[Cite as *Gulbrandsen v. Summit Acres, Inc.*, 2016-Ohio-1550.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

EVELINE GULBRANDSEN,

Plaintiff-Appellee,	:	Case No. 14CA26 14CA27
vs.	:	
SUMMIT ACRES, INC., et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Bret C. Perry and Jason Paskan, Bonezzi Switzer Polito & Hupp Co. LPA, Cleveland, Ohio, for Appellant G. Brenda Coey

Susan C. Rodgers, Akron, Ohio, for Appellant Buckingham, Doolittle & Burroughs, LLC

Susan E. Petersen and Todd Petersen, Chardon, Ohio, for Appellees

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CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-31-16
ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court judgment that (1) sanctioned Attorney G. Brenda Coey, appellant herein, (2) found Coey in direct contempt of court, and (3) awarded Susan E. Petersen and Todd Petersen, appellees[1] herein, $37,433.81 in attorney fees. The court further ordered Coey and her former law firm, Buckingham, Doolittle & Burroughs

[1] The Petersens refer to appellees as the underlying plaintiffs in the litigation. However, the attorney fee judgment that is being appealed was entered in favor of the Petersens, personally, not in favor of the plaintiffs. Thus, we refer to the Petersens as the appellees in this appeal.

LLC (BDB), appellant herein, to be jointly and severally liable to the Petersens.

{¶ 2} In Case Number 14CA26, Coey assigns the following error for review:

> "THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING SANCTIONS AGAINST G. BRENDA COEY, ESQ. DURING HER REPRESENTATION OF DEFENDANTS SUMMIT ACRES, INC., DBA SUMMIT ACRES SKILLED NURSING AND REHABILITATION IN THE ABOVE CAPTIONED MATTER."

{¶ 3} In Case Number 14CA27, BDB assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT ATTORNEY G. BRENDA COEY COMMITTED AN ACT OF CONTEMPT WHICH RESULTED IN THE IMPOSITION OF SANCTIONS AGAINST APPELLANT BUCKINGHAM."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING APPELLANT BUCKINGHAM JOINTLY AND SEVERALLY LIABLE FOR THE SANCTIONS ASSESSED FOR THE PURPORTED CONTEMPTUOUS ACT OF ATTORNEY COEY AS APPELLANT BUCKINGHAM WAS NOT PROVIDED NOTICE OF THE APRIL 1, 2014 CONTEMPT HEARING NOR THE OPPORTUNITY TO APPEAR AND TO DEFEND ITSELF."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN ITS IMPOSITION OF SANCTIONS AGAINST APPELLANT BUCKINGHAM PURSUANT TO OHIO CIV.R. 37 WHERE ATTORNEY BRENDA G. COEY COMMITTED NO ACTS IN VIOLATION OF OHIO CIV.R 37."
>
> FOURTH ASSIGNMENT OF ERROR:
> "THE TRIAL COURT ERRED IN ITS IMPOSITION OF SANCTIONS AGAINST APPELLANT BUCKINGHAM AS A LAW FIRM IS NOT VICARIOUSLY LIABLE FOR AN ATTORNEY'S ACTS OF CONTEMPT."

{¶ 4} The procedural history of the events that gave rise to the instant appeal is rather tortuous, but this appeal concerns an alleged lie that Coey (while employed at BDB) told opposing counsel, Ms. Peteresen,[2] during the course of discovery in the underlying litigation between the parties. The Petersens represent the plaintiffs. Coey represents the primary defendant, Summit Acres, Inc., dba Summit Acres Skilled Nursing and Rehabilitation (Summit Acres).

{¶ 5} In April 2013, the plaintiffs served subpoenas duces tecum upon Summit Acres' two retained experts: Dr. Keith Armitage and Dr. Kenneth Writsel. The plaintiffs requested the physicians to produce "[a]ll reports or summaries of opinions * * * in connection with a medical legal review for each of the years 2003 to date in 2013," i.e., expert reports prepared for other litigation. Summit Acres subsequently filed a motion to modify the subpoenas duces tecum and requested, inter alia, that the court modify the request for expert reports or summaries that the physicians prepared for other cases. Summit Acres asserted that the disclosure of the expert reports prepared for other cases would violate uninterested, third parties' privacy rights and would require the disclosure of work product information and/or violate the attorney-client privilege of uninterested, third-parties.

{¶ 6} At an oral hearing, the trial court partially granted Summit Acres' motion. The court ordered the physicians to produce the expert reports, but further ordered that the reports be redacted to remove all personal identifiers. Coey indicated that she would discuss the matter with the physicians to "see how comfortable they are" with the modified terms of the subpoenas.

{¶ 7} Before Coey received a written copy of the trial court's order regarding Summit Acres' motion to modify, she gave the plaintiffs copies of the expert reports. Coey, however,

[2] Unless otherwise indicated, "Petersen" as used throughout this opinion means Ms. Petersen.

redacted more information than what the trial court had ordered at the oral hearing. Instead of redacting only personal identifiers, she also redacted the name of the law firm for which the physicians prepared the report. Coey believed that this information was privileged.

{¶ 8} On May 6, 2013, the plaintiffs filed a motion that requested the trial court to order Drs. Writesel and Armitage to appear before the court and show cause why they refuse to abide by the court order regarding the subpoenaed documents.

{¶ 9} On May 7, 2013, the trial court filed its written decision regarding the motion to modify, which tracked its decision pronounced on the record at the oral hearing. The court stated: "Subject to stipulated protective order, Defendant's experts, Drs. Writesel and Armitage, are required to produce all expert reports prepared in the last two years from their review of medical-legal cases. All identifying information should be redacted from the reports."

