

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Greg A. Bell et al., :  
 :  
 Plaintiffs-Appellants, :  
 :  
 v. : No. 10AP-1036  
 : (C.P.C. No. 08CVH-04-6427)  
 Robert D. Nichols et al., : (ACCELERATED CALENDAR)  
 :  
 Defendants-Appellees. :

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D E C I S I O N

Rendered on June 20, 2013

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Philip Wayne Cramer, for appellants.

Montgomery, Rennie & Jonson, Linda L. Woeber and Lisa M. Zaring, for appellee Robert D. Nichols.

*Onda, LaBuhn, Rankin & Boggs Co., LPA, Timothy S. Rankin, M. Breck Roesch and Derek L. Graham*, for appellees Stephen J. Pronai, David Dhume, Robert D. Hackett, Chris R. Snyder, County Risk Sharing Authority, Inc., Beth Miller, James P. Sabin, and Madison County Board of County Commissioners.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiffs-appellants, Greg A. and Marcia C. Bell ("plaintiffs" or "Bells"), appeal from a judgment of the Franklin County Court of Common Pleas overruling plaintiffs' objections to the magistrate's decision and granting defendants-appellees', Robert D. Nichols ("Judge Nichols"), the Madison County Board of County Commissioners, Stephen J. Pronai, David Dhume, Robert D. Hackett, Chris R. Snyder,

James P. Sabin, and Beth Miller (collectively "defendants" or "movants"), motion for sanctions, and granting Judge Nichols' motion to substitute. Because (1) the trial court did not err in adopting the magistrate's decision and granting the movants' motion for sanctions, (2) the magistrate did not err in presiding over the sanctions motion, (3) the trial court did not err in allowing Judge Nichols to substitute his insurance carrier, Columbia Casualty Company ("Columbia") as the real party in interest, and (4) the manifest weight of the evidence supports the award of sanctions, we affirm.

### **I. FACTS AND PROCEDURAL HISTORY**

{¶ 2} On April 30, 2008, plaintiffs filed a complaint in the Franklin County Court of Common Pleas against the above defendants and Stephen LaForge, Isaac, Brant, Ledman & Teetor, LLP ("Isaac Brant"), County Risk Sharing Authority, Inc. ("CORSA"), Mid-Ohio Pipeline, and URS Corporation. The complaint expressly stated that it was "a collateral attack upon a judgment in the case of *MADISON COUNTY BOARD OF COMMISSIONERS vs. Greg A. and Marcia Bell* No. 2003 Cv-02-071," from the Madison County Court of Common Pleas. (Complaint, ¶ 1.) Plaintiffs alleged that Judge Nichols, the judge who presided over the Madison County case, did not have jurisdiction in that case due to "extensive judicial misconduct, failure of joinder of essential parties – the mortgage lender – needed for just adjudication, fraudulent misrepresentation, prosecutorial misconduct, and misconduct by counsel for Defendant Madison County Board of Commissioners." (Complaint, ¶ 2.) Plaintiffs asserted the collateral attack was necessary "due to a frivolous, malicious and unwarranted prosecution by Defendants Commrs. \* \* \* of an eminent domain action." (Complaint, ¶ 6.)

{¶ 3} Ultimately, the Franklin County Court of Common Pleas concluded that res judicata barred plaintiffs from filing their complaint in Franklin County and granted the movants' motion for sanctions. To understand the basis for the sanctions award, a review of the litigation in Madison County and Franklin County is necessary. The history of this case is set forth in detail in the trial court's decision overruling plaintiffs' objections to the magistrate's decision. In the interests of judicial economy, we adopt that portion of the trial court's statement of the facts and procedural history which follows:

#### **A. The Madison County Appropriations Action**

In the Madison County action, the Madison County Commissioners sought appropriation of Plaintiffs' property for purposes of a construction easement and alleged that the property was valued at \$1.00. Plaintiffs filed an answer, a class action counterclaim, and a third-party complaint. Plaintiffs set forth numerous allegations including that: the Commissioners and Pronai falsely stated in their complaint that they "endeavored to agree with Plaintiffs on the parcel of property to be purchased and the amount of compensation to be paid and are unable to agree with the owners;" the Commissioners instructed Pronai to initiate the taking in violation of R.C. Chapter 163 and the United States and Ohio Constitutions; that the Commissioners, Pronai, URS, and Mid-Ohio Pipeline's actions violated the Due Process Clauses of the U.S. and Ohio Constitutions as well as 42 U.S.C. §1983; that the Commissioners, Pronai, URS, and Mid-Ohio Pipeline engaged in a conspiracy in violation of 42 U.S.C. §1985 to deprive the Bells of their constitutional rights; Pronai, Mid-Ohio Pipeline, and their agents trespassed upon the property; Pronai committed the torts of abuse of process and malicious prosecution; the Commissioners, Pronai and URS violated R.C. 163.59(I), URS engaged in the unauthorized practice of law.

Thereafter, Judge Nichols denied a majority of Plaintiffs' motions. Additionally, the Bells' motion for appointment of a special prosecutor, original action for prohibition against Judge Nichols, and an affidavit of disqualification against Judge Nichols were all denied or dismissed. Madison County Bd. of Comm'rs v. Bell, Madison App. No. 2005-09-036, 2007-Ohio-1373, at ¶¶5-7. As to the issues in the appropriation action, Judge Nichols held a "necessity hearing" pursuant to R.C. Chapter 163, allowed the Commissioners to amend their complaint to abandon their fee simple interest demand and entered summary judgment and/or a dismissal against Plaintiffs on their counterclaim and third-party complaint. *Id.* at ¶7. On July 11, 2005, a jury determined that Plaintiffs were not entitled to any compensation for the easement on their property. *Id.* at ¶8.

Plaintiffs then filed an appeal with the Twelfth District Court of Appeals. The Bells argued that Judge Nichols entered into an ex parte agreement with Pronai to delay the appropriation litigation for six months and that the ex parte communication was in violation of the Code of Judicial Conduct and the Code of Professional Responsibility. The appellate court noted that

the Ohio Supreme Court has exclusive jurisdiction to determine violations of attorney disciplinary rules and further ruled that there was no evidence of any *ex parte* communication other than Plaintiffs' assumption. *Id.* at ¶16.

