr. Singh constituted frivolous conduct under R.C. 2323.51(A)(2)(a). The court reasoned that “The pleadings were motivated by improper purpose and asserted claim[s] which [were] neither warranted under existing law, nor could be supported by good faith arguments for the establishment of new law.” *(Id.)* In addition, the trial court found that the refusal to indemnify appellee for his legal fees in accordance with Gamma Center’s by-laws also constituted frivolous conduct on behalf of appellants. *(Id.)*

{¶40} The trial court also found that attorney Hensel should be sanctioned under Civ.R. 11 as she should have known that there were not good grounds to establish liability against appellee, and that there were not good grounds to refuse to indemnify him. *(Id.)* Ultimately the court held that “[a]s a result of the frivolous conduct and Civ. R. 11 violation referenced herein, Third-Party Defendant appellee incurred the sum of \$57,265.82 in attorney fees and expenses.”

{¶41} The trial court then stated that before its decision was reduced to judgment, it would entertain arguments as to any request for additional fees and

expenses incurred by appellee following the August 24, 2011, hearing, and any argument as to whether there should be an allocation of the award between Third-Party Plaintiffs and their former counsel Jan Hensel and her law firm Dinsmore & Shohl, or whether the judgment should be jointly and several against all. (*Id.*)

{¶42} On February 24, 2014, appellee filed an application for additional attorney fees and expenses against Dr. Reddy, Dr. Singh, Hensel and Dinsmore & Shohl. (Doc. No. 122). In the application appellee's attorney identified some fees and expenses that were specifically attributable to the various appellants. (*Id.*) Specifically, appellee listed that all parties were jointly and severally liable for the amount of \$65,250.09, that Hensel and Dinsmore & Shohl were jointly and severally liable for \$5,393.22, and that Dr. Reddy and Dr. Singh were jointly and severally liable for \$4,705.97. (*Id.*) The total award thus requested amounted to \$75,349.28.

{¶43} On February 26, 2014, appellants requested a hearing to allocate the attorney fees and dispute the amount of sanctions. (Doc. No. 124).

{¶44} On February 28, 2014, appellee filed an amended memorandum regarding allocation of attorney fees and expenses. (Doc. No. 125). In the memorandum, appellee stated that he had claimed \$48,118.72 in unreimbursed legal fees in Gamma Center's bankruptcy. (*Id.*) The amended memorandum stated that appellee had received a check in the amount of \$10,384.50 from

Gamma Center's bankruptcy trustee. (*Id.*) Based on receiving the money from the trustee, appellee reduced the total request for sanctions to \$64,964.78, with \$55,329.78 for all parties jointly and severally, \$5,393.22 from Dinsmore & Shohl, jointly and severally, and \$4,241.78 from Dr. Reddy and Dr. Singh, jointly and severally. (*Id.*)

{¶45} On May 8, 2014, appellee filed a second amended application for additional attorney fees and expenses. The new amount totaled \$65,631.60, with \$62,489.78 for fees before February 1, 2014. From February through April, 2014, \$3,141.82, and fees and expenses were alleged to be assessed jointly and severally to Dr. Reddy, Dr. Singh, Hensel, and Dinsmore & Shohl.

{¶46} On May 9, 2014, the trial court held a hearing to determine the remaining issues. At the hearing, the trial court first clarified with the parties that Gamma Center's bankruptcy had been finalized and that there would be no more money recovered from Gamma Center. (May 9, 2014, Tr. at 8). Appellee then presented the testimony of Thomas A. Mathews, an attorney practicing in the Marion, Ohio, area. Mathews testified that he had reviewed the fees in this case and indicated that they were appropriate and fair. (Tr. at 26). Herbert, appellee's attorney, then testified as to the work he had done in this case related to the appellants as a result of what the trial court found to be frivolous conduct and he

provided his opinion on how the award should be allocated between the appellants.

{¶47} Herbert also testified that appellee had not paid the fees billed since the June 12, 2012, dismissal of his motion for sanctions. (*Id.* at 83). Herbert further testified that if fees were not awarded, he would write them off and would not require appellee to pay them. (Tr. at 94). He testified that he made that decision because appellee had been a good client who he believed had been treated wrongly by the opposing parties. (*Id.*)

{¶48} After Herbert testified, appellants argued that any fees Herbert was not requiring appellee to pay were not “incurred” pursuant to the statute and thus could not be recoverable as attorney fees. Once appellants made this argument, they elected not to call any witnesses, saying instead that they were “not going to argue over allocation. We’re gonna let [the court] do that.” (Tr. at 112). In addition, appellants also argued at the hearing that they should not be responsible for the fees incurred by appellee related to his first appeal from the prior trial judge’s ruling requiring a “disinterested” expert to award attorney’s fees.

{¶49} On July 3, 2014, the trial court filed its final judgment entry on the matter. The trial court first analyzed whether fees had been “incurred” if Herbert did not intend to actually force appellee to pay for the work. Ultimately the court found that “Herbert’s decision not to require his client to pay the attorney fees that

were reasonably incurred does not prevent an award of attorney fees under R.C. 2323.51.” (Doc. No. 131). The court then went on to determine reasonable attorney fees and ultimately awarded a total of \$77,643.76 to appellee, which was offset by the amount appellee had already received through Gamma Center’s bankruptcy, \$10,384.50, for a total award of \$67,259.26. (*Id.*)

{¶50} Lastly, the court determined the allocation of the award amongst the appellants. The court specifically assessed \$4,705.97 against Dr. Singh and Dr. Reddy, and \$5,393.22 exclusively attributable to Hensel and Dinsmore & Shohl. The remaining \$57,160.07 was assessed jointly and severally against all. (*Id.*)

{¶51} It is from this judgment that Dr. Singh, Dr. Reddy, Hensel, and Dinsmore & Shohl appeal.

{¶52} Dr. Singh and Dr. Reddy assert the following assignments of error for our review.

***DR. SINGH AND DR. REDDY’S
FIRST ASSIGNMENT OF ERROR***

THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLANTS’ COMPLAINT WAS FRIVOLOUS AND FAILED TO DISMISS APPELLEE’S MOTIONS FOR SANCTIONS PURSUANT TO OHIO R.C. §2323.51 AND CIV. RULE 11.

***DR. SINGH AND DR. REDDY’S
SECOND ASSIGNMENT OF ERROR***

THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLANTS’ REFUSAL TO INDEMNIFY APPELLEE FOR HIS LEGAL FEES IN ACCORDANCE WITH ARTICLE XII

OF GAMMA CENTER'S BY-LAWS CONSTITUTED FRIVOLOUS CONDUCT.

***DR. SINGH AND DR. REDDY'S
THIRD ASSIGNMENT OF ERROR***

THE TRIAL COURT ERRED WHEN IT AWARDED APPELLEE'S ATTORNEY FEES PURSUANT TO OHIO R.C. §2323.51 AND CIV. RULE 11 WITHOUT ANY EVIDENCE THAT APPELLEE WAS ADVERSELY AFFECTED BY THE FRIVOLOUS CONDUCT FINDING.

***DR. SINGH AND DR. REDDY'S
FOURTH ASSIGNMENT OF ERROR***

THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLEE WAS ENTITLED TO ATTORNEY FEES PURSUANT TO OHIO R.C. §2323.51 AND CIV. RULE 11 AFTER THE AUGUST 24, 2011 HEARING AND WAS ENTITLED TO ATTORNEY FEES FOR APPELLEE'S PRIOR APPEAL IN *GROVE V. GAMMA CTR., INC.*

***DR. SINGH AND DR. REDDY'S
FIFTH ASSIGNMENT OF ERROR***

THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLEE HAD INCURRED ANY ATTORNEY FEES AFTER THE AUGUST 24, 2011 HEARING.

{¶53} Hensel and Dinsmore & Shohl assert the following assignments of error for our review.

***HENSEL AND DINSMORE & SHOHL'S
FIRST ASSIGNMENT OF ERROR***

THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT APPELLEE WAS ENTITLED TO FEES UNDER REVISED CODE SECTION 2323.51 WHEN HENSEL HAD A COLORABLE BASIS TO ASSERT THE CLAIMS IN THE THIRD-PARTY COMPLAINT, APPELLEE FAILED TO CARRY HIS BURDEN AT THE HEARING TO SUPPORT A FINDING OF FRIVOLOUS CONDUCT, AND APPELLEE

FAILED TO PROVE HE WAS ADVERSELY AFFECTED BY ANY ALLEGED FRIVOLOUS CONDUCT.

***HENSEL AND DINSMORE & SHOHL'S
SECOND ASSIGNMENT OF ERROR***

THE TRIAL COURT ERRED WHEN IT HELD THAT HENSEL VIOLATED OHIO CIVIL RULE 11 WHEN IT FAILED TO FIND SHE ACTED WILLFULLY, A NECESSARY REQUIREMENT TO FIND A VIOLATION OF RULE 11.