{¶ 10} On May 8, 2013, Petersen sent Coey an email regarding the expert reports. The email stated:

> "I received a copy of the redacted expert reports in your correspondence dated May 6, 2013 as ordered to be turned over by the court. I see that you redacted not only the patient/personal identifiers but the addressee (attorney) to whom the report was directed. I just listened to the audio tape of the hearing. * * * Redaction of the hiring attorney's information was not part of the order. The concern you raised was disclosure of HIPAA protected patient identifiers. The identity of the attorney who hired these experts is not protected and was ordered to be produced. Please produce this information immediately as ordered by the court. I need Dr. Writesel's today."

{¶ 11} Coey responded: "The information you received is that which the physicians are willing to supply under the present circumstances."

{¶ 12} On May 20, 2013, the physicians (through independent counsel who was also an attorney at BDB) filed a joint motion to modify or quash the subpoenas combined with a

memorandum opposing the plaintiffs' motion for sanctions. The physicians asserted that the expert reports contained private health information of non-parties to the case and thus were privileged. They further argued that they have not violated a written court order and thus, that the plaintiffs' motion for sanctions is meritless.

{¶ 13} On May 24, 2013, the plaintiffs filed a supplement to the motion to show cause and included a request for sanctions against BDB "for the professional misconduct displayed by its lawyer." The plaintiffs alleged that Coey "has misled the court and counsel in this litigation and has lied to 'win.'" The plaintiffs asserted that when their counsel deposed the two doctors, counsel learned that the doctors had submitted unredacted expert reports to Coey. The plaintiffs thus argued that Coey misled the court about the physicians' unwillingness to respond to the subpoenas, withheld the expert reports, redacted information beyond what the court ordered, and then lied and blamed the redaction on the experts. The plaintiffs requested the court (1) to find that BDB and Coey "violated the Rules of Professional Conduct," (2) to enter a default judgment, (3) to award the plaintiffs "[c]osts, expert and attorney fees, and expenses associated with the pleadings relative to the subpoenas and the depositions of the witnesses," and (4) to award any other relief. On May 30, 2013, the trial court held a hearing to consider several matters, including the plaintiffs' motion for sanctions against Coey and BDB. At this hearing, the plaintiffs claimed that Dr. Writesel's deposition shows that Coey lied when she advised Petersen in the May 8, 2013 email that the information Petersen received from the physicians was all that they were willing to supply. The plaintiffs quoted the following excerpt from Dr. Writsel's deposition as support for their assertion that Coey lied:

"[Peteresen]: Did you tell [Coey]–were you willing to supply me with

unredacted reports?

[Dr. Writesel]: I gave them to Miss Coey."

The plaintiffs asserted that Petersen then asked Dr. Writesel to explain why Coey sent Petersen an email indicating that the information Coey gave Petersen was "all you are willing to supply." Dr. Writesel responded, "That's between you and Miss Coey." The plaintiffs thus argued that Coey told "a bold faced lie" and indicated that the physicians "were unwilling to produce documents which we now know they were willing to produce."

{¶ 14} The plaintiffs further alleged that Coey "led [the] Court to believe that she had been acting on [the physicians'] behalf, not on behalf of Summit Acres, but on behalf of the doctors in saying that they did not want to produce those reports." The plaintiffs asserted that both doctors testified under oath that they were willing to produce the reports, that they provided the reports to Coey, and that the court modified the subpoena based upon Coey's representation that the doctors would not comply, "when the fact is, they would." The plaintiffs additionally contended that Coey "filed a motion to modify, when she didn't have authority to represent [the doctors]. She portrayed to the Court as if she did represent them, that they were unwilling to produce documents which we now know they were willing to produce and the Court modified * * * the subpoena, based upon [Coey's] representation." The plaintiffs argued that their counsel was "put at a disadvantage by deposing these experts without this information that they were willing to supply. And she lied to us about the circumstances relating to that."

{¶ 15} In response, Coey asserted that she filed the motion to modify on behalf of Summit Acres and never indicated that she represented the doctors. She stated: "In fact, during that hearing, the Court * * * said that if the physicians have any additional concerns, they can go out

and get counsel * * *. So, clearly the Court was aware that I wasn't representing the doctors."

{¶ 16} Drs. Writsel and Armitage's counsel stated that his clients did have a discussion with Coey after the April 17, 2013 hearing regarding Summit Acres' motion to modify, and Coey told them what the court had ordered. The doctors' counsel stated: "What I can tell you for sure, is that my clients did have a discussion with Ms. Coey after that hearing and were told about what you ordered."

{¶ 17} On June 7, 2013, the trial court denied the doctors' motion to modify or quash the subpoenas. The court granted the plaintiffs' motion to show cause directed to the doctors and ordered them to immediately produce the information. The court took the plaintiffs' motion to show cause and motion for sanctions against Coey and BDB under advisement.

{¶ 18} Summit Acres subsequently appealed both the trial court's May 7 and June 7, 2013 orders. The doctors appealed the court's June 7, 2013 order. On July 29, 2013, this court dismissed the appeals as they pertained to the court's order compelling the doctors to produce non-privileged documents, i.e., tax return information. We determined, however, that the appeal concerning the trial court's order compelling the doctors to produce expert reports that they prepared for other litigation was appealable. We stated that the appellants "presented at least a colorable claim that the medical expert reports contain physician-patient privileged materials."