Plaintiffs also argued that Judge Nichols erred in not granting their motion for summary judgment seeking a finding that the Commissioners failed to negotiate with them regarding the taking as required by Ohio statutory law. The appellate court rejected this assignment of error, stating:

\* \* \* we adopt the trial court's well-reasoned analysis of the negotiation issue set forth in its July 29, 2004 decision. The trial court specifically addressed what manner of negotiation was required to meet the statutory prerequisite of inability to agree. The court determined that "it is the attempt to establish negotiations that must be bona fide and made in good faith, not the offer made in the negotiations themselves." With this premise in mind, the court examined the facts of the case:

"Here, it is significant that the Commissioners were dealing with 880 owners, and it would not have been practicable for them to have contacted each individual personally and discussed the need for easements. Instead they held public meetings where the homeowners could have their questions answered and their grievances heard. Also, the Commissioners mailed out an 'easement document' to the homeowners. \* \* \* In the record there is evidence that Greg A. Bell attended one of these 'open house' meetings. It is reasonable to infer that the valuation of the easements was discussed at the meeting. Greg Bell has never denied that he attended the meeting. \* \* \* Also, it is reasonable to infer that the Bells received an 'easement document.' "

Inferring that appellants were informed of the easement sought and the \$1 valuation, appellants' inability to agree is evidenced by their aggressive opposition to the appropriation. Based upon the evidence, we agree with the trial court that there was a sufficient attempt at negotiation, and that the parties were unable to agree.

*Id.* at ¶¶41-43. (Citations omitted). (Emphasis in original).

Plaintiffs further argued that Judge Nichols erred in denying their motion to dismiss for failure to hold the hearing mandated by R.C. 163.09(B). This provision requires a

hearing when a property owner, in its answer to an appropriation petition, raises R.C. 163.08 challenges. The hearing is required to be held within fifteen days of the filing of the answer. Judge Nichols determined that Plaintiffs were not improperly deprived of a timely hearing, citing to case law finding that an owner may waive the right to a hearing by pursuing discovery. *Id.* at ¶¶57-58. Upon review, the appellate court agreed:

\* \* \* after raising R.C. 163.08 challenges, appellants proceeded with lengthy discovery, motions for dismissal, summary judgment, disqualification, and prohibition, and (according to the trial court) "other vexatious and frivolous filings." Such actions effectively frustrated a timely hearing on these challenges, and constituted a waiver of appellants' right to an immediate R.C. 163.09(B) hearing.

We find no prejudicial error in the trial court's denial of appellants' motion to dismiss the complaint for failure to timely hold a R.C. 163.09(B) hearing.

*Id.* at ¶¶59-60.

Plaintiffs also argued that Judge Nichols erred by granting the Commissioners leave to substantively amend their eminent domain petition in bad faith. The original complaint sought a fee simple interest in the property while the amendment sought only an easement. Plaintiffs contended that the Commissioners delayed the amendment in bad faith. *Id.* at ¶79. The appellate court rejected their argument and found that they were not prejudiced by the amendment. *Id.* at ¶¶81, 82.

Plaintiffs next asserted that Judge Nichols erred in overruling their motion to strike and motion to dismiss for failure to state a claim as to the amended complaint. In this assignment of error, Plaintiffs contended the amended complaint failed to state with particularity the interest being sought and further that the Commissioners had no authority to destroy their private on-site sewage system. *Id.* at ¶85. The appellate court first determined that the pleading readily identified and described the property interest being appropriated. *Id.* at ¶92. They then found no merit to Plaintiffs' argument that the Commissioners lacked authority to destroy the on-site sewage system:

The resolution adopted by appellee to proceed with the sewer project conformed with R.C. 6117.51, which provides, in pertinent part, as follows:

"If the board of health of the health district within which a new public sewer construction project is proposed or located passes a resolution stating that the reason for the project is to reduce or eliminate an existing health problem or a hazard of water pollution, the board of county commissioners of the county, by resolution, may order the owner of any premises located in a sewer district in the county \* \* \* to connect the premises to the sewer \* \* \* and to cease the discharge of the sewage or other waste into a \* \* \* private sewer \* \* \* if the board finds that the sewer is available for use and is accessible to the premises following a determination and certification to the board by a registered professional engineer designated by it as to the availability and accessibility of the sewer."

This statute embodies the recognized policy against private, on-site sanitation systems. Such private sewer systems inherently pose a greater danger to the public health than centralized sewer systems and, consequently, should be replaced when possible.

Id. at ¶¶93-95. (Citations omitted). (Emphasis in original).

Plaintiffs also argued that Judge Nichols erred in dismissing the third-party complaint against URS, the private firm hired by the Commissioners to perform engineering services for the construction project. They argued that they adequately defended against URS' motion to dismiss by asserting theories under which they might prevail, including agency and conspiracy. Id. at ¶103. Upon review, the appellate court agreed with Judge Nichols' decision, finding that Plaintiffs' Sections 1983 and 1985 claims against URS were not valid, that entity being neither a government nor an appropriating agency. Id. at ¶¶105-107.