***HENSEL AND DINSMORE & SHOHL'S
THIRD ASSIGNMENT OF ERROR***

THE TRIAL COURT'S AWARD OF FEES WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE WHEN APPELLEE FAILED TO PROVE THAT HIS REQUESTED FEES WERE REASONABLE AND HE COULD NOT IDENTIFY WHICH FEES WERE EXPENDED IN DEFENSE OF THE CLAIMS ASSERTED BY THE INDIVIDUAL DEFENDANTS RATHER THAN GAMMA CENTER.

***HENSEL AND DINSMORE & SHOHL'S
FOURTH ASSIGNMENT OF ERROR***

THE TRIAL COURT ERRONEOUSLY AWARDED APPELLEE THE FEES HE INCURRED DURING THE FIRST APPEAL WHEN APPELLEE WAS NOT DEFENDING THE TRIAL COURT'S AWARD OF FEES UNDER REVISED CODE SECTION 2323.51, BUT RATHER APPEALING THE TRIAL COURT'S DECISION DENYING HIS CLAIMS UNDER 2323.51.

{¶54} Where possible, and where the discussion of the pertinent points in the assignments of error alleged by appellants overlap, we will address those arguments and assignments of error together.

*Dr. Singh and Dr. Reddy's First and Third Assignments of Error;
Hensel and Dinsmore & Shohl's First Assignment of Error;*

{¶55} In Dr. Singh and Dr. Reddy's first assignment of error, they make multiple arguments contending that the trial court erred by finding that appellants engaged in frivolous conduct. Specifically, Dr. Singh and Dr. Reddy contend that, 1) appellee could not rely on previously submitted evidence to prove frivolous conduct, 2) the evidence presented did not establish frivolous conduct, 3) a contract existed between appellee and Gamma Center, and that he did breach that contract or at least there was a colorable claim that he did, 4) the trial court did not take into consideration that Gamma Center had colorable claims even if Dr. Singh and Dr. Reddy did not, and 5) appellee fully participated in the litigation and did not file for dismissal, or a motion to strike in order to minimize his fees. In Dr. Singh and Dr. Reddy's third assignment of error, they argue that the trial court erred by awarding appellee attorney fees without any evidence that appellee was "adversely affected" by the frivolous conduct.

{¶56} Hensel and Dinsmore & Shohl make a number of similar arguments in their first assignment of error, including that, 1) there was a colorable basis for the suit against appellee and for refusing to indemnify appellee, 2) appellee failed to carry his burden to establish frivolous conduct at the hearing when he did not present evidence, 3) appellee did not show he was "adversely affected" by frivolous conduct, and 4) the trial court did not distinguish between Gamma

Center's suit and the suit filed on behalf of Dr. Reddy and Dr. Singh when finding that frivolous conduct existed.

Evidence Presented at Hearing

{¶57} In this case all of the appellants contend that the appellee did not carry his burden to establish frivolous conduct at the August 24, 2011, hearing because appellee relied on the evidence already contained within the record to establish frivolous conduct rather than presenting, or re-presenting, that evidence at the hearing. At the August 24, 2011, hearing, appellee's attorney indicated that he would not present any evidence related to liability beyond what was already contained in the record in the summary judgment motion and the motions for frivolous conduct and Civ.R. 11 sanctions.¹²

{¶58} On appeal, appellants argue that appellee could not simply rely on the evidence contained in the record, rather, he had to call witnesses and/or enter the documents into the record specifically at the hearing in order for the trial court to consider them. To support this proposition, appellants cite *Pisanick-Miller v. Roulette Pontiac-Cadillac GMC, Inc.*, 62 Ohio App.3d 757, 577 N.E.2d 446 (11th Dist.1991). In *Pisanick-Miller* the Eleventh District Court of Appeals held that "a motion for attorney fees under R.C. 2323.51 must be decided solely upon the evidence presented at the hearing, not upon evidentiary materials submitted with

¹² Appellee did present evidence regarding attorney's fees at the hearing.

the motion or otherwise.” *Pisanick-Miller* at syllabus. In making its decision, the Eleventh District found that a brief containing evidentiary documents from the appellant, and an attorney’s affidavit from the appellee, which were both submitted after the close of evidence in a R.C. 2323.51 hearing, could not be considered by the trial court in determining frivolous conduct. The brief and its evidentiary documents and the affidavit were, unlike the evidence in this case, not otherwise part of the trial court’s record. Nevertheless, appellants urge us to apply the stern wording of *Pisanick-Miller*’s holding to this case.

{¶59} Despite appellants’ argument, courts have not applied *Pisanick-Miller*’s holding as rigidly as appellants urge us to apply it. In *Jackson v. Bellomy*, 10th Dist. Franklin No. 01AP-1397, 2002-Ohio-6495, the Tenth District Court of Appeals was presented with a situation where an appellee in a R.C. 2323.51 frivolous conduct hearing “declined to introduce witness testimony, [but] did inform the court that the evidence he would submit for consideration was fully developed and documented within the court’s case file. Therefore, in the interest of time and efficiency, [appellee] referred the court to the record.” *Jackson* at ¶ 46. In *Jackson*, the appellants contended that the trial court’s consideration of material already contained in the record, but not presented at the R.C. 2323.51 hearing, was improper based on *Pisanick-Miller*, but the Tenth District disagreed, holding, “to require [appellees] to reproduce evidence of documents and

proceedings already in the record would be an unnecessarily ‘pointless gesture.’ ” *Id.* at ¶ 47 (Citation omitted). The Tenth District thus found that the trial court’s decision, which was based partly on evidence contained in the record but not submitted in the hearing, was not improper. *Id.* at ¶¶ 46-50.

{¶60} Similarly, in *Patton v. Ditmyer*, 4th Dist. Athens Nos. 05CA12, 05CA21, 05CA22, 2006-Ohio-7107, the Fourth District Court of Appeals found that where a party urged the court to consider the pleadings in the underlying case at a R.C. 2323.51 hearing, but did not reproduce them into evidence at the hearing, the court could properly consider those pleadings, particularly when there was no objection to the court’s consideration. *Id.* at ¶¶ 64-66. In *Patton*, the Fourth District specifically addressed *Pisanick-Miller*, holding,

[t]o the extent *Pisanick-Miller* holds that a court may never consider evidence outside the attorney fee hearing, we disagree with it. See, also, *Jackson v. Bellomy*, Franklin App. No. 01AP-1397 (disagreeing with *Pisanick-Miller* and stating that “to require the [defendants] to reproduce evidence of documents and proceedings already in the record would be an unnecessarily ‘pointless gesture’ ”). We agree with the reasoning set forth in *Murrell v. Williamsburg Local School Dist.* (1993), 92 Ohio App.3d 92, 96, 634 N.E.2d 263:

Ditmyer at ¶ 65.

{¶61} In the case cited by *Patton*, *Murrell v. Williamsburg Local School Dist.*, 92 Ohio App.3d 92 (12th Dist.1992), the Twelfth District Court of Appeals considered similar question to that which is before us and that which *Pisanick-*

Miller, Patton, and Jackson determined. In *Murrell*, the Twelfth District found that where appellants did not object to appellee's reliance on evidence already contained in the record, the court did not believe the statute "obligates the parties to present into evidence documents and proceedings already in the record. To do so would be a 'pointless gesture.'" *Murrell* at 96 (Citations omitted). However, the *Murrell* decision relied strongly on appellant's lack of objection and appellant's lack of desire to present any evidence at a hearing

{¶62} We would note that similar to *Patton* and *Murrell*, appellants did not object when appellee stated at the hearing that he intended to rely on the evidence already contained in the record. However, while appellants did not object at the time appellee's counsel stated that he intended to rely on evidence contained in the record, counsel for Hensel and Dinsmore & Shohl did argue at the conclusion of appellee's case that appellee's claims for sanctions and frivolous conduct should be dismissed because he did not put forth any evidence. (Aug. 24, 2011, Tr. at 43).

{¶63} Notwithstanding whether appellants objected to appellee's reliance on evidence already contained in the record, we agree with the Tenth District's holding in *Jackson* and the Fourth District's holding in *Patton* that to require appellee to reproduce documents already contained in the record would be "an unnecessarily pointless gesture." *Jackson* at ¶ 47.

{¶64} Moreover, *Pisanick-Miller* is easily distinguishable from this case, since both parties in *Pisanick-Miller* were attempting to use documents that were not contained in the record, were not presented at the R.C. 2323.51 hearing, and were filed *after* the hearing (when the parties had each rested). *See Pisanick-Miller* at 761-762. Furthermore, the reasoning for reversal in *Pisanick-Miller* was also predicated partly on the fact that appellants did not have an opportunity to rebut the documents at the hearing because they were submitted after the hearing. *Pisanick-Miller* at 761 (“As a result of counsel’s actions, appellant was denied the opportunity to cross-examine counsel as to the merits of his statements.”). In this case appellants were able to call any witnesses they wished to contest the evidence contained in the record at the hearing and they did, in fact, do just that. Therefore, we do not find *Pisanick-Miller* persuasive in this instance.