{¶ 19} On July 31, 2013, the plaintiffs withdrew their request that the doctors produce expert reports prepared for other litigation.[3] On October 2, 2013, we dismissed the appeals as

[3] Coey raised an argument that once the plaintiffs withdrew their request for the expert reports, the request for sanctions became moot. None of the parties, however, sufficiently developed the issue to enable this court to adequately review it. See generally State v. Quarterman, 140 Ohio St.3d 464, 2014–Ohio–4034, 19 N.E.3d 900, ¶19, quoting State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶78 (O'Donnell, J., concurring in part and dissenting in part), quoting Carducci v. Regan, 714 F.2d 171, 177 (D.C.Cir.1983) ("We are not obligated

moot.

{¶ 20} In 2014, the plaintiffs advised the trial court that it had yet to rule on their request for sanctions against BDB and Coey. On April 1, 2014, the court permitted the parties to present additional arguments regarding the motion for sanctions. The plaintiffs' counsel reiterated its assertion that Coey lied by indicating that the physicians were unwilling to supply the plaintiffs with unredacted expert reports. Counsel stated: "The testimony is irrefutable from Dr. Writesel that he provided those reports through [Coey], he was willing to provide me everything, unredacted, and it was [Coey who] decided to withhold them and redact information. And when I asked her about that, she said it was him. She blamed her experts, instead of saying, it's me. And that is a discovery abuse. That is something that our oath as lawyers and as officers of the court prohibit, and she should be sanctioned for that."

{¶ 21} At the end of the hearing, the trial court determined that Coey should be "sanctioned." The court explained to Coey:

> "What you said was, the doctors weren't going to give them. And maybe that's paraphrasing. They weren't going to allow this. And that just flat wasn't true.
>
> Now, there's times that maybe we could all go back and rephrase our words, but it isn't even close to being true. And that really did cause this Court considerable extra time and the Plaintiffs extra time.
>
> * * * *
>
> But you simply can't say that the–the doctors aren't allowing it, because that sends the other attorney all–down all the wrong roads. And had you said, I do–I object to this strenuously, I think there were options. Appeal is one. I think reconsideration. But you certainly involve the Court in it. And that's the–that's

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to search the record or formulate legal arguments on behalf of the parties, because '"appellate courts do not sit as self-directed boards of legal inquiry and research, but [preside] essentially as arbiters of legal questions presented and argued by the parties before them."'"); State ex rel. Corn v. Russo, 90 Ohio St.3d 551, 556, 740 N.E.2d 265 (2001).

the–the conduct that I find objectionable here today."[4]

{¶ 22} On May 20, 2014, the trial court granted the plaintiffs' motion for sanctions. The court found that Coey "lied to opposing counsel in the course of discovery" and caused the court and counsel "considerable extra time." The court found that "Coey's statements were not truthful." The court thus found that sanctions were appropriate, with the amount to be determined at a later hearing.

{¶ 23} Summit Acres requested the trial court to reconsider its decision to sanction Coey. Summit Acres asserted that Coey, as counsel for the party who retained the experts, properly acted on their behalf when seeking to modify the subpoena and when responding to discovery requests. Summit Acres also attached the doctors' affidavits in which they stated that they sent unredacted reports to Coey with the "expectation that Attorney Coey would review these reports and redact any information from them that would violate any federal or state law, rule and/or regulation, and/or that would violate any privilege that might be attached to the reports, as [they] had discussed in our earlier conversation." The doctors further averred that they relied upon Coey "to perform any and all redaction, if necessary, before production to plaintiff's counsel." The trial court denied Summit Acres' motion to reconsider.

{¶ 24} On June 16, 2014, BDB filed a motion for relief from the trial court's decision to sanction Coey.

{¶ 25} On July 30, 2014, the trial court denied BDB's motion for relief from the court's decision to sanction Coey. The court rejected BDB's assertion that R.C. 2323.51 governed the

[4] We observe that although the trial court faulted Coey for failing to appeal the court's order regarding the doctors' expert reports, Coey–on behalf of Summit Acres–did, in fact, appeal the court's order. The doctors also appealed the court's order.

court's authority to sanction Coey and instead stated that "[t]hese proceedings were and always have been pursuant to Civ.R. 37 and the Court's general contempt powers." The court also stated that BDB

> "tried to convince this Court that these physicians' testimony at their depositions were false. This was by way of affidavits. However, this Court believes their original testimony. [BDB]'s actions through another attorney in their office was a pathetic attempt to cloud the issue of credibility. The doctors never personally appeared at any of this Court's hearings."

We observe, however, that BDB did not attach any affidavits to its motion. Instead, the affidavits were attached to Summit Acres' motion to reconsider.

{¶ 26} The court also determined the amount of attorney fees to award "as a direct result of an email sent by" Coey. The court found the email

> "to be false in as much as [Coey] represented that she was legal counsel for these expert witness[es] and these doctors objected to giving [the plaintiffs'] attorney their entire medical records when in fact Attorney Coey was not their legal counsel and they did not object to the giving of their medical records to [the plaintiffs'] attorneys. This situation was compounded by Attorney Coey redacting, without knowledge or authorization of these physicians, substantial portions of their medical records. Without the full records [the plaintiffs'] attorney * * * could not conduct a full and proper deposition of the doctors nor could any attorney have properly and fully prepared for these depositions."

The court found that Coey's "actions, if left uncovered, would have tainted the trial in this action, denied [the plaintiffs] of the representation she was entitled to and prohibited a just resolution of this matter by a jury. These are the actions that this Court has found objectionable and sanctionable." The court further determined that Coey's actions "were willful, contemptuous and clearly caused delays in this matter, additional work by [the plaintiffs'] attorney and this court. They occurred out of the presence of this Court but were a direct contempt of Court."