Plaintiffs finally argued that Judge Nichols erred in granting summary judgment against them on their counterclaim and third-party complaint. In disagreeing, the appellate court stated:

[a]lthough this court conducts a de novo review of a trial court's summary judgment decision, we find that the trial court thoroughly discussed the propriety of summary

judgment in favor of appellee. We adopt the following portion of the trial court's July 6, 2005 decision:

"Plaintiff Madison County Board of Commissioners move for summary judgment on defendants' counterclaim. The Court notes that the uncontroverted facts were set forth in the [July 29, 2004 and October 27, 2004] decisions outlined above. Each claim that defendants reasserted in their Amended Counterclaim has heretofore been disposed of. The previous decisions of this Court represent the law-of-the-case; on that basis alone, plaintiffs are entitled to summary judgment. The Court finds as a matter of law that plaintiff complied with the petition requirements of R.C. 163.04 and 163.05; defendants cannot bring a private action for damages for violation of R.C. 163.01 et seq.; defendants' sole remedy for an eminent domain taking is just compensation \* \* \*; as a matter of law, defendants' 42 U.S.C. § 1983 [claim] fails because no fundamental right is involved and defendants fail to demonstrate an unconstitutional policy, practice or procedure engaged in a conspiracy for the purpose of depriving them [of] equal protection, privileges or immunities, or an overt act in furtherance thereof to their detriment - - they have failed to establish a 42 U.S.C. § 1985 claim; plaintiff, a political subdivision, engaged in the governmental function of eminent domain and is therefore entitled [to] tort immunity pursuant to R.C. 2744.01 et seq.; defendants failed to state a claim of fraud and failed to produce facts in support thereof; the Court thoroughly analyzed defamation claims against Bradley Couch and the underlying rationale applies to such claims against Prosecutor Pronai for which he and plaintiff are entitled to judgment as a matter of law; defendants failed to set forth material facts that establish abuse of process, malicious prosecution, tortious interference with a contract, negligence or violation of Article 1, § 19 of the Ohio Constitution. There is no genuine issue of material fact with regard to any of these claims; plaintiff is entitled to judgment as a matter of law on each claim set forth."

We also find no fault in the trial court's award of summary judgment to the third-party defendants. None of those parties were appropriating agencies, and the facts did not support appellants' claims against them. We adopt and incorporate those portions of the trial court's July 6, 2005 decision granting summary judgment to Mid-Ohio, Prosecutor Pronai, the Madison County Prosecutor's Office, the Madison County

Engineer's Office, and the Madison County-London City Health District.

Because the trial court properly awarded summary judgment to appellee and the third-party defendants after those parties satisfied their respective burdens of proof regarding the absence of any genuine issues of material fact, appellants' 13th assignment of error is overruled.

To the extent appellants have raised other issues on appeal, we have considered them and find them to be without merit. The judgment of the trial court is affirmed.

Id. at ¶¶113-117.

The Ohio Supreme Court declined to allow a discretionary appeal from the appellate court's decision. See Madison Cty. Bd. of Comms. v. Bell, 114 Ohio St.3d 1512, 2007-Ohio-4285.

#### B. The Franklin County Lawsuit

Plaintiffs then initiated this action asserting numerous claims, which were primarily brought pursuant to 42 U.S.C. §§1983, 1985, and/or 1986. Plaintiffs alleged that the Commissioners: entered into a conspiracy and devised a scheme to forgo securing the independent appraisals of property rights required by R.C. 163.59 (C), R.C. 307.08(B)(2), and R.C. 6117.39(B)(2) by enlisting Pronai to assume the role of project proponent and represent that the property was worthless so that property owners would donate their valuable land; had no authority to destroy their existing on-site wastewater treatment plant, yet, nevertheless, directed Pronai to file the appropriations case seeking such authority; devised a scheme to abandon the original complaint for appropriation with malicious purpose to subvert their right to attorney's fees; falsely stated that they negotiated with them and were unable to agree on the value of the property; and committed trespasses on their property with respect to the construction easement.

\* \* \*

As to Judge Nichols, Plaintiffs alleged that he, with malicious purpose and in bad faith: conspired to delay the appropriation action; had ex parte communications with Pronai; directed Pronai's fraudulent filings; had knowledge that statutory



negotiations had not occurred yet certified that they did take place; delayed the initial necessity hearing required by statute; refused to disqualify himself; and refused to hold the necessity hearing as to the second appropriation pleading. Plaintiffs alleged that Mid-Ohio Pipeline trespassed on their property with regard to the construction easement.

Plaintiffs alleged that LaForge, who represented the Commissioners with regard to the amended appropriation pleading, and his employer, Isaac, Brant, Ledman & Teetor, committed the torts of abuse of process and malicious prosecution with respect to filing the second petition for appropriation, which they contended was not in compliance with Ohio statutory law. They further alleged that he conspired to have Sabin trespass on their property and sought to hold his law firm liable due to its alleged failure to supervise him and its deliberate indifference to their constitutional rights.

Finally, Plaintiffs sought to hold County Risk Sharing Authority ("CORSA"), a non-profit political subdivision joint self-insurance pool, and Beth Miller, CORSA's Claim and Litigation Manager, accountable for their failure to supervise LaForge. They also alleged that CORSA was providing lawyer referral services in violation of Ohio's ethics and professionalism rules and further that CORSA should not be providing any of the Defendants a defense as they are statutorily prohibited from doing so due to the allegations of maliciousness, bad faith, wanton conduct, and recklessness.

The Commissioners, Pronai, Sabin, Judge Nichols, LaForge, Isaac Brant, URS, and Mid-Ohio Pipeline moved for summary judgment arguing that the claims were barred by the doctrine of res judicata and/or expiration of the statute of limitations. They further asserted immunity defenses and argued that Plaintiffs causes of action failed to state claims for which relief may be granted. CORSA and Miller sought judgment based on the expiration of the statute of imitations and as the Complaint failed to state claims against them for which relief may be granted. In granting judgment in favor of all of the Defendants, this Court found as follows:

[a]fter a thorough review of the record, it is clear that the majority of [Plaintiffs'] claims are a repackaging of issues addressed or that could have been addressed by the Madison County Court of Common Pleas and the Twelfth District Court of Appeals. To be sure, [Plaintiffs] admit that they are

collaterally attacking the judgment rendered against them. They assert that the doctrine of res judicata does not apply based on their contention that the underlying judgment was procured by "fraud" and was rendered by a court without competent jurisdiction. However, their allegations of fraud and absence of jurisdiction were raised in and rejected by the appellate court. Significantly, it has been conclusively determined that:

- [Plaintiffs] did not prove that Pronai and Judge Nichols engaged in ex parte communications.
- Judge Nichols did not err in delaying the review of the appropriations cases.
- The Commissioners did attempt to negotiate with [Plaintiffs] as required by Ohio statutory law, but were unable to reach an agreement as to the amount of compensation to be paid.
- [Plaintiffs] waived any right to an immediate hearing under R.C. 163.09(B).
- Judge Nichols properly allowed the Commissioners to amend their appropriation pleading.
- The Commissioners had authority to destroy [Plaintiffs] private on-site sewage system.
- [Plaintiffs] have no legal basis to recover against URS as that entity did not act as a government official under 42 U.S.C. §§ 1983 or 1985.
- The Commissioners complied with the requirements of R.C. 163.04 and R.C. 163.05, and [Plaintiffs] cannot bring a private cause of action for violation of R.C. 163.01, et. seq.
- [Plaintiffs'] 42 U.S.C. § 1983 claim against the Commissioners fails because no fundamental right is involved and they failed to demonstrate an unconstitutional policy, practice or procedure.
- As against Pronai, [Plaintiffs] failed to set forth material facts establishing an abuse of process or malicious prosecution.
- Judgment was properly entered against [Plaintiffs] on their counterclaim and third-party complaint against the Commissioners, Pronai, Mid-Ohio Pipeline, and URS.

Moreover, the jury's determination that the Commissioners were entitled to an easement on [Plaintiffs'] property and that

they were not entitled to any compensation for the easement was affirmed. Yet, [Plaintiffs] continue to challenge the propriety of that taking and are improperly seeking to relitigate issues that were or could have been addressed in the underlying action. Consequently, the Court finds that their claims against the Commissioners, Pronai, Sabin, Judge Nichols, LaForge, Isaac Brant, URS, and Mid-Ohio Pipeline are barred by the doctrine of res judicata and the encompassed concept of collateral estoppel.

As [Plaintiffs'] claims against LaForge are barred, it follows that they cannot hold Miller and CORSA vicariously liable for LaForge's actions. [Plaintiffs'] remaining claim alleges that CORSA is providing lawyer referral services in violation of Ohio's ethics and professionalism rules and further that CORSA should not be providing any services to the Madison County Defendants due to the allegations of malicious purpose, bad faith, and wanton and reckless conduct. CORSA argues that [Plaintiffs] have failed to state a claim for which relief may be granted as the Court does not have jurisdiction to determine violations of disciplinary rules and as [Plaintiffs] do not have standing to challenge the relationship between it and the other Defendants.

Even construing the evidence in favor of [Plaintiffs], the Court finds that they have not stated meritorious claims against CORSA. Again, CORSA is a joint self-insurance pool operating under the authority of R.C. 2744.0819(A) which provides:

\* \* \*

[Plaintiffs] allege that CORSA should not have provided the Madison County Defendants with a defense as their actions were committed outside the course and scope of employment. However, the Court agrees with CORSA's arguments as to [Plaintiffs] lack of standing to raise such an issue. Moreover, as noted above, it has been conclusively established that the actions taken by the Madison Count [sic] Defendants in relation to the appropriation lawsuit were in accordance with the law and further that [Plaintiffs] are barred from relitigating their claims as to the propriety of the appropriation proceedings. [Plaintiffs] further argue that CORSA has violated Ohio's ethics and professionalism rules. However, violation of these rules "does not, in itself, create a private cause of action." Fred Siegel Co., L.P.A. v. Arter & Hadden (1999), 85 Ohio St.3d 171, 178. Additionally, the power to

determine such violations is reserved to the Ohio Supreme Court. Id. Accordingly, the Court finds that CORSA and Miller are entitled to judgment on [Plaintiffs'] claims against them.

(Decision and Entry, April 3, 2009, pp. 15-17).

The Court's judgment was then affirmed on appeal:

[t]he basic premise of the lawsuit filed in Franklin County to attack the Madison County judgment is that the common pleas court in Madison County did not have jurisdiction over an appropriation case involving a property interest in land in Madison County. Stated that simply, the fallacy of the premises is apparent. The common pleas court in the county where the land is situated always has jurisdiction over appropriation actions involving the land.

The argument presented on behalf of [Plaintiffs] is that the common pleas court judge in Madison County and various other public officials behaved in such a way as to divest the Madison County Court of Common Pleas of the jurisdiction which it alone possesses. This argument was presented in detail to the Twelfth District, which totally rejected it.

The common pleas judge who heard the collateral attack filed in Franklin County felt that she was bound by the decisions rendered in the Madison County court and the Twelfth District. The judge in the Franklin County Court of Common Pleas was clearly correct.

Litigation must always come to an end at some point in time. A party or parties cannot litigate a point over and over. Once the point has been decided by a court of competent jurisdiction, that point and all related points which could or should have been raised are permanently decided. Case law commonly refers to such points as *res judicata*, which is merely Latin for "a matter decided."

Sometimes a related legal theory, collateral estoppel, comes into play. Collateral estoppel means a party cannot attack from a different angle what has been already decided or could have been decided in prior litigation. The party is prevented from making a new argument which could or should have been made before the point was made in a prior lawsuit.

As stated before, the Madison County court had jurisdiction over the appropriation case involving land owned by [Plaintiffs]. The judgment rendered was appealed to the appropriate court of appeals, the Twelfth District. With that, the litigation of the issues in the appropriate case comes to an end.

Bell v. Nichols, Franklin App. No. 09AP-438, 2009-Ohio-4851, at ¶¶3-8.

(Decision and Entry Overruling Plaintiffs' Objections to Magistrate's Decision, 2-15.)

{¶ 4} On May 4, 2009, the movants filed a R.C. 2323.51 motion for sanctions against both plaintiffs and their counsel, Philip Wayne Cramer. The movants alleged that the plaintiffs' complaint, various pleadings, and appeal amounted to frivolous conduct under R.C. 2323.51(A)(2)(a)(i) and (ii). The trial court held the motion for sanctions in abeyance until the plaintiffs' appeal regarding the motion for summary judgment concluded. After this court rendered its appellate decision, and the Supreme Court of Ohio denied jurisdiction to consider the plaintiffs' discretionary appeal, the trial court, pursuant to defendants' motion, reactivated the case in order to consider the joint motion for sanctions. The court referred the hearing on the motion for sanctions to a magistrate.