{¶65} Thus for all of these reasons we cannot find that the trial court erred in using the evidence already contained in the record to make its decision on frivolous conduct in this case. Appellants’ arguments on this issue are not well-taken.

Frivolous Conduct Pursuant to R.C. 2323.51(A)(2) and
Sanctions Pursuant to Civ. R. 11

{¶66} Next, appellants all contend that there was a colorable basis for filing the suit against appellee, that the trial court improperly found that appellants had

engaged in frivolous conduct pursuant to R.C. 2323.51, and that the trial court improperly imposed sanctions pursuant to Civ.R. 11.

{¶67} “ ‘[N]o single standard of review applies in R.C. 2323.51 cases.’ ” *Namenyi v. Tomasello*, 2d Dist. Greene No. 2013-CA-75, 2014-Ohio-4509, ¶ 19, quoting *Wiltberger v. Davis*, 110 Ohio App.3d 46, 51 (10th Dist.1996). When the question regarding what constitutes frivolous conduct calls for a legal determination, such as whether a claim is warranted under existing law, an appellate court is to review the frivolous conduct determination de novo, without deference to the trial court’s decision. *Natl. Check Bur. v. Patel*, 2d Dist. Montgomery No. 21051, 2005–Ohio–6679 at ¶ 10. “Similarly, whether a party has good grounds to assert a claim under Civ.R. 11 also involves a legal determination, subject to a de novo standard of review.” *ABN AMRO Mtge. Grp., Inc. v. Evans*, 8th Dist. Cuyahoga No. 98777, 2013–Ohio–1557, ¶ 14 citing *Fast Property Solutions v. Jurczenko*, 11th Dist. Lake Nos. 2012-L-015, 2012-L-016, 2013-Ohio-60, ¶ 57.

{¶68} “In contrast, if there is no disputed issue of law and the question is factual, we apply an abuse of discretion standard of review.” *Riverview Health Inst., L.L.C. v. Kral*, 8th Dist. Cuyahoga No. 24931, 2012-Ohio-3502, at ¶ 33, citing *Natl. Check Bur.* at ¶ 11. Likewise, if the trial court determines that a violation under R.C. 2323.51 or Civ.R. 11 exists, the trial court’s imposition of

sanctions for said violation will not be disturbed absent an abuse of discretion. *Gallagher v. AMVETS Post 17*, 6th Dist. Erie No. E-09-008, 2009-Ohio-6348, ¶ 32, citing *State ex rel. Fant v. Sykes*, 29 Ohio St.3d 65 (1987). An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Worrell v. Ohio Police & Fire Pension Fund*, 122 Ohio St.3d 116, 2006–Ohio–6513, ¶ 10.

{¶69} Ohio law provides two separate mechanisms for an aggrieved party to recover attorney fees, court costs, and other reasonable expenses arising out of frivolous conduct: R.C. 2323.51 and Civ.R. 11. *ABN AMRO Mtge. Group, Inc. v. Evans*, 8th Dist. Cuyahoga No 98777, 2013-Ohio-1557, ¶ 15 citing *Sigmon v. S.W. Gen. Health Ctr.*, 8th Dist. Cuyahoga No. 88276, 2007–Ohio–2117, ¶ 14. Although both provisions allow for the award of sanctions, they have separate standards of proof and differ in application. *Id.*; *Id.*

{¶70} Frivolous conduct is governed by R.C. 2323.51(A)(2), which reads, in pertinent part,

(2) “Frivolous conduct” means either of the following:

(a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other party's counsel of record 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.

{¶71} In determining whether a claim itself is frivolous under the statute, the test is whether no reasonable lawyer would have brought the action in light of the existing law. *Orbit Elecs., Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 2006–Ohio–2317, ¶ 49 (8th Dist.) (citation omitted).

{¶72} Civ.R. 11, conversely, governs the signing of pleadings, motions, and other documents and provides in pertinent part:

The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney’s or party’s knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court’s own motion, may be subjected to appropriate action, including an award to the

opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule.

{¶73} In ruling on a motion for sanctions made pursuant to Civ.R. 11, a court “must consider whether the attorney signing the document (1) has read the pleading, (2) harbors good grounds to support it to the best of his or her knowledge, information, and belief, and (3) did not file it for purposes of delay.” *Ceol v. Zion Indus., Inc.*, 81 Ohio App.3d 286, 290 (9th Dist.1992); *ABN AMRO Mtge, supra*, 2013-Ohio-1557, ¶ 17.

{¶74} On appeal in this case, appellants make a number of assertions claiming that their suit against appellee was not legally groundless. They claim that appellee owed a fiduciary duty to appellants that he breached, that he was negligent, and that he breached a contract with Reddy and Singh and Gamma Center to manage Gamma Center. As the determination of whether a claim is legally groundless is a question of law, we review this issue de novo. *Mainsource Bank v. Winafeld*, 5th Dist. Stark No. 2008CA00001, 2008-Ohio-4441, ¶ 17.

{¶75} To succeed on a claim of breach of a fiduciary duty, a plaintiff must prove the existence of a duty arising from a fiduciary relationship, a failure to observe the duty, and an injury resulting proximately therefrom. *Tablack v. Wellman*, 7th Dist. Mahoning No. 04-MA-218, 2006-Ohio-4688, ¶ 69, citing *Culbertson v. Wigley Title Agency, Inc.*, 9th Dist. Summit No. 20659, 2002-Ohio-714; *Strock v. Pressnell*, 38 Ohio St.3d 207, 216 (1988). To succeed on any claim

of negligence, a plaintiff must show that the defendant breached an applicable duty of care and that the breach proximately caused the plaintiff's injuries. *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 571, 2009-Ohio-3718, ¶ 36. To succeed on a breach of contract claim, a plaintiff must demonstrate that: 1) a contract existed; 2) the plaintiff fulfilled his obligations; 3) the defendant breached his obligations; and 4) damages resulted from this breach. *Caley v. Glenmoor Country Club, Inc.*, 5th Dist. Stark Nos. 2013 CA 00012, 2013 CA 00018, 2013-Ohio-4877, ¶ 59. All claims thus required appellants to have established that appellee's actions (or lack thereof) specifically caused damages to Dr. Singh and Dr. Reddy.

{¶76} Appellants' view of appellee's liability was summarized by their former attorney, appellant Jan Hensel, at the August 24, 2011, hearing. Hensel indicated that Gamma Center, Dr. Singh, and Dr. Reddy had been sued by Nancy Grove for multiple causes of action. According to Hensel, had appellee informed Gamma's Board that Grove complained to him about sexual harassment, the Board could have discussed this, and might have taken action to remedy the situation. In addition, Hensel claimed that the Board would have been aware that by potentially firing Grove they could face a retaliation suit. By the Board being

as appellants claimed, unaware of Grove's allegations,¹³ appellee's inaction allegedly prevented the defendants from being able to assert an affirmative defense at trial.

{¶77} Thus appellants seem to contend that had appellee informed the Board of Grove's claims,¹⁴ *and* had the Board taken action to remedy the situation, *and* had Gamma still fired Grove while Grove had good performance evaluations as she had in her employment, *and* had Grove brought her case to trial and made a prima facie case against defendants, *then* the defendants could assert an affirmative defense, which, *if proven*, would absolve defendants from liability for one or possibly two of the claims Grove filed against them.

{¶78} When analyzing these issues, the trial court found that appellants had committed frivolous and sanctionable conduct by filing their third-party complaint against appellee, that the pleadings were motivated by an improper purpose, that the claims were "neither warranted under existing law nor could be supported by good faith arguments for the establishment of new law[.]" According to the trial court, "[t]here is no statutory or case law which supports liability under these circumstances." Further, the trial court stated that "even if [appellants] could have

¹³ Although appellee admitted he never informed the Board as a whole, he testified that he did inform two of the Board's members, the alleged sexual harassers. In addition, Grove also indicated that she informed Verma, another of the Board's members, of the alleged sexual harassment.

¹⁴ This presupposes that appellee did not, as he suggested, inform two of the Board's members that they had been accused of sexual harassment.

convinced the [c]ourt to buy their novel legal argument,” the appellants “could not establish proximate cause.”