{¶ 27} The court further indicated that it reviewed the fee information the Petersens

submitted and found that the fees were "reasonable, necessary, and directly related to the conduct that was false." The court thus ordered: "Attorneys Susan Petersen and Todd Petersen shall have judgment against Attorney Brenda Coey and the firm of [BDB] jointly and severally in the sum of $[37,433.81]."[5] These appeals followed.

{¶ 28} Coey's sole assignment of error, and BDB's first and third assignments of error, raise related issues. For ease of discussion, we consider them together.

{¶ 29} In her sole assignment of error, Coey argues that the trial court abused its discretion by awarding appellees attorney fees. In its first assignment of error, BDB asserts that the trial court abused its discretion by finding Coey guilty of contempt. In its third assignment of error, BDB contends that the trial court erred as a matter of law by imposing Civ.R. 37 sanctions when the evidence fails to support any finding that Coey violated its provisions.

{¶ 30} While the parties raise several arguments in support of the foregoing assignments of error, we address those that we find dispositive of this appeal. BDB notes that the court indicated that it awarded the attorney fees pursuant to Civ.R. 37 and its inherent contempt authority. BDB asserts, however, that the trial court did not find that Coey violated one of Civ.R. 37's provisions, and thus, Civ.R. 37 does not have any applicability to the facts in the case sub judice. Coey observes that the trial court found her in "direct contempt," but she asserts that the court instead actually found her guilty of indirect contempt. As such, Coey argues, the trial court is required to comply with the procedural safeguards set forth in R.C. 2705.03, but it did not.

A

[5] The court entered a nunc pro tunc entry on August 7, 2014 that changed the amount from $27,533.81 to $37,433.81.

CIV.R. 37

{¶ 31} As a general matter, "[t]he discovery rules give the trial court great latitude in crafting sanctions to fit discovery abuses." Nakoff v. Fairview Gen. Hosp., 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996); Toney v. Berkemer, 6 Ohio St.3d 455, 458, 453 N.E.2d 700 (1983); accord State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶18. Thus, "[a] reviewing court's responsibility is merely to review these rulings for an abuse of discretion." Nakoff, 75 Ohio St.3d at 256. "'[A]buse of discretion' [means] an 'unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.'" State v. Kirkland, 140 Ohio St.3d 73, 2014–Ohio–1966, 15 N.E.3d 818, ¶67, quoting State v. Brady, 119 Ohio St.3d 375, 2008–Ohio–4493, 894 N.E.2d 671, ¶23. "An abuse of discretion includes a situation in which a trial court did not engage in a '"sound reasoning process."'" State v. Darmond, 135 Ohio St.3d 343, 351, 2013-Ohio-966, 986 N.E.2d 971, 978, ¶34, quoting State v. Morris, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶14, quoting AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). The abuse-of-discretion standard is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court. Darmond at ¶34.

{¶ 32} When, however, "'a trial court's order is based on an erroneous standard or a misconstruction of the law,'" "[d]e novo review is appropriate." State v. Morris, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶16, quoting Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2d Dist. 1992). "In determining a pure question of law, an appellate court may properly substitute its judgment for that of the trial court *

* *.'" Id., quoting Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2d Dist. 1992). Thus, when a party claims that a trial court improperly determined that the civil rules authorized sanctions in the first place, appellate courts will independently review whether the trial court properly construed the law.

{¶ 33} In the case at bar, BDB questions whether the trial court's decision to impose sanctions under Civ.R. 37 is an erroneous interpretation of the law. BDB thus raises a question of law. We therefore independently review whether the trial court properly determined that Civ.R. 37 authorized sanctions in the case sub judice.

{¶ 34} Civ.R. 37(B)(2) permits a trial court to sanction "any party or an officer, director, or managing agent of a party" for failing "to obey an order to provide or permit discovery." The rule allows a court to "make such orders in regard to the failure as are just" and contains a non-exclusive list of sanctions that a court may impose, including "an order treating as a contempt of court the failure to obey any orders * * *." Civ.R. 37(B)(2)(d). Civ.R. 37 also states that "the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Thus, a contempt finding and attorney fee award are proper Civ.R. 37 sanctions that a court may impose.

{¶ 35} However, before a court may sanction a party under Civ.R. 37 for failing "to obey an order to provide or permit discovery," the court must have actually issued an order to provide or permit discovery. HK New Plan Exchange Property Owner II, L.L.C. v. Hamilton Cty. Bd. of Revision, 122 Ohio St.3d 438, 2009-Ohio-3546, 912 N.E.2d 95, ¶18; Rogers v. Credit Acceptance