{¶ 5} Plaintiffs filed a memorandum contra the motion for sanctions on March 19, 2010. Plaintiffs also served subpoenas on all of the movants, their attorneys, and other non-parties to the action. The subpoenaed parties filed various motions to quash the subpoenas. On April 7, 2010, the magistrate conducted a hearing on the motions to quash. The magistrate quashed 11 of the 15 subpoenas, permitting only the movants' attorneys to testify at the sanctions hearing.

{¶ 6} On April 16, 2010, the magistrate held a telephone conference to address plaintiffs' discovery requests. During the telephone conference, plaintiffs requested the contract between Judge Nichols and his attorney, but were unable to identify any other appropriate discovery item. On May 13, 2010, Judge Nichols filed a motion to substitute Columbia as the real party in interest, attaching the insurance contract between Judge Nichols and Columbia to the motion.

{¶ 7} The movants filed a supplemental memorandum in support of their joint motion for sanctions on April 7, 2010. In the supplemental memorandum, the movants

narrowed the bases on which they sought sanctions to just one: that plaintiffs committed frivolous conduct under R.C. 2323.51(A)(2)(a)(ii) by filing a civil action that was not warranted under existing law, and could not be supported by a good-faith argument for an extension, modification, or reversal of existing law, or for the establishment of new law. The memorandum alleged that the complaint was an improper collateral attack which was barred by res judicata.

{¶ 8} On May 25, 2010, the magistrate held the hearing on the motion for sanctions. The magistrate noted that the sole issue before it was whether, when plaintiffs filed their claims, they had any reason to believe those claims were not barred by res judicata. Plaintiffs' attorney testified stating that he knew "about res judicata" but also knew that "you shall not be entitled to a strict application of res judicata when it deals with a fundamental right. The taking of one's property is one of the most fundamental rights in this nation." (Sanctions Tr. 29.) Attorney Linda Woeber testified regarding the fees her client, Judge Nichols, incurred in defending against the complaint and attorney Timothy S. Rankin testified regarding the fees his clients, the other Madison County defendants, incurred in defending against the complaint.

{¶ 9} On June 18, 2010, the magistrate filed a decision granting defendants' motion for sanctions. The magistrate concluded that "the filing and maintaining of this action constitute frivolous conduct under R.C. 2323.51(A)(2)(a)(ii) because this action was clearly barred by res judicata." (Magistrate's Decision, 14.) While the magistrate found Cramer responsible for bringing and maintaining the action, the magistrate found plaintiffs "equally responsible," as they represented themselves pro se in Madison County. Mr. Bell made a statement during the hearing on the motions to quash indicating that he was familiar with the facts of the Madison County litigation, and the record showed that the plaintiffs had "simply refused to accept the result of the Madison County litigation and refused to accept that litigation must come to an end at some point in time." (Magistrate's Decision, 16.) The magistrate found the attorney fees presented by the defendants to be reasonable and necessary, awarding the Madison County defendants \$92,601.32 in fees, and awarding Judge Nichols \$22,112.40 in fees. Plaintiffs filed objections to the magistrate's decision.

{¶ 10} On October 5, 2010, the trial court issued a decision and entry overruling the plaintiffs' objections to the magistrate's decision. The court summarized plaintiffs' objections as follows:

- The Magistrate failed to independently and objectively consider relevant facts and evidence.
- The Decision improperly references the telephone conference of April 2, 2010 as the conference was not on the record and no determinations or rulings were made that were later reduced to writing.
- The Magistrate exceeded his authority under the referral by allowing Defendants to "rescope" the nature of the hearing.
- The Magistrate erred in not reducing his April 7, 2010 verbal orders to writing, thereby depriving them of an opportunity to challenge his decisions.
- The Magistrate erred in completely depriving them an opportunity to conduct discovery.
- The Magistrate erred in entering an award in favor of Judge Nichols' as he did not suffer injury since he did not pay any legal bills. Additionally, the Magistrate erred as there was no testimony from any movant that they had been harmed, and the Magistrate merely presumed injury from the time billings.
- The Magistrate incorrectly relied upon Ceol v. Zion Ind. (1992), 81 Ohio App.3d 286 in finding that they had no objective basis for believing that their claims were not barred by res judicata.
- The Magistrate erred in finding that all of their claims were subject to res judicata as the doctrine does not apply to claimed violations of federal civil rights, they brought numerous claims against parties who were not named in the underlying appropriations action, and as they in good faith asserted causes of action that were based upon acts that occurred during the underlying litigation.
- The Magistrate erred in entering an award in favor of CORSA as its counsel was not competent to testify and was evasive as to whether he was lawfully appointed.

(Decision and Entry Overruling Plaintiffs' Objections, 27.)

{¶ 11} The trial court concluded the magistrate did not err in any of his procedural or discovery rulings. The court further concluded that res judicata barred plaintiffs from filing their Franklin County complaint, noting that the plaintiffs attempt to "frame this case as involving new issues and parties [was] unavailing. This lawsuit was a repackaging of the arguments and claims made in the appropriations case and was barred by res

judicata." (Decision and Entry Overruling Plaintiffs' Objections, 35.) The court also granted Judge Nichols' motion to substitute Columbia as the real party in interest.

## **II. ASSIGNMENTS OF ERROR**

{¶ 12} Plaintiffs appeal, assigning the following errors:

[I.] THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS AND THEIR COUNSEL BY DENYING THEM DUE PROCESS OF LAW UNDER R.C. 2323.51(B)(2) AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

[II.] THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS BY DENYING THEM DUE PROCESS OF LAW UNDER R.C. 2323.51(B)(2) AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ADOPTING THE MAGISTRATE'S REPORT'S CONCLUSION THAT APPELLANTS ACTED FRIVOLOUSLY.

[III.] THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS BY AWARDED SANCTIONS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 13} For ease of discussion, we will address plaintiffs' second assignment of error first. Although the trial court awarded sanctions against both plaintiffs and Cramer; Cramer, who continues to represent plaintiffs in this appeal, clarified at oral argument that this appeal does not concern the sanctions imposed against him personally, but only the sanctions imposed against plaintiffs.