{¶79} On our own *de novo* review, it is apparent from listing all of the steps that would necessarily have to have been taken for Gamma Center to even, in theory, establish an affirmative defense that was traced back to appellee’s conduct, proximate cause is lacking in this case. This is even more readily apparent when considering that appellee left Gamma Center in September of 2006 and Grove was not fired until June of 2007, nine months *after* appellee was no longer part of Gamma Center. Appellee took no part in the decision to remove Grove and he was never alleged to have harassed Grove; rather he was merely indicated as one of possibly two people Grove had spoken out to regarding her alleged sexual harassment. In fact, Grove’s complaint indicated that she was fired about a week after she made her *final* sexual harassment complaint, which was also approximately nine months after appellee was no longer affiliated with Gamma Center.

{¶80} However, appellants attempt to argue that appellee, in his managerial capacity of Gamma Center, should have adopted a sexual harassment policy for Gamma Center, particularly after Grove complained to him, and that because appellee did not adopt a policy, he breached “his contract” with Gamma Center.

{¶81} Notably there was no written contract between appellee and Gamma Center requiring appellee to adopt a sexual harassment policy. In fact, even the agreement for appellee to manage Gamma Center was disputed as to what appellee's duties covered and what his compensation was exactly. However, appellants seem to contend that appellee should have adopted a sexual harassment policy regardless of the absence of any stated requirement.

{¶82} Nevertheless, it is undisputed that appellee, although he took on some managerial duties, was not an official employee of Gamma Center and that appellee had no supervisory authority over the alleged sexual harassers, Dr. Singh and Dr. Reddy. Because he had no supervisory authority over the alleged sexual harassers, appellee indicated that he spoke privately with Dr. Singh and Dr. Reddy about the alleged sexual harassment, though both doctors denied that the conversation ever took place. It is thus entirely unexplained in the record or in the law what appellee could have done to prevent any of the alleged sexual harassment, or how any policy he put in place would have any impact, when he could not supervise the alleged sexual harassers. This is especially true given the fact that the harassment allegedly continued *for nine months after appellee was no longer with Gamma Center.*

{¶83} Even assuming that appellee owed a duty to disclose Grove's complaints to the Board and/or Dr. Singh and Dr. Reddy, and even assuming he

did not speak to Dr. Reddy and Dr. Singh, appellants could not establish what action should have been taken as a result, breaking any remote claim to a chain of causation. When specifically asked in an interrogatory to identify each remedial action appellee should have taken in response to Grove's claims, appellants objected, indicating that "[t]his interrogatory calls for speculation and conjecture." (Aug. 24, 2011, Hrg. Pl's Ex. 5). The trial court found that this answer demonstrated a "lack of good faith in pursuing this complaint." It is difficult for appellants to maintain that appellee could have taken steps to prevent Grove's lawsuit against them yet remain unable to identify those steps when pressed.

{¶84} Moreover, appellants were only able to indicate that the Board *might* have taken action that *could* have given them an affirmative defense had appellee informed the Board of Grove's complaints. They are not able to affirmatively establish that they would have done something between the time of Grove complaining to appellee of the alleged sexual harassment, appellee leaving Gamma Center, Grove getting a good performance evaluation in April of 2007, then Grove allegedly complaining again in June 2007 and being subsequently fired.¹⁵

¹⁵ The trial court suggests that no action would have been taken by the Board even if appellee had formally notified the Board as Dr. Singh and Dr. Reddy denied any sexual harassment, and Dr. Arora testified that he believed Dr. Singh and Dr. Reddy and therefore did not believe any sexual harassment took place. Based on this, the trial court stated, "[a]s such, a majority of the Board was firmly of the position that there was no sexual harassment and no need for any remedial action. Therefore, the evidence is undisputed that even if a report had been made to the Board, it would not have affected the action taken by the company."

{¶85} Furthermore, the trial court also came to the conclusion that if it were to determine that liability *could* exist for appellee’s “failure” to communicate knowledge of a sexual harassment report to Gamma Center’s Board, liability would *only* extend to Gamma Center and not to the individual alleged sexual harassers, Dr. Singh and Dr. Reddy. Yet the individual alleged sexual harassers sued the appellee for the same causes of action as Gamma Center, and *they* were the ones found to have committed frivolous conduct, not Gamma Center. It is not evident, under any set of circumstances, how appellee could have been liable to Dr. Singh and Dr. Reddy individually for breach of a fiduciary duty, negligence, or breach of contract, especially when no written or oral contract existed between appellee and Dr. Singh and Dr. Reddy. Even attorney Hensel noted that she would have dismissed the breach of contract claim if she had not been removed as counsel for Gamma Center, Dr. Reddy, and Dr. Singh before she was able to do so.

{¶86} For all of these reasons, we cannot find that appellants’ claims against appellee were warranted under existing law, could be supported by a good faith argument for an extension of the law, or the establishment of new law. Thus we cannot find that the trial court erred in finding that frivolous and/or sanctionable conduct occurred with regard to the filing of the third-party complaint against appellee. Therefore, this argument is not well-taken.

Frivolous Conduct Based on the Failure to Indemnify

{¶87} The appellants next argue that the trial court erred in finding that they had committed frivolous conduct separate and distinct from filing legally groundless claims by refusing to indemnify appellee in this case. Unlike our review of whether appellants' claims were legally groundless, we review whether appellants' refusal to indemnify appellee was frivolous conduct under the abuse of discretion standard.¹⁶

{¶88} When Gamma Center, Dr. Reddy and Dr. Singh were first sued by Grove in this case, they elected to file a third-party complaint against appellee. Appellee subsequently requested that Gamma Center indemnify him for the suit according to Gamma Center's by-laws. Regarding indemnification, Gamma Center's by-laws read,

To the maximum extent permitted by Ohio law in effect from time to time, the Corporation, *without requiring a preliminary determination of the ultimate entitlement to indemnification*, shall indemnify and shall pay or reimburse reasonable expenses in advance of final disposition of a proceeding to * * * any individual who is a present or former director or officer of the Corporation and who is made party to the proceeding by reason of his service in that capacity * * * [.]

(Emphasis added).

{¶89} Gamma Center's by-laws thus provided extremely broad coverage for indemnification. In order to get around the very strict wording of Gamma

¹⁶ Appellants concede this point in their brief. (Dr. Singh and Dr. Reddy Br. at 8).

Center's by-laws, which would seem to mandate indemnification, Gamma Center cited R.C. 1701.13(E)(2), which governs the authority of corporations in Ohio, and reads, in pertinent part,

(2) A corporation may indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that the person is or was a director, officer, employee, or agent of the corporation, * * * including attorney's fees, actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit, *if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation*, except that no indemnification shall be made in respect of any of the following:

(a) Any claim, issue, or matter as to which such person is adjudged to be liable for negligence or misconduct in the performance of the person's duty to the corporation unless, and only to the extent that, the court of common pleas or the court in which such action or suit was brought determines, upon application, that, despite the adjudication of liability, but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the court of common pleas or such other court shall deem proper[.]

(Emphasis added.)

{¶90} Appellants cite R.C. 1701.13(E)(2) for the proposition that appellee could not be indemnified if he was not acting in good faith. Appellants contend that appellee was not acting in good faith and thus appellants properly refused to indemnify him. Appellee counters by pointing to R.C. 1701.13(E)(6), claiming that it allows corporations in their by-laws to provide greater indemnity

protections than those listed in the statute under R.C. 1701.13(E)(2). Revised Code 1701.13(E)(6) reads,

(6) The indemnification or advancement of expenses authorized by this section shall not be exclusive of, and shall be in addition to, any other rights granted to those seeking indemnification or advancement of expenses under the articles, the regulations, any agreement, a vote of shareholders or disinterested directors, or otherwise, both as to action in their official capacities and as to action in another capacity while holding their offices or positions, and shall continue as to a person who has ceased to be a director, trustee, officer, employee, member, manager, or agent and shall inure to the benefit of the heirs, executors, and administrators of that person. A right to indemnification or to advancement of expenses arising under a provision of the articles or the regulations shall not be eliminated or impaired by an amendment to that provision after the occurrence of the act or omission that becomes the subject of the civil, criminal, administrative, or investigative action, suit, or proceeding for which the indemnification or advancement of expenses is sought, unless the provision in effect at the time of that act or omission explicitly authorizes that elimination or impairment after the act or omission has occurred.

Appellee contends that the extremely broad wording of Gamma Center's by-laws required indemnification under this provision if not (E)(2). Appellees also claim that there was no indication that Singh was acting in bad faith, or that he was acting outside the scope of his duties, particularly since he was being sued for allegedly failing to fulfill his duties.

{¶91} When determining this issue of whether appellants' refusal to indemnify appellee constituted frivolous conduct, the trial court conducted the following analysis.