Corp., 9th Dist. Lorain No. 11CA010141, 2013-Ohio-1097, ¶10, citing Powell v. Wisener, 9th Dist. Summit No. 22023, 2004–Ohio–4459, ¶7 ("[A]s no motion to compel discovery was filed in the trial court and no order compelling discovery was ever entered, the trial court lacked the authority to impose the sanctions contained in Civ.R. 37(B)."); Siegel v. LifeCenter Organ Donor Network, 1st Dist. Hamilton No. C-100777, 2011-Ohio-6031, 969 N.E.2d 1271, ¶48 ("Sanctions are based on the party's failure to follow the court's order."); Grenga v. Bank One, N.A., 7th Dist. Mahoning No. 04-MA-94, 2005–Ohio–4474, ¶23 (explaining that sanctions provided for in Civ.R. 37[B] result from a violation of a discovery order, not merely from a discovery request); Dafacto, Inc. v. Reynolds, 9 Ohio App.3d 4, 5, 457 N.E.2d 916 (10th Dist. 1983) ("[I]n the instance of all failures to make discovery * * *, it is necessary * * * to apply to the court for an order to compel discovery pursuant to Civ.R. 37(A) and to obtain an order of the court which must then be violated before a second motion is used to obtain sanctions for failure to comply with the order."). "The party who feels aggrieved or who wants discovery must take affirmative action. There is no automatic compulsion upon those who do not comply with discovery requests or who resist discovery." Kristian v. Youngstown Orthopedic Assoc., 7th Dist. Mahoning No. 03-MA-189, 2004–Ohio–7064, ¶20, quoting Staff Notes, Civ.R. 37. "By its very nature, a motion to compel acts as notice to the nonmoving party that sanctions could result, and a trial court's order granting a motion to compel would contain some indication that consequences will follow if the discovery is not provided." Rogers v. Credit Acceptance Corp., 9th Dist. Lorain No. 11CA010141, 2013-Ohio-1097, ¶12. Thus, "a court order is a prerequisite to the imposition of Civ.R. 37[B] sanctions." Williams v. Boltenhouse, 4th Dist. Pickaway No. 92CA01, 1992W 126187, *1-2 (May 29, 1992). Consequently, a trial court may not impose Civ.R. 37 sanctions unless it issued a

prior order directing a party to comply with a discovery request.

{¶ 36} In the case at bar, the trial court sanctioned Coey and found her in contempt for allegedly lying to opposing counsel during the course of discovery. Specifically, the court found that she lied when she informed opposing counsel in an email that the physicians were not willing to provide unredacted expert reports. The court determined that Coey's email was a lie because the doctors stated in their depositions that they gave Coey unredacted reports. Importantly, the court did not sanction Coey for failing to comply with an order compelling her or the party she represented to produce unredacted expert reports. Instead, the court imposed sanctions based upon its finding that Coey lied to Peteresen. Nothing in Civ.R. 37 appears to permit a trial court to sanction an attorney for lying to opposing counsel during the course of discovery, unless the lie otherwise contravenes a court order compelling discovery. Indeed, appellees' brief does not even attempt to identify precisely how Coey's purported lying violated Civ.R. 37. Instead, appellees claim, in a conclusory fashion, that lying warrants sanctions. We further observe that when Coey told the alleged lie, the court had not issued any written order directing her to turn over unredacted reports. Consequently, because Coey's purported lie did not violate a court order compelling discovery, Civ.R. 37 did not authorize the trial court to sanction Coey. The trial court, therefore, erroneously determined that Civ.R. 37 authorized it to impose sanctions against Coey for allegedly lying to opposing counsel.

B

CONTEMPT

{¶ 37} Although Civ.R. 37 did not authorize the trial court to sanction Coey for her conduct, the trial court also determined that sanctions were appropriate because Coey was guilty of

"direct contempt." Thus, we must determine whether we may uphold the trial court's judgment on the basis that Coey acted in direct contempt of court.

{¶ 38} In general, contemptuous conduct is conduct that "'brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.'" Denovchek v. Bd. of Trumbull Cty. Commrs., 36 Ohio St.3d 14, 15, 520 N.E.2d 1362 (1988), quoting Windham Bank v. Tomaszczyk, 27 Ohio St.2d 55, 271 N.E.2d 815 (1971), paragraph one of the syllabus. The power to punish contempt is an inherent power of the courts: "[C]ourts have inherent authority—authority that has existed since the very beginning of the common law—to compel obedience of their lawfully issued orders. * * * Fundamentally, the law of contempt is intended to uphold and ensure the effective administration of justice. Of equal importance is the need to secure the dignity of the court and to affirm the supremacy of law." Cramer v. Petrie, 70 Ohio St.3d 131, 133, 1994♥Ohio♥404, 637 N.E.2d 882 (1994). We will not reverse a trial court's contempt finding unless the court abused its discretion. State ex rel. Cincinnati Enquirer v. Hunter, 138 Ohio St.3d 51, 2013-Ohio-5614, 3 N.E.3d 179, ¶21, citing State ex rel. Ventrone v. Birkel, 65 Ohio St.2d 10, 11, 417 N.E.2d 1249 (1981).

{¶ 39} Courts may classify contempt as either direct or indirect. State v. Kilbane, 61 Ohio St.2d 201, 204, 400 N.E.2d 386 (1982). "The fundamental distinction between direct contempt and indirect contempt lies in the location of the act of contempt—whether it takes place within the presence of the judge, or elsewhere." A.P. Lee & Co., v. R.R. Bowler, 10th Dist. Franklin No. 14AP-599, 2015-Ohio-2535, ¶31. "It is said that direct contempt takes place in the presence of the court, and indirect contempt is all other contempt." Cincinnati v. Cincinnati Dist. Council 51, 35 Ohio St.2d 197, 202, 299 N.E.2d 686 (1973). "The distinction between direct and indirect

contempt is important. Both procedural and substantive rights are affected. Direct contempt is generally dealt with summarily, whereas it has been stated that statutory procedures must be followed in indirect contempt proceedings." Id. In the case at bar, we first determine whether the trial court abused its discretion by summarily holding Coey in direct contempt of court.