## **III. SECOND ASSIGNMENT OF ERROR—FRIVOLOUS CONDUCT**

{¶ 14} Plaintiffs' second assignment of error asserts the trial court erred by adopting the magistrate's decision, which found that plaintiffs engaged in frivolous conduct under R.C. 2323.51(A)(2)(a)(ii). Plaintiffs assert their conduct was not frivolous.

{¶ 15} When a magistrate hears an action, Civ.R. 53 requires that the parties make specific, timely objections in writing to the trial court identifying any factual or legal error in the magistrate's decision. *Little v. Watkins*, 10th Dist. No. 12AP-335, 2012-Ohio-5041, ¶ 5. "Pursuant to Civ.R. 53(D)(3)(b), a party may not raise on appeal any error pertaining to a trial court's adoption of any finding of fact or conclusion of law by the magistrate, unless that party timely objected to that finding or conclusion, as required by the rule."



*Id.*, citing *State ex rel. Booher v. Honda of Am. Mfg., Inc.*, 88 Ohio St.3d 52, 53-54 (2000).

{¶ 16} In ruling on objections to a magistrate's decision, the trial court must undertake an independent review of the matters objected to in order "to ascertain [whether] the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). Thus, although the trial court reviews the magistrate's decision *de novo*, this court reviews the trial court's adoption of a magistrate's decision for an abuse of discretion. *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-606, 2012-Ohio-1017, ¶ 6. Here, the trial court independently reviewed the record, including the plaintiffs' filings in Madison and Franklin Counties, to conclude that filing the Franklin County complaint amounted to frivolous conduct. For the reasons that follow, we find the trial court did not abuse its discretion in adopting the magistrate's decision.

{¶ 17} R.C. 2323.51 provides that a court may award court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. "Frivolous conduct," as defined in R.C. 2323.51(A)(2)(a)(ii), includes conduct that is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law. "Under this definition of 'frivolous conduct,' the test is whether no reasonable attorney would have brought the action in light of the existing law." *Groves v. Groves*, 10th Dist. No. 09AP-1107, 2010-Ohio-4515, ¶ 17, citing *L & N Partnership v. Lakeside Forest Assn.*, 183 Ohio App.3d 125, 2009-Ohio-2987, ¶ 37 (10th Dist.).

{¶ 18} "No single standard of review applies to appeals of rulings on R.C. 2323.51 motions." *Id.* at ¶ 18, citing *Indep. Taxicab Assn. of Columbus, Inc. v. Abate*, 10th Dist. No. 08AP-44, 2008-Ohio-4070, ¶ 13. The standard an appellate court uses depends upon whether the trial court's determination resulted from factual findings or a legal analysis. When the question regarding what constitutes frivolous conduct calls for a legal determination, "e.g., whether a claim is warranted under existing law or could be supported by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law," we employ a *de novo* standard of review. *Id.* When

the determination of frivolous conduct results from a factual determination, we review the trial court's findings with a "degree of deference, and we do not disturb those findings where the record contains competent, credible evidence to support them." *Id.*

{¶ 19} "Where a trial court has found the existence of frivolous conduct, the decision to assess or not to assess a penalty lies within the sound discretion of the trial court." *Sain v. Roo*, 10th Dist. No. 01AP-360 (Oct. 23, 2001), citing *Wiltberger v. Davis*, 110 Ohio App.3d 46, 52 (10th Dist.1996). "Further, R.C. 2323.51 employs an objective standard in determining whether sanctions may be imposed against either counsel or a party for frivolous conduct." *Id.*, citing *Stone v. House of Day Funeral Serv., Inc*, 140 Ohio App.3d 713 (6th Dist.2000).

{¶ 20} The magistrate and trial court found that plaintiffs' complaint was an improper collateral attack on another court's judgment and barred by res judicata. The doctrine of res judicata provides that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995), syllabus. "It has long been the law of Ohio that "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit." ' ' (Emphasis sic.) *Id.* at 382, quoting *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62 (1990), quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69 (1986) (noting that " '[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it' ").

{¶ 21} A collateral attack is an attempt to defeat a judgment, in a proceeding where a new right, derived from or through the judgment is involved. *Ohio Pyro, Inc. v. Ohio Dept. of Comm., Div. of State Fire Marshall*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶ 16. A collateral attack is not inherently improper, but is strongly disfavored, as direct appeals are the primary way to challenge a judgment. *Id.* at ¶ 19, 22. The "reasons for disfavoring collateral attacks do not apply in two principal circumstances—when the issuing court lacked jurisdiction or when the order was the product of fraud." *Id.* at ¶ 23. Absent either of those two grounds, a collateral attack is improper. *Id.* Moreover, "[r]es judicata

principles can apply to prevent parties and those in privity with them from modifying or collaterally attacking a previous judgment." *Id.* at ¶ 34.

{¶ 22} As detailed in the facts section above, the claims in plaintiffs' Franklin County complaint arose out of the same transaction or occurrence as the Madison County case: the appropriation of plaintiffs' property by the Madison County Board of County Commissioners. Plaintiffs' allegations in the complaint to support the Madison County court's lack of jurisdiction were the same substantive claims which plaintiffs made in Madison County and appealed to the Twelfth District Court of Appeals. *Compare* Complaint, ¶ 2 and *Madison Cty. Bd. of Commrs. v. Bell*, 12th Dist. No. CA2005-09-036, 2007-Ohio-1373. Plaintiffs asserted throughout this litigation that, the Madison County court's failure to comply with certain statutory provisions governing appropriation cases deprived the Madison County court of jurisdiction and rendered its final order the product of fraud. *See* Sanctions Tr. 30-31. However, the Madison County court and the Twelfth District addressed plaintiffs' contentions regarding the appropriation statutes, and found that those claims lacked merit. *See* July 29, 2004 Decision and Entry of the Madison County Court of Common Pleas, 28-30, R. 105; *Madison Cty. Bd. of Commrs.* at ¶ 55-60.