In spite of the clear language of the corporate by-laws and R.C. 1701.13(E)(3), Defendant Ga[m]ma Center refused to indemnify Third-Party Defendant Indi Singh for his legal fees. Counsel for Indi Singh made the request for indemnification less than a week after he was served with the third-party complaint (Plaintiff's Ex. 3). The request was denied in a letter from Attorney Hensel stating that Ind[i] Singh did not act in good faith and because some of the claims against him were based on conduct that was "clearly outside the scope" of his duties (Plaintiff's Ex. 4). Dr. Singh and Dr. Reddy testified that they did not recall whether they had reviewed Exhibit 4 with their attorney (Tr. Pg. 94-95, 108). However, Attorney Hensel testified that she was sure that she discussed the issue with the Doctors and they "agreed 100%" with not paying Third-Party Defendant Indi Singh's attorney fees (Tr. Pg. 143-144).

The claimed reasons for the failure to indemnify Third-Party Defendant Indi Singh for attorney fees cannot be supported from a review of the Third-Party Complaint. The Third-Party Complaint makes no allegation that the Third-Party Defendant Singh acted in bad faith. Rather, it alleges a breach of fiduciary duties and breach of contract. Further, since the entire theory of liability against Third-Party Defendant Singh is based on his alleged failure to fulfill his duties as a shareholder, officer, and director of Gam[m]a Center, as well as his alleged failure to adopt appropriate policies in connection with his contract to manage the office of Gamma Center, it is impossible to fathom how Attorney Hensel could, in good faith, assert that the allegations against Third-Party Defendant Singh were "outside the scope of Mr. Singh's duties to Gamma Center and its shareholders."¹⁷

¹⁷ The trial court cited R.C. 1701.13(E)(3), rather than (E)(2) or (E)(6), which the parties cite. Revised Code 1701.13(E)(3) reads,

(3) To the extent that a director, trustee, officer, employee, member, manager, or agent has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in division (E)(1) or (2) of this section, or in defense of any claim, issue, or matter in the action, suit, or proceeding, the person shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by the person in connection with the action, suit, or proceeding.

{¶92} The trial court then went on to say that Hensel should have known that there were not good grounds to refuse to indemnify appellee, and that the decision to refuse to indemnify him was jointly made by Hensel, Dinsmore & Shohl, Dr. Singh, and Dr. Reddy.

{¶93} In any event, we cannot find that the trial court abused its discretion in determining that appellants' committed frivolous conduct by failing to indemnify appellee. The trial court's findings were supported by the record. The letter that was sent to appellee informing him that he would not receive indemnification alleged that he had not acted in good faith or in a manner that was reasonably believed to be or not opposed to the interests of Gamma Center. However, *nothing* in the third-party complaint alleged that appellee acted in bad-faith and there is no indication of a showing of bad-faith on his part. Therefore, we cannot find that the trial court erred in finding that appellants committed frivolous and sanctionable conduct by refusing to indemnify appellee in this case, particularly given the strong wording of Gamma Center's by-laws. This argument is thus not well-taken.

It is not clear whether the trial court inadvertently referred to (E)(3) or was in fact indicating that at the very least appellants should have indemnified appellee once he was awarded summary judgment in this case pursuant to section (E)(3).

“Adverse Affect”

{¶94} Next, Dr. Reddy and Dr. Singh argue in their third assignment of error, and Hensel and Dinsmore & Shohl argue as part of their first assignment of error, that the trial court erred in awarding fees for frivolous conduct without making a specific finding that appellee was “adversely affected” as a result of defending against the frivolous conduct.

{¶95} “[A]n appellate court applies an abuse-of-discretion standard with respect to a trial court's decision to award attorney fees on the basis that frivolous conduct has adversely affected a party.” *Bowling v. Stafford & Stafford Co., L.P.A.*, 1st Dist. Hamilton No. C-090565, 2010-Ohio-2769, ¶ 8.

{¶96} In this argument appellants essentially contend that the trial court failed to take into account that Gamma Center had “colorable claims” and that the trial court did not distinguish between Gamma Center’s suit and the suit filed on behalf of Dr. Reddy and Dr. Singh in making an award for frivolous conduct. According to appellants, because Gamma Center’s claims were not established as frivolous,¹⁸ appellee is unable to show that he was “adversely affected” by the frivolous conduct alone in order to recover his fees. Appellants claim this is due to the fact that appellee has to prove he incurred *additional* fees as a direct identifiable result of defending the frivolous conduct *alone*, rather than merely

¹⁸ Again, to be clear, appellee did not file for frivolous conduct against Gamma Center itself, likely because Gamma Center was going through bankruptcy. He did argue as part of his motion for frivolous conduct sanctions against appellants that he was entitled to indemnification from Gamma Center.

from the litigation as a whole. Appellants argue that if appellee's expenses were the same for defending against Gamma Center and against Dr. Reddy and Dr. Singh, appellee cannot establish that defending against Dr. Reddy and Dr. Singh's "frivolous conduct" *alone* "adversely" impacted him.

{¶97} As support for their position, appellants cite *Wiltberger v. Davis*, 110 Ohio App.3d 46, 54 (10th Dist.1996). In *Wiltberger*, the 10th District Court of Appeals held that where a determination of frivolous conduct has been made, the party seeking R.C. 2323.51 attorney's fees must affirmatively demonstrate that he or she incurred additional attorney's fees as a direct, identifiable result of defending the frivolous conduct in particular. *Id.* The Tenth District noted that the statute itself speaks to this requirement and disallows an award in excess of fees "reasonably incurred * * * and *necessitated by the frivolous conduct.*" (Emphasis added.) *Id.*, citing R.C. 2323.51(B)(3).

{¶98} The statute at issue in *Wiltberger*, and which appellants base their argument, has been amended since *Wiltberger* was released. At the time *Wiltberger* was released, R.C. 2323.51(B) read, in pertinent part,

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

* * *

(3) The amount of an award that is made pursuant to division (B)(1) of this section shall not exceed, and may be equal to or less than, whichever of the following is applicable:

* * *

(b) In all situations other than that described in division (B)(3)(a) of this section, the attorney's fees that were both reasonably incurred by a party and necessitated by the frivolous conduct.

(4) An award made pursuant to division (B)(1) of this section may be made against a party, the party's counsel of record, or both.

Since the amendments, the same provisions now read,

(B)(1) Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in division (E)(2)(b) of section 101.15 or division (I)(2)(b) of section 121.22 of the Revised Code, at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section.

* * *

(3) The amount of an award made pursuant to division (B)(1) of this section that represents reasonable attorney's fees shall not exceed, and may be equal to or less than, whichever of the following is applicable:

* * *

(b) In all situations other than that described in division (B)(3)(a)¹⁹ of this section, the attorney’s fees that were reasonably incurred by a party.

(4) An award made pursuant to division (B)(1) of this section may be made against a party, the party’s counsel of record, or both.

{¶99} As noted by the Fifth District Court of Appeals in *Mid-Ohio Mechanical v. Eisenmann Corp.*, 5th Dist. Guernsey Nos. 07 CA 000035, 08 CA 00012, 2009-Ohio-5804, the statute was altered by the amendments in subtle but significant ways. In *Eisenmann*, the Fifth District found that, “[t]he amendment to the statute clearly removed the requirement that fees be necessitated by the frivolous conduct, and replaced it with language allowing a party to recover attorney’s fees ‘reasonably incurred’ by a party in a civil action.” *Eisenmann* at ¶ 157; see R.C. 2323.51(B)(3). Therefore, the Fifth District found reliance on *Wiltberger*’s specific holding after the statute’s amendment was “misplaced.” *Id.*; see also *Helfrich v. Madison*, 5th Dist. Licking No. 2011-CA-89, 2012-Ohio-3701, ¶¶ 46-51.

{¶100} The First District Court of Appeals agreed with this distinction in *Bowling v. Stafford & Stafford Co., L.P.A.*, 1st Dist. Hamilton No. C-090565, 2010-Ohio-2769, ¶ 14, where it held that since R.C. 2323.51 had been amended it “require[d] proof only that the fees had been ‘incurred in connection with the civil

¹⁹ (B)(3)(a), in both the old and the new statute, refers to a situation where there is a contingent fee agreement and thus is not applicable here.

action’ in which the frivolous conduct had occurred. Under the amended statute, the requirement that the expenditures be specifically ‘necessitated by the frivolous conduct’ applies only to court costs and expenses, not to attorney fees.” *Bowling* at ¶ 14.

{¶101} In this case there was a clear financial impact on appellee for having to defend against the third-party complaint. While appellants contend that appellee’s defense against the third-party complaint did not adversely affect him by creating additional fees necessitated by the frivolous conduct beyond what appellee was already incurring for defending against Gamma Center, the trial court was certainly well within its discretion to determine that attorney’s fees had been reasonably incurred in this case by defending against the frivolous conduct. Therefore, appellants’ argument on this issue is not well-taken.

Gamma Center’s Claims and Appellee’s
Participation in the Case

{¶102} Appellants next argue that the trial court failed to take into consideration Gamma Center’s “colorable claims” when making its frivolous conduct determination. Appellants argue that “The trial court should have determined whether the claim[s] raised by Gamma Center [constituted] frivolous conduct[.]” (Reddy, *et al.* Br. at 14).