1

DIRECT CONTEMPT

{¶ 40} R.C. 2705.01 addresses direct contempt and allows a court to "summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." Accord Kilbane, 61 Ohio St.2d at 204; In re Lands, 146 Ohio St. 589, 595, 67 N.E.2d 433 (1946). Direct contempt "threatens a court's immediate ability to conduct its proceedings, such as where a witness refuses to testify or a party disrupts the court." Internatl. Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 832, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994).

> "The power of a trial court to deal summarily with contemptuous conduct which occurs in the presence of the judge is well established. Ex Parte Terry (1888), 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405; United States v. Wilson (1975), 421 U.S. 309, 95 S.Ct. 1802, 44 L.Ed.2d 186. Such power to act without prior notice and a hearing is justified because the trial judge is personally aware of the relevant facts. It is necessary, among other reasons, so that there can be immediate punishment to vindicate the court's authority and to prevent a continuing obstruction of justice."

Kilbane, 61 Ohio St.2d at 204.

{¶ 41} In the case at bar, we are unable to discern how Coey was in direct contempt of court. The alleged contemptuous act–a lie–occurred in an email Coey sent to opposing counsel. The alleged lie did not occur in the trial judge's presence, and the judge was not personally aware

of the alleged lie. Kilbane. Moreover, the alleged lie did not directly involve the court or directly interfere with the actions in the courtroom. Nor did the email threaten the court's immediate ability to conduct its proceedings. Bagwell. Instead, the alleged lie occurred outside of court and concerned a discovery dispute between Summit Acres and the plaintiffs. The alleged lie did not occur so near the court as to constitute direct contempt of court that permitted the court to summarily punish Coey. Consequently, because we are unable to discern a sound reasoning process to affirm the court's direct contempt finding, we believe that the court abused its discretion by holding Coey in direct contempt of court. We therefore reverse the judgment that found Coey in direct contempt of court. However, we must nevertheless uphold the trial court's ultimate decision to sanction Coey if the record supports a finding that Coey is guilty of indirect contempt.[6] See Agricultural Ins. Co. v. Constantine, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944) ("[I]t is the definitely established law of this state that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as the basis thereof."); accord Stammco, L.L.C. v. United Tel. Co. of Ohio, 136 Ohio St.3d 231, 2013–Ohio–3019, 994 N.E.2d 408, ¶51 (stating that "a reviewing court should not reverse a correct judgment merely because it is based on erroneous reasons"); State ex rel. Carter v. Schotten, 70 Ohio St.3d 89, 92, 637 N.E.2d 306 (1994); Joyce v. General Motors Corp., 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990). When a trial court has stated an erroneous basis for its judgment, an appellate court must nevertheless affirm the judgment if it is legally correct on other grounds. Reynolds v. Budzik, 134 Ohio App.3d 844, 846, 732 N.E.2d 485, fn. 3 (6th Dist.1999); Newcomb

[6] Appellees have made no attempt to justify the trial court's decision under an indirect contempt rationale. Instead, they rely solely upon Civ.R. 37 for the trial court's authority to sanction Coey.

v. Dredge, 105 Ohio App. 417, 424, 152 N.E.2d 801 (2nd Dist.1957) ("It is the duty of the reviewing court to affirm the judgment if it can be supported on any theory, although a different theory from that of the trial court.").

2

INDIRECT CONTEMPT

{¶ 42} Indirect contempt involves acts committed outside the presence of the court and "tends to obstruct the due and orderly administration of justice." In the Matter of Lands, 146 Ohio St. 589, 595, 67 N.E.2d 433 (1946); accord Burt v. Dodge, 65 Ohio St.3d 34, 35, 599 N.E.2d 693, 694 (1992), fn. 1. R.C. 2705.02(B), for instance, permits a court to "punish[] as for a contempt" a person the court finds "guilty" of the following act, among others: "Misbehavior of an officer of the court in the performance of official duties, or in official transactions[.]" Additionally, indirect civil contempt may result when a party fails "to comply with document discovery." Bagwell, 512 U.S. at 833.

{¶ 43} Unlike acts of direct contempt, acts of indirect contempt may not be punished summarily. Id. ("Summary adjudication of indirect contempts is prohibited."). Rather, "[w]here judges have no personal knowledge of the alleged act of contempt because of its commission beyond the court's actual physical presence, the procedure outlined in R.C. 2705.03, requiring a written charge, an adversary hearing upon the issues, and an opportunity for the accused to be represented by counsel, should be strictly adhered to." State ex rel. Seventh Urban, Inc. v. McFaul, 5 Ohio St.3d 120, 122, 449 N.E.2d 445, 447 (1983). Furthermore, R.C. 2705.05(A) requires a court to conduct a hearing to "investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt

charge." Consequently, "an individual charged with indirect contempt must be provided with the following minimum constitutional due process protections: (1) notice of the charge of indirect contempt; (2) a hearing; (3) defense counsel; and (4) an opportunity to testify and call other witnesses." Hillman v. Edwards, 10th Dist. Franklin No. 10AP-950, 2011-Ohio-2677, ¶29, citing Courtney v. Courtney, 16 Ohio App.3d 329, 332, 475 N.E.2d 1284 (1984), citing In re Oliver, 333 U.S. 257, 275, 68 S.Ct. 499, 508, 92 L.Ed. 682 (1948).