{¶ 23} Because plaintiffs previously litigated their jurisdictional claims, those claims were res judicata in this action. *King v. King*, 4th Dist. No. 04CA786, 2006-Ohio-183, ¶ 14, citing *Squires v. Squires*, 12 Ohio App.3d 138 (12th Dist.1983) (finding that "[o]nce a jurisdictional issue has been fully litigated and determined by a court that has authority to pass upon the issue, such determination is res judicata in a collateral action and can only be attacked directly by appeal"). Moreover, this court has already conclusively determined that the Madison County court possessed subject-matter jurisdiction over the appropriations case. *Bell v. Nichols*, 10th Dist. No. 09AP-438, 2009-Ohio-4851, ¶ 3. Even if plaintiffs' contentions regarding the statutory provisions were correct, the Madison County court's failure to follow those provisions would not have deprived the court of subject-matter jurisdiction, which the court already possessed. Rather, the failure to follow the statutes would merely constitute an error in the court's exercise of its jurisdiction, which plaintiffs could raise on direct appeal. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, syllabus.

{¶ 24} Plaintiffs allege that *State ex rel. Blank v. Beasley*, 121 Ohio St.3d 301, 2009-Ohio-835 demonstrates that "Judge Nichols did not have subject matter jurisdiction for any of the Bell's Third Party tort claims." (Appellants' Notice of Additional Authority, 3.) In *Beasley* the Supreme Court of Ohio held that, when a contractor working for the state negligently damages private property, the property owner cannot institute a counterclaim in mandamus to compel the state to appropriate the damaged property. Instead, the property owner is "relegated to alternate remedies, e.g., injunction for the alleged trespass and actions for damages based on negligence or nuisance against the state and the contractor." *Id.* at ¶ 29. *Beasley* does not establish that the Madison County court lacked jurisdiction over plaintiffs' third-party complaint. Rather, it establishes that, if a contractor hired by the state negligently damaged plaintiffs' property, plaintiffs could have filed suit in Madison County to recover those damages.

{¶ 25} Plaintiffs failed to establish that the Madison County court lacked jurisdiction over their case, or that its order was the product of fraud. As such, plaintiffs' Franklin County complaint was an improper collateral attack, and res judicata prevented plaintiffs from attempting to re-litigate the Madison County appropriations case in Franklin County. In prior cases of this court, sanctions have been awarded where a party ignores or fails to investigate the doctrine of res judicata. *See Stuller v. Price*, 10th Dist. No. 03AP-30, 2003-Ohio-6826, ¶ 21 (where the appellant filed her third lawsuit, asserting the same claim for loss of consortium arising out of the same alleged medical malpractice, this court concluded that "had appellant's attorneys undertaken a reasonable inquiry as to the applicable law, they should have determined that appellant's claims were clearly barred by the doctrine of res judicata"); *Sain* ("filing of appellants' 1998 action was so clearly barred by res judicata that appellants had no objective basis to believe it was not so barred"); *Streb v. AMF Bowling Ctrs., Inc.*, 10th Dist. No. 99AP-633 (May 4, 2000) (since appellant's claim was barred by res judicata, refiling the claim met the definition of "frivolous conduct" under R.C. 2323.51(A)(2)(a)(ii)). In light of the clear application of res judicata to the facts of this case, the filing of the Franklin County complaint amounted to frivolous conduct under R.C. 2323.51(A)(2)(a)(ii). As such, the trial court did not err in awarding sanctions against plaintiffs.

{¶ 26} Plaintiffs allege that the magistrate's reliance on *Ceol v. Zion Industries, Inc.*, 81 Ohio App.3d 286 (9th Dist.1992) for the proposition that "the statutory definition of frivolous conduct is an objective one," was incorrect. (Magistrate's Decision, 10.) Plaintiffs assert the magistrate should have looked to the plaintiffs "subjective basis [for] the conduct." (Appellants' brief, 7.) As noted above, to determine whether conduct is frivolous under R.C. 2323.51(A)(2)(a)(ii), the test is whether any "reasonable attorney would have brought the action in light of the existing law." *Groves* at ¶ 17. Thus, an objective standard of review was appropriate in this case. Moreover, pursuant to our de novo review of the frivolous conduct finding, we are not bound by the magistrate's citation to *Ceol*.

{¶ 27} Plaintiffs assert that the award of sanctions was inappropriate because the magistrate "incorrectly conclude[d] that state law trumps federal law," by applying res judicata to plaintiffs' federal civil rights claims. Plaintiffs asserted claims under 42 U.S.C. 1983 and 1985 against various parties in the Madison County action, and renewed those claims in the Franklin County action.

{¶ 28} Citing *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, plaintiffs note that they have "repeatedly argued, and again raised at hearing, that extreme applications of res judicata are contrary to Appellants' federal civil rights." (Appellants' brief, 8.) In *Schachter* the Supreme Court of Ohio noted that "'[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues \* \* \*,' with the caveat that 'extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is "fundamental in character." ' " *Id.* at ¶ 43, quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996), quoting *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918). Plaintiffs' reliance on *Schachter* is misplaced. In *Richards*, the plaintiff received "neither notice of, nor sufficient representation in, the [prior] litigation," thus, "as a matter of federal due process," res judicata could not bar the plaintiff's action. *Richards* at syllabus. In *Schachter*, the petitioner actively participated in the prior litigation, rendering the application of res judicata to the petitioner's subsequent action appropriate. Here, plaintiffs filed their third-party claims in Madison County and appealed the denial of those claims to the Twelfth District. Because plaintiffs have fully litigated their claims,

this case does not present the extreme application of res judicata which plaintiffs suggest. As the trial court noted, "[s]imply because the underlying subject matter involves the taking of property and alleged violations of federal rights does not entitle [plaintiffs] to re-litigate matters that have been conclusively decided." (Decision and Entry Overruling Plaintiffs' Objections, 37.)

{¶ 29} Plaintiffs assert that because their complaint in Franklin County was "against new parties for injuries done to Appellants during the pendency of the prior litigation," it "did not arise 'out of the transaction or occurrence' " of the prior litigation. (Appellants' brief, 9.) In support of their contention, plaintiffs cite to Counts 10 through 20 of the complaint which asserted claims against LaForge, Isaac Brant, CORSA, and CORSA's litigation manager, Beth Miller. As noted in the facts above, plaintiffs' claims against LaForge involved his representation of the various parties in the Madison County litigation. The claims against Isaac Brant, CORSA, and Miller were for their conduct in either hiring or failing to supervise LaForge. The collateral estoppel arm of res judicata barred plaintiffs' claims against these parties.