{¶103} Due to Gamma Center’s bankruptcy, whether Gamma Center’s claims were frivolous was not before the trial court as appellee and Verma never

filed any motion for frivolous conduct sanctions against Gamma Center. It is hard to imagine how, when this issue was not before the trial court for determination, it would be proper for us to rule on it on appeal. Nevertheless, the same issues were readily apparent as the claims were the same against appellee from Gamma Center and Dr. Reddy and Dr. Singh. The only real difference was that there was absolutely not a contract between appellee and Dr. Reddy and Dr. Singh upon which to base any breach of contract claim, and a contract arguably existed between appellee and Gamma Center. As was previously discussed, however, appellee had no supervisory authority over Dr. Singh and Dr. Reddy and it is not clear how, in his “contractual” capacity as manager for Gamma Center, he could have taken any steps that would have proximately caused Gamma Center to have liability.

{¶104} Moreover, we previously found that the trial court need not have specifically determined that the litigation costs awarded were necessitated by frivolous conduct alone so long as they were “reasonably incurred” in the civil action. Therefore, appellants’ argument is not well-taken.

{¶105} Appellants next contend that appellee should not be rewarded for his participation in this case, arguing that appellee should have tried to “minimize” his costs by, at the very least, filing a motion to dismiss early in this action.

Appellants cite no compelling law to support this point and we find no reversible error here. Therefore, appellants' arguments on this issue are not well-taken.

{¶106} For all of these reasons, Dr. Reddy and Dr. Singh's first and third assignments of error are overruled, and Jan Hensel and Dinsmore & Shohl's first assignment of error is overruled.

Dr. Singh and Dr. Reddy's Second Assignment of Error

{¶107} In Dr. Singh and Dr. Reddy's second assignment of error, they allege that the trial court erred by finding appellants' refusal to indemnify appellee for his legal fees was frivolous conduct. Specifically, Dr. Singh and Dr. Reddy argue that the issue was not properly before the trial court as it was not alleged in appellee's original motion claiming frivolous conduct, and that because it was not raised appellee could not prepare a defense.

{¶108} Appellee filed his motion for frivolous conduct sanctions against Dr. Reddy and Dr. Singh on May 17, 2010. The motion indicated that he was entitled to judgment against Gamma Center for indemnification, and that Dr. Singh and Dr. Reddy had engaged in frivolous conduct by filing the third-party complaint against him. In addition, the motion also indicated that Dr. Reddy and Dr. Singh controlled Gamma Center and were responsible for its actions. As part of the argument that Dr. Reddy and Dr. Singh controlled Gamma Center and were responsible for its actions, appellee's motion stated as follows.

In 2007, Drs. Singh and Reddy and Dr. Chander Arora, who share a joint medical practice and collectively own two thirds of Gamma Center's shares, took control of Gamma Center by removing Tarlock Purewall, M.D. and Sanjeev Verma from its board of directors. Thereafter, Drs. Arora, Reddy and Singh ran Gamma Center for their own benefit:

After November 1, 2007, Gamma Center made profit distributions to Drs. Arora, Reddy and Singh, but not its other shareholders.

Although its bylaws limited indemnity for legal fees to officers and directors sued on account of their corporate activities, Gamma Center paid Dr. Singh's and Reddy's legal fees despite the fact that both were sued *individually*. [Emphasis *sic*]

Although Third Party Plaintiffs sued Indi Singh based on his activities as an officer and director, Gamma Center *did not pay his legal fees*, claiming R.C. §1701.13(E) forbade it, despite R.C. §1701.13(E)(6) which permits indemnification for anything save intentional misconduct. [Emphasis *sic*]

In November 2009 Gamma Center borrowed \$120,000 to settle Stacy Grove's claims but made no claim for reimbursement against Drs. Reddy and Singh.

In January 2010, 8 weeks after Gamma Center borrowed \$120,000, Drs. Arora, Reddy and Singh spent Gamma Center's funds to place it into Chapter 7 bankruptcy. Because corporations are dissolved, not rehabilitated under Chapter 7, the filing was financially pointless: its only effect was to interfere with these proceedings.

Shortly after they placed Gamma Center in bankruptcy, Drs. Arora, Reddy and Singh established their own nuclear medicine facility to provide the same services Gamma Center had previously offered, depriving Gamma of a corporate opportunity.

Because they completely controlled Gamma Center, used that control to file a frivolous lawsuit against Indi Singh then denied him the indemnity he was owed under Gamma Center's bylaws, Drs. Reddy and Singh may not hide behind Gamma Center to avoid liability. [Emphasis added] See, syll. ¶3, *Belvedere Condominium Unit Owners' Ass'n. v. R.E. Roark Cos.* (1993), 67 Ohio St.3d 274.

{¶109} In their response to appellee's motion, Dr. Reddy and Dr. Singh focused primarily on the aspect of whether the filing of the third-party complaint was frivolous. They did not address the information cited above regarding Dr. Singh and Dr. Reddy's control of Gamma Center despite the fact that it was the longest of all of appellee's arguments and constituted 1.5 pages out of the 6 page motion. *See* (Doc. Nos. 76, 80).

{¶110} Now, on appeal, Dr. Reddy and Dr. Singh argue that they were not on notice that appellee intended to argue that Dr. Reddy and Dr. Singh had committed frivolous conduct by failing to indemnify him. However, appellee's motion did provide them with notice as it was clearly cited as an issue in the last paragraph excerpted above. Therefore, Dr. Reddy and Dr. Singh's argument that they were not on notice is not well-taken, and their second assignment of error is overruled.

*Hensel and Dinsmore & Shohl's
Second Assignment of Error*

{¶111} In Dinsmore & Shohl's second assignment of error, they argue that the trial court erred when it held that Hensel violated Civil Rule 11 when it did not specifically find that she acted "willfully."

{¶112} "Civ.R. 11 measures sanctionable conduct using a subjective bad faith standard which requires all violations to be willful." *Law Office of Natalie F. Grubb v. Bolan*, 11th Dist. Geauga No. 2010-G-2965, 2011-Ohio-4302, ¶ 32, citing *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 194, 874 N.E.2d 510, 2007-Ohio-4789. The Ohio Supreme Court has defined bad faith as " 'not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will.' " *State ex rel. Bardwell v. Cuyahoga Cty. Bd. Of Commrs.*, 127 Ohio St. 3d 202, 2010-Ohio-5073, ¶ 8 quoting *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 151 (1962), overruled on other grounds in *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, (1994) (Additional citations omitted). Thus, " * * * a court can impose sanctions only when the attorney or pro se litigant acts willfully and in bad faith by filing a pleading that he or she believes lacks good grounds or is filed merely for the purpose of delay." *Bardwell* at ¶ 8.

{¶113} In this case the trial court found as follows with regard to Hensel and Dinsmore & Shohl's frivolous conduct and Civ.R. 11 violation:

1. The filing of the Third-Party Complaint against * * * Singh * * * constituted frivolous conduct under R.C. 2323.51(A)(2)(a) on behalf of Third-Party Plaintiffs Sudesh Reddy and Parminder Singh, and their attorneys Jan E. Hensel and Dinsmore & Shohl, LLP. The pleadings were motivated by improper purpose and asserted claim[s] which [were] neither warranted under existing law, nor could be supported by good faith arguments for the establishment of new law.

2. The refusal to indemnify * * * Singh * * * also constituted frivolous conduct as defined in R.C. 2323.51(A)(2)(a) on behalf of * * * Reddy and Parminder Singh, as well as their attorneys Jan E. Hensel and Dinsmore & Shohl.

3. The filing of the Third-Party Complaint * * * as well as the decision to refuse to indemnify * * * were decisions jointly made by * * * Reddy and Parminder Singh and their attorneys[.]

*** * ***

6. While Attorney Hensel was not required to disbelieve her clients' claims, she should have known that, even if their claims that Third-Party Defendant Indi Singh never reported his knowledge of sexual harassment complaints, there were still not good grounds to establish liability against him and in favor of the alleged sexual harassers based in the theories set forth in the Third-Party Complaint or the Amended Third-Party Complaint.

7. Attorney Hensel further should have known that there was not good grounds to fail to indemnify Third-Party Defendant Indi Singh for his attorney fees in accordance with Article XII of the Gam[m]a Center By-Laws.

8. Attorney Hensel's signature on the Third-Party Complaint and the Amended Third-Party Complaint constitute a violation

of Civ.R. 11 because she should have known there were not good grounds to support the pleadings.

9. As a result of the frivolous conduct and Civ. R. 11 violation referenced herein, Third-Party Defendant Singh incurred the sum of \$57,265.82 in attorney fees and expenses, as outlined in Plaintiff's Exh. 2. The Court finds that these fees and expenses are reasonable.