{¶ 44} In the case sub judice, Coey's alleged contemptuous act occurred outside of the trial court's presence and the trial judge lacked personal knowledge of the alleged act of contempt. The alleged lie, therefore, is in the nature of indirect contempt. McFaul. As such, the trial court was required to afford Coey specific procedural safeguards before finding her guilty of indirect contempt. In the case sub judice, the trial court did not give Coey any written notice of a possibility that the court might find her in contempt of court. None of appellee's motions or memoranda requested the court to find Coey in contempt. In fact, the first mention of contempt did not occur until the trial court entered its decision finding Coey in direct contempt. Thus, while Coey may have had notice that she might be subject to sanctions as requested in appellee's motion, she did not have any notice that the court might cite her for contempt. Furthermore, the trial court did not afford Coey an opportunity to obtain defense counsel. Accordingly, because the trial court did not afford Coey the procedural protections required before finding a party guilty of indirect contempt, we cannot uphold its decision on this basis. See Medas v. Monyak, 9th Dist. Lorain No. 13CA010487, 2015-Ohio-1252, 19 (reversing trial court's indirect contempt finding when trial court failed to provide party with written notice of the charges against her).

{¶ 45} We further note that clear and convincing evidence must support a finding of

indirect civil contempt. Brown v. Executive 200, Inc., 64 Ohio St.2d 250, 253, 416 N.E.2d 610 (1980). The evidence must show beyond a reasonable doubt that a person is guilty of indirect criminal contempt. Liming at 11, citing Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 444, 31 S.Ct. 492, 55 L.Ed. 797 (1911). Additionally, in cases of indirect criminal contempt, the evidence must show "that the alleged contemnor intended to defy the court." Midland Steel Prod. Co. v. Internatl. U.A.W. Local 486, 61 Ohio St.3d 121, 573 N.E.2d 98 (1991), paragraph two of the syllabus. In the case sub judice, the trial court made none of these findings.

{¶ 46} We also question whether clear and convincing evidence would support a finding of indirect civil contempt and whether the evidence shows, beyond a reasonable doubt, that Coey committed indirect criminal contempt. The full context of the physicians' depositions indicates that they provided Coey unredacted reports. Neither one stated that they would give unredacted reports directly to the plaintiffs. Dr. Armitage responded as follows to Petersen's question whether he informed Coey that he was not "willing to provide me with un-redacted reports[:]" "Well, again, I'm not a lawyer and I don't understand what happened to these reports. I was concerned that I would be in violation of HIPPA, and I was concerned about that, and I wasn't clear what was going to happen, but that did come up." Petersen further asked him if he instructed Coey that he was not "willing to provide the identity of the individuals to whom the reports were written." Dr. Armitage stated that he did not "recall one way or the other." Petersen continued to question Dr. Armitage whether he was "willing to supply that information to us as to who [the report] was to," and Dr. Armitage responded: "I am not a lawyer. I have no idea." The following colloquy ensured:

"Q. I am asking, were you willing to supply that to us?

A. I don't have an opinion. I don't know.
Q. Yes or no?
A. I can't answer that. I am not a lawyer."

{¶ 47} Petersen continued this line of questioning in order to ascertain whether Dr. Armitage was willing to supply the information that Coey had redacted, but Dr. Armitage clearly expressed that he was not comfortable answering the questions because he did not understand the legal issues involved. At one point, Dr. Armitage stated:

> "I don't have an opinion. I don't know what the legal issues are and you know that, and I must say, you know, I'm sort of shocked by this whole proceeding. I mean, I'm just here to give my opinions. I'm just a doctor. I don't understand these issues. I'm not a lawyer. You know, I just think this is ridiculous."

{¶ 48} Although appellees relied heavily upon Dr. Writesel's deposition to show that Coey lied, his deposition testimony is similarly obscure as to whether he was willing to give the plaintiffs the information that Coey had redacted. Dr. Writesel stated that he personally objected to the request for personal income information and informed Coey that he was considering hiring counsel relative to that request. He further indicated that he did not instruct Coey to file a motion to modify the subpoena, but he could not "speak for what Ms. Coey might have done or may do." Petersen asked Dr. Writesel whether he was "fine" complying with the subpoena, except for the requests for personal income information. Dr. Writesel responded: "No. I wasn't fine with it. But I went ahead and did it." Dr. Writesel stated that he gave Coey unredacted copies of his expert reports, and he did not inform her to redact any information. Petersen asked him why Coey informed her that the doctors were not willing to supply certain identifying information contained in the expert reports. Dr. Writesel answered that he could not "speak for Ms. Coey's actions." Petersen continued: "But that would not be true, would it?" The doctor responded: "Again, I can't

speak for * * * her[] intentions or actions." Petersen again tried to ask Dr. Writesel to admit the falsity of Coey's statement that the doctors were not willing to supply the identifying information, but Dr. Writesel stated: "I supplied these letters to Ms. Coey as requested in this subpoena." Petersen asked Dr. Writesel whether he was "willing to supply us with the addressee, the folks to whom those letters were sent." The doctor stated: "I've already supplied the copies of the records that were requested in this subpoena. So I've already responded to the request in the subpoena." Petersen asked Dr. Writesel if he would be "willing to send [the documents] to [her] directly." Dr. Writesel stated: "I've already produced those, again." The following colloquy then ensued:

> "[By Mrs. Petersen] Q. Well, I issued a subpoena to you, sir. Will you comply and send me what you sent her?
> Ms. Coey: Objection.
> A. Again, I've already provided copies of the correspondence that reflect the cases that I'm currently involved in or have been involved in within the last two years.
> Ms. Petersen: Can you explain why you lied to me in this email? And I'm directing this to Ms. Coey.
> Ms. Coey: This is not my deposition.
> Ms. Petersen: It is when you lie to me.
> Ms. Coey: Well, you can ask all your questions you want. You're not getting any response from me.
> Ms. Petersen: This is a pattern. This is a pattern for you. And it's not acceptable."