{¶114} Appellee does not dispute on appeal that the trial court failed to find that Hensel acted willfully as is required under Civ.R. 11. Rather, Appellee argues that pursuant to a case out of the Fifth District Court of Appeals, *Aultcare Corp. V. Mayle*, 5th Dist. Stark No. 96-CA-0374 (Aug. 4, 1997), the lack of a “good-faith argument for reversal of existing law” can constitute a “willful” violation of Civ.R. 11. At least one court has disagreed with the Fifth District’s approach in *Aultcare*. See *Wilson v. Marino*, 6th Dist. Lucas No. L-06-1027, 2007-Ohio-1048, ¶ 46.

{¶115} However, notwithstanding whether lack of a good-faith argument can constitute a “willful” violation of Civ.R. 11, courts have found that where a trial court has determined that an attorney has committed frivolous conduct under R.C. 2323.51, failure to specifically find a “willful violation under Civ.R. 11 [is] inconsequential, as R.C. 2323.51 independently support[s] the [trial] court’s award.” *Neubauer v. Ohio Remcon, Inc.*, 10th Dist. Franklin No. 05AP-946, 2006-Ohio-1481, ¶ 46; see also *Lewis v. Celina Fin. Corp.*, 3d Dist. Mercer No. 10-94-21, 101 Ohio App.3d 464, 472-473 (“[W]hile the [law] firm may not be

sanctioned under Civ.R. 11, the trial court predicated its award of attorney fees under R.C. 2323.51, as well as Civ.R. 11 and its inherent power. Therefore, * * * counsel of record * * * remains liable for attorney fees under R.C. 2323.51.”).

{¶116} Thus in this case, even assuming that it was error for the trial court not to specifically find a “willful” violation of Civ.R. 11, Hensel and Dinsmore & Shohl are still liable for the award based on their frivolous conduct, and thus any lack of a finding is, as the Tenth District Court of Appeals stated, inconsequential. Accordingly, Hensel and Dinsmore & Shohl’s second assignment of error is overruled.

*Hensel and Dinsmore & Shohl’s
Third Assignment of Error*

{¶117} In Hensel and Dinsmore & Shohl’s third assignment of error, they argue that sufficient evidence was not presented establishing the attorney fees in this case. Specifically, they contend that appellee did not “offer any evidence as to his attorney’s reputation, experience, or abilities,” and that there was no testimony that the work done by appellee’s attorney was “reasonable.”

{¶118} In this case, the trial court heard testimony from S. Fredrick Zeigler, who testified he was a Marion area attorney and that he represented Verma at some point during the litigation. (Aug. 24, 2011, Tr. at 9). Zeigler testified that his normal hourly rate was \$200 and that appellee’s attorney’s bills indicated that appellee was being charged \$175 per hour. (*Id.* at 13). Zeigler testified that the

rate was appropriate. (*Id.*) Zeigler also testified that the work charged by appellee's attorney was appropriate and that the work was necessary. (Aug. 24, 2011, Tr. at 17). In fact, Zeigler specifically testified on cross-examination that, "What my testimony is is that his bill looks like it's reasonable and necessary to me. His charges looks [sic] like they're reasonable and necessary. His hourly rate looks like it's reasonable and necessary to me." (Tr. at 20).

{¶119} Thus Appellee's attorney clearly produced testimony from another attorney that his fee was "appropriate," that it was comparable (actually less than) what another attorney charged practicing in the same local area, and that the work done was reasonable and necessary. Exhibits itemizing the billing were introduced into the record at the hearing, and were identified by Ziegler. On the record before us, we cannot find that there was a lack of testimony as to the reasonableness and necessity of the fees.

{¶120} Similarly, we cannot find that there was error here on the basis of a lack of extensive testimony as to appellee's attorney's expertise. There was testimony from appellee's attorney's clarifying his background, including that he had been practicing law since 1975 and that he had experience in corporate litigation. (Tr. at 22). There was testimony presented that the fee was reasonable and comparable to other attorneys in the area and that the work was necessary.

Accordingly, Hensel and Dinsmore & Shohl's third assignment of error is overruled.

*Dr. Singh and Dr. Reddy's Fourth Assignment of Error;
Hensel and Dinsmore & Shohl's Fourth Assignment of Error*

{¶121} In Dr. Reddy and Dr. Singh's fourth assignment of error, and in Hensel and Dinsmore & Shohl's fourth assignment of error, appellants argue that the trial court erred by awarding appellee attorney fees after the August 24, 2011, hearing. Specifically, they argue that there was never a finding that their oral motion to dismiss appellee's frivolous conduct sanctions was, in itself, frivolous.

{¶122} In both appellants' fourth assignments of error, they argue that no attorney's fees should have been awarded after the August 24, 2011, hearing. Appellants contend that appellee's motion for frivolous conduct was dismissed after the August 24, 2011, hearing, and that he was the one to appeal it. They argue that their motion to dismiss was not found to be frivolous, so appellee should not be awarded attorney's fees for the initial appeal, or for that point forward.

{¶123} In analyzing this issue, the trial court held as follows.

Initially, the Third-Party Plaintiffs and Attorneys Hensel and Dinsmore & Shohl contended that the Third-Party Defendant should not be permitted to recover any attorney fees associated with Third-Party Defendant's appeal of Judge Davidson's June 12, 2012 Journal Entry that denied the motion for sanctions because the moving party had not presented independent evidence from a disinterested attorney regarding reasonableness

of the fees charged (3rd Dist. App. Case No. 09-12-041). There is no dispute that an award of attorney fees made by a court pursuant to R.C. 2323.51 may include fees incurred in prosecuting a motion for sanctions. *Ron Scheiderer & Assoc. v. City of London* (1998), 81 Ohio St.3d 94 at syllabus. Thus, Third-Party Defendant Indi Singh is entitled to recover not just fees incurred defending the third-party complaint and amended third-party complaint which were filed against him. He is also entitled to recover fees incurred in prosecuting the motion to seek the fees.

At the hearing, the Third-Party Plaintiffs and Attorneys Hensel and Dinsmore & Shohl conceded that if Judge Davidson had granted an award of fees and the parties or attorneys found to have engaged in frivolous conduct appealed the order, Third-Party Defendant Indi Singh could recover for the attorney fees incurred while defending the appeal. See e.g. *Helfrich v. Madison* (May 5, 2014), 5th App. Dist. Case No. 13-CA-57 at ¶21 which reached this same conclusion.

Third-Party Plaintiffs and Attorneys Hensel and Dinsmore & Shohl contend that since Third-Party Defendant Indi Singh appealed from the trial court's order, the result should be different. They provided no authority for this distinction. Moreover, since the prosecution of the motion for sanctions required Third-Party Defendant Indi Singh to file an appeal, based on the holdings of the Ohio Supreme Court in the *Scheiderer* case, this Court finds that the fees associated with the appeal are recoverable as fees incurred in prosecuting the motion for sanctions.

{¶124} In arguing against the trial court's holding, appellants cite to *State ex. Rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338, 343, 603 N.E.2d 1017 (1992). In *Sowald*, the respondent in a mandamus action requested attorney fees pursuant to R.C. 2323.51 for the purportedly frivolous conduct of the petitioner in appealing the decision of an appellate court to the Ohio Supreme Court. The

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Supreme Court denied the request, holding that “R.C. 2323.51 does not contemplate awarding attorney fees for defending appeals of civil actions.” *Sowald* at 343. *Sowald* thus stated that fees for appeals are not contemplated; however, unlike this case, *Sowald* dealt with an appeal of a decision that *originated* in the court of appeals.

{¶125} The Fifth District Court of Appeals addressed *Sowald* in *Bilbaran Farm, Inc. v. Bakerwell, Inc.*, 5th Dist. Knox No. 14CA07, 2014-Ohio-4017, ¶ 35, and held that,

the *Sowald* case was based on a former version of R.C. 2323.51, prior to the 1996 amendment of the statute. R.C. 2323.51(13)(1) expressly allows for the recovery of fees for frivolous conduct “incurred in connection with the civil action or appeal.” Therefore, the trial court properly allowed fees and expenses incurred in conjunction with the prior appeal to this Court. See *Helfrich v. Madison*, 5th Dist. Licking No. 13–CA–57, 2014–Ohio–1928, ¶ 65.

{¶126} The Tenth District Court of Appeals also allowed for appellate fees where the appellee was defending an appeal of a *trial court’s judgment*. *Jackson v. Bellomy*, 10th Dist. Franklin No. 01AP-1397, 2002-Ohio-6495. Similarly, in *Dudley v. Dudley*, 12th Dist. Butler No. CA2011–02–016, 2011 Ohio-5870, ¶ 21, the Twelfth District Court of appeals held that a trial court was within its discretion to award fees associated with a previous appeal in the same case where frivolous conduct was found.

{¶127} Appellants argue that the Fifth and Tenth District's interpretations allowing fees for an appeal are improper based on *Sowald* and other courts that have followed *Sowald*, at least its general holding such as *Early v. Toledo Blade Co.*, 6th Dist. Lucas No. L-11-1002, 2013-Ohio-404, ¶ 16 and *Earnhart Petroleum, Inc. v. People's Transportation, Inc.*, 2d Dist. Miami No. 10CA04, 2011-Ohio-385. None of the cases cited by appellant deal precisely with the unique circumstances of this case where an appellee's motion for frivolous conduct sanctions was dismissed by the trial court for a defect, which was overturned on appeal when it was determined no defect existed, and then remanded to the trial court to fully determine the motions for sanctions.

{¶128} In addition, what appellants ignore is that they began this entire action, which has been found frivolous, by filing a third-party complaint against appellee and failing to indemnify him upon request. None of appellee's actions, including the initial appeal to overturn the improper grant of dismissal, would have been necessary had appellants not filed this action in the first place. Thus all of the legal work after the initial filing could be attributable to appellants' frivolous conduct.

{¶129} Therefore we cannot find that the trial court abused its discretion in awarding attorney's fees for the initial appeal to appellee. Accordingly, Dr. Singh

and Dr. Reddy's Fourth and Fifth Assignments of Error and Hensel and Dinsmore & Shohl's Fourth Assignment of Error are overruled.

*Dr. Singh and Dr. Reddy's
Fifth Assignment of Error*

{¶130} In Dr. Singh and Dr. Reddy's fifth assignment of error, they argue that the trial court erred in determining that any fees billed were actually "incurred" after the August 24, 2011, hearing. Specifically, Dr. Singh and Dr. Reddy argue that appellee's attorney indicated that appellee had not paid his fees since the first appeal and that appellee's attorney was going to "write them off" if he was unsuccessful in acquiring attorney's fees for frivolous conduct and Civ.R. 11 sanctions.

{¶131} At the May 9, 2014, hearing where the parties were presenting evidence as to attorney fees since the August 24, 2011, hearing and presenting evidence as to allocation of the fees/sanctions between appellants, the following exchange took place between the trial court and appellee's attorney, John Herbert, while Herbert was on the stand, which gave rise to Dr. Singh and Dr. Reddy's arguments in this assignment of error.

THE COURT: Let – I just have a couple of questions. First of all, thee [sic] – I think your testimony was that you told Mr. Singh that he really didn't need to pay the bill until we got done with the case, is that –

MR. HERBERT: Yes.

THE COURT: -- at some point, you got to that point. Is the expectation that he would pay that bill if attorney fees are not awarded?

MR. HERBERT: I will write it off if attorney fees are not awarded.

THE COURT: Okay. Have you told him that or –

MR. HERBERT: Yes.

THE COURT: -- that's just what you decided.

MR. HERBERT: I've told him that.

THE COURT: Okay. And you would do that why?

MR. HERBERT: I feel that Indi Singh was badly abused by the justice system. That Third Party Complaint was garbage. It was never ever going to make economic sense. Simply because they were going to have to pay his legal fees. It couldn't make sense. He put up with big fees from us. He was polite. He was helpful and it should not have happened the way it did. When it started I thought that simply making the Third Party Plaintiff aware of the fact that they were gonna have to write a check and pay for this when it was done, win, lose, or draw would end it. Instead what I got was an Amended Complaint that added a claim of Breach of Contract which arguably took it out from under the indemnity clause. We deposed something like a dozen, pardon me, ten witnesses I believe was what it was. Might only have been nine. Indi dug through cell phone receipts and other stuff to make a – to respond to Discovery. We spent an entire day in a mediation in which the case was actually settled as far as Stacy Grove was concerned and we didn't get even an offer to – to settle the case. So forgive me, I was just mad. And win, lose, or draw I wanted to see something that resembled justice in this case. So yeah, I – I guess this is a case where it makes a difference who's paying me.

(May 9, 2014, Tr. at 93-95).

{¶132} Following Herbert’s statements at the hearing, appellants all argued to the trial court that since Herbert would “write the fees off” they were not incurred pursuant to R.C. 2323.51(B)(1). Under R.C. 2323.51(B)(1), “[t]he court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct,” and the award may include “reasonable attorney’s fees * * * *incurred* in connection with the civil action or appeal.” (Emphasis added.)

{¶133} Appellants contend that fees are “incurred” when they are “actually paid” or a party becomes “obligated to pay.” (Dr. Singh and Dr. Reddy Br. at 24).

{¶134} The trial court addressed this issue in its judgment entry and reasoned as follows.

Third-Party Plaintiffs and Attorneys Hensel and Dinsmore & Shohl argued that any attorney fees which Attorney Herbert was not requiring Third-Party Defendant Indi Singh to pay were not “incurred” and thus could not be recoverable as attorney fees under R.C. 2323.51.

* * *

At issue is whether “fees that were reasonably incurred by a party” include only those fees that the party is required to pay. An analysis of the statute, makes clear that in some instances the amount of “fees reasonably incurred by a party” may be different than the amount of fees the client is required to pay. R.C. 2923.51(B)(3)(a), which is quoted above, provides that where the fees are charged based on a contingent fee agreement, that the fee award is based on the reasonable amount of attorney fees that would have been charged, rather than based on the contingent fee agreement. Since R.C. 2923.51(B)(3)(a) uses the

word “charged” and R.C. 2923.51(B)(3)(b) uses the word “incurred,” it is apparent that the two words are intended to have different meanings. R.C. 2323.51(C) further provides

An award of reasonable attorney’s fees under this section does not affect or determine the amount of or the manner of computation of attorney fees as between an attorney and the attorney’s client.

Similarly, R.C. 2323.51(A)(4) makes specific provisions for awarding attorney fees where a suit is filed against a governmental entity that is represented by the Attorney General, Prosecuting Attorney, Law Director or other governmental attorney, even though the governmental entity would typically not be charged a specific amount for attorney fees.

*** * * In a more recent case, the Ohio Supreme Court upheld awarding \$3,503 in attorney fees to the City of Shelby, Ohio, even though the City only paid \$312 in attorney fees, as the remainder was paid by the City’s insurance carrier. *State ex rel. Striker v. Cline* (2011), 130 Ohio S.3d 214 at ¶23-25. The Supreme Court held that the contrary interpretation would condone frivolous conduct against parties that had the foresight to obtain liability insurance.**

Based on the language of R.C. 2323.51, and the interpretations of the statute by the Ohio Supreme Court, this Court holds that Attorney Herbert’s decision not to require his client to pay the attorney fees that were reasonably incurred does not prevent an award of attorney fees under R.C. 2323.51. The issue is whether the amount of the attorney fees incurred is reasonable, not whether the attorney that represented the party subjected to frivolous conduct is willing to forgive these attorney fees through his own generosity.

(Doc. No. 131).

{¶135} We can find no abuse of discretion with the trial court’s analysis and determination. The case cited by the trial court, *State ex rel. Striker v. Cline*,

130 Ohio St.3d 214 (2011), does seem to indicate that even though the party may not ultimately be obligated to pay the attorney fees that were billed, they were still incurred.

{¶136} Moreover, Black’s Law Dictionary defines “incur” as, “[t]o suffer or bring on oneself (a liability or expense).” *Black’s Law Dictionary* (10th ed. 2014). Liability is defined by Black’s Law Dictionary as, “[t]he quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment” or “[a] financial or pecuniary obligation in a specified amount.” *Id.* Expense is defined as “[a]n expenditure of money, time, labor, or resources to accomplish a result; esp., a business expenditure chargeable against revenue for a specific period.” *Id.* These definitions all seem to indicate that that a fee is “incurred” when there is an expenditure of time and labor that a person is legally obligated or accountable for.

{¶137} In this case, appellee’s attorney indicated that he had expended time and labor and that he had been keeping track of the hours and amount billed to appellee. While he did testify that he would “write off” the amount if fees were not awarded, he could decide ultimately that he was not going to do that, and there is no indication that appellee would not be legally obligated to pay his attorney for the expenses reasonably incurred. Therefore, like the trial court, we cannot find that the expenses were not “incurred” merely on the basis of appellee’s attorney’s

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stated generosity. Accordingly, Dr. Reddy and Dr. Singh's fifth assignment of error is overruled.

{¶138} For the foregoing reasons Dr. Singh and Dr. Reddy's first, second, third, fourth, and fifth assignments of error are overruled, and Hensel and Dinsmore & Shohl's first, second, third, and fourth assignments of error are overruled. Having found no error prejudicial in the particulars assigned, the judgment of the Marion County Common Pleas Court is affirmed.

Judgment Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/jlr