{¶ 49} As the foregoing deposition testimony clearly shows, Dr. Writesel never explicitly stated that he would give the plaintiffs the information. Instead, he stated that he gave Coey the unredacted reports. While he may have been willing to give Coey the unredacted reports, this does not necessarily mean that he was willing to hand over the reports directly to the plaintiffs without first allowing Coey to review them and determine whether any information should be redacted. In fact, when Petersen attempted to ask him if he would send them directly to her, Dr.

Writesel refused to state that he would, and instead noted that he provided the information to Coey. In sum, we believe that the doctors' deposition testimony does not clearly show, as the trial court apparently believed, that they were willing to supply the plaintiffs with unredacted reports.

{¶ 50} Additionally, Coey, as the attorney for the party who retained the experts, appears to have had a right to exercise significant control over the information that the physicians provided. See Pettiford v. Aggarwal, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913, ¶30-32. In Pettiford, the court explained:

> "The retained expert witness is engaged to review the facts and offer opinion testimony on the essential, material elements of the claim at issue. In essence, the expert is an extended voice of the party and the proponent of the party's claims.
> * * * * [A]n attorney's direction of a retained, nonparty expert is significant, akin to the attorney's direction of a party. The attorney directs the expert as to the subject matter upon which an opinion is needed, helps to determine what evidence the expert reviews, and works closely with the expert through the litigation to prove or defend against the causes of action. Because the expert's testimony is required to prove or defend against claims, it is paramount that the attorney exercises a significant degree of control over the expert.
> * * * * [T]he attorney often acts during an expert's deposition as he or she would act during a party's deposition, objecting to opposing counsel's questioning and rehabilitating the expert if necessary."

In fact, Petersen had absolutely no issue with Coey defending the experts during their depositions. It seems incongruous that she objected to Coey speaking on their behalf when responding to a subpoena but not when she spoke on their behalf during their depositions. Thus, it is questionable whether a legitimate basis exists for finding that Coey outright lied in the email she sent to Petersen. Instead, it was "paramount that [Coey] exercise[d] a significant degree of control over the expert[s]." Id. at 32. That is exactly what Coey did in her May 8 email.

{¶ 51} Moreover, even if we followed the trial court's logic that Coey lied, Coey's alleged lie cost Petersen twelve days. The alleged lie occurred on May 8, 2013. Twelve days later, the

physicians filed, through separate counsel, a motion to modify or quash the subpoenas for the same essential reasons Coey had raised in Summit Acres' earlier motion to modify the subpoena. Thus, once the physicians filed their motion to modify or quash the subpoenas, there was no reason for appellees to have been misled into thinking that the physicians were unwilling to provide unredacted reports. The physicians' motion to modify or quash made their positions crystal clear and those positions coincided with what Coey had informed Peteresen on May 8 and what she had argued in Summit Acres' motion to modify. Once the physicians filed their motion, Petersen's claimed costs and fees resulted from opposing their motion–not from Coey's alleged lie–and from choosing to pursue her motion for sanctions due to Coey's alleged "professional misconduct." Thus, we question whether Coey's alleged lie–which supposedly misled Petersen for a total of twelve days–could be worth $37,433.81 in attorney fees. Indeed, we tend to agree with the physicians' counsel's assessment, as stated at the May 30, 2013 hearing, that this matter has been blown out of proportion. While we recognize that trial courts have inherent authority to punish contempt, and possess a great deal of discretion when doing so, courts should not mistake zealous advocacy for contemptuous conduct.

{¶ 52} In view of all of the foregoing circumstances, we are unable to find a basis to uphold the trial court's judgment finding Coey in contempt of court and ordering her and BDB to be jointly and severally liable to the Petersens in the amount of $37,433.81 as attorney fees. We cannot uphold the trial court's judgment under Civ.R. 37(B), because Coey's alleged lie did not violate a court order. We emphasize that the court did not determine that Coey's lie violated a court order, or that she otherwise violated a court order. We also cannot uphold the trial court's judgment as a finding of direct contempt because Coey's alleged lie occurred outside the court's

presence. We cannot uphold the court's judgment as a finding of indirect civil contempt, because the court did not afford Coey the specified procedural safeguards. Furthermore, our review of the record fails to clearly and convincingly show that Coey lied in her email to Petersen. We thus cannot uphold the trial court's judgment as a finding of indirect criminal contempt because the trial court did not find Coey guilty beyond a reasonable doubt, or that she intended to defy the court. Moreover, the record is insufficiently developed to allow us to draw a conclusion that Coey intended to defy the court. Additionally, because the evidence is far from clear and convincing that Coey actually lied, it also is far from proving beyond a reasonable doubt that she lied.

{¶ 53} Accordingly, based upon the foregoing reasons, we hereby sustain Coey's sole assignment of error and BDB's first and third assignments of error. The remaining assignments of error are moot. See App.R. 12(A)(1)(c). We thus reverse the trial court's judgment.

JUDGMENT REVERSED.

Harsha, J., concurring:

{¶ 54} I concur in judgment and opinion except for the analysis addressing indirect contempt. I cannot join in that effort because I see a distinction between affirming a judgment upon a different rationale than the trial court, which is appropriate, and reviewing a different judgment than that entered by the trial court, which is the focus of the indirect contempt anlaysis.

JUDGMENT ENTRY

It is ordered that the judgment be reversed. Appellants shall recover of appellees the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J.: Concurs in Judgment & Opinion
Harsha, J.: Concurs with Concurring Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.