{¶ 30} The doctrine of res judicata has two aspects: claim preclusion and issue preclusion. *Dehlendorf v. Ritchey*, 10th Dist. No. 12AP-87, 2012-Ohio-5193, ¶ 13, citing *Grava* at 380. Issue preclusion, also known as collateral estoppel, provides that "a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395 (1998). Even where the cause of action in the subsequent action is different, the judgment in the prior suit may nevertheless affect the outcome of the second suit. *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶ 27. "Collateral estoppel means a party cannot attack from a different angle what has been already decided or could have been decided in [the] prior litigation." *Bell* at ¶ 7.

{¶ 31} Plaintiffs' claims against LaForge, Isaac Brant, CORSA, and Miller, are simply an attempt to attack the Madison County decision from a different angle, by attempting to attack the parties involved in representing the third-party defendants in the

Madison County action. Although not named parties in the Madison County action, LaForge, Isaac Brant, CORSA, and Miller were all in sufficient privity with the third-party defendants so as to bar plaintiffs' claims against them in this action. *See Brown v. Dayton*, 89 Ohio St.3d 245, 248 (2000), quoting *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.1950) ("privity is 'merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata' "); *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, ¶ 9, quoting *Brown* at 248 ("[a]n interest in the result of and active participation in the original lawsuit," or "[a] 'mutuality of interest, including an identity of desired result,' " can establish privity); *Electrical Enlightenment, Inc. v. Kirsch*, 9th Dist. No. 23916, 2008-Ohio-3633, ¶ 9, citing *Singfield v. Yuhasz*, 9th Dist. No. 22432, 2005-Ohio-3636, ¶ 11. Accordingly, collateral estoppel barred plaintiffs' attempt to re-litigate the issues from the Madison County case by bringing suit against parties who were in privity with the named third-party defendants in the Madison County case.

{¶ 32} In the final analysis, the claims plaintiffs raised in the Franklin County complaint involved claims which either were or could have been raised in the Madison County action against individuals who were either parties to that action or in privity with named parties. As such, the trial court did not err in adopting the magistrate's decision and granting the movants' motion for sanctions.

{¶ 33} Based on the foregoing, plaintiffs' second assignment of error is overruled.

#### **IV. FIRST ASSIGNMENT OF ERROR—DUE PROCESS**

{¶ 34} Plaintiffs' first assignment of error asserts the trial court violated their due process rights by (1) quashing 11 out of the 15 subpoenas plaintiffs issued, (2) permitting the movants to amend their motion for sanctions, (3) awarding sanctions when the moving parties failed to present any evidence of injury, and (4) granting Judge Nichols' motion to substitute his insurance carrier as the real party in interest.

##### **A. Granting the Motions to Quash**

{¶ 35} Plaintiffs assert that "[i]n order to exercise their rights to obtain evidence in their favor, and challenge the allegations against them, Appellants issued subpoenas to each of the parties that had moved for sanctions against them," but "the magistrate quashed all subpoenas." (Appellant's brief, 3.)

{¶ 36} Civ.R. 53(C)(2)(b) provides that "magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to \* \* \* [r]uling upon the admissibility of evidence." Thus, magistrates have the authority to rule on the admissibility of evidence and, "in this regard, magistrates enjoy the same authority granted to trial courts." *Ruffian, L.L.C. v. Hayes*, 10th Dist. No. 09AP-948, 2011-Ohio-831, ¶ 23. We review the decision to quash a subpoena under an abuse of discretion standard. *Cunningham v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-330, 2008-Ohio-6911, ¶ 13, citing *State v. West*, 10th Dist. No. 06AP-11, 2006-Ohio-6259, ¶ 8.

{¶ 37} Civ.R. 45(C)(3) provides that a court may quash a subpoena if the subpoena subjects the individual to an undue burden. When an individual moves to quash a subpoena on the basis that the subpoena will cause them an undue burden, the court must quash the subpoena "unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship." Civ.R. 45(C)(5).

{¶ 38} Plaintiffs served subpoenas on the following individuals: attorneys Linda Woeber and Lisa Zaring, counsel for Judge Nichols; attorneys Craig Spadafore and Timothy S. Rankin, counsel for the various Madison County defendants; LaForge; Judge Nichols; Chris R. Snyder, a Madison County Commissioner; David Dhume, a Madison County Commissioner; Robert D. Hackett, a Madison County Commissioner; Mark Forrest, a non-party to the action and current Madison County Commissioner; James P. Sabin, the Madison County Sheriff; Stephen J. Pronai, the Madison County Prosecutor; Mary Ann Webb, a non-party to the action and the current Madison County Health Commissioner; Beth Miller; and David Brooks, a non-party to the action and the managing director of CORSA. The magistrate determined that Woeber, Zaring, Rankin, and Spadafore could be called to testify to defend the necessity and reasonableness of their fees.

{¶ 39} Regarding the remaining individuals, the magistrate did not err in quashing their subpoenas. At the hearing on the motion for sanctions, parties are only permitted to present relevant evidence. R.C. 2323.51(B)(2)(c). Because the moving defendants sought



sanctions on the basis that plaintiffs' complaint was not warranted under existing law, the sanctions hearing predominately concerned only that legal issue. *L & N Partnership* at ¶ 37.

{¶ 40} At the hearing on the motions to quash, plaintiffs demonstrated that they sought testimony from the various witnesses which was irrelevant to the sanctions hearing. For example, regarding Judge Nichols, plaintiffs argued his testimony was "critical to the process of the underlying complaint" because he "made a decision before the case was even filed that he would not hold a hearing for six months." (Quash Tr. 12.) Notably, the Twelfth District Court of Appeals specifically addressed plaintiffs' claims regarding the six-month delay. *See Madison Cty. Bd. of Commrs.* at ¶ 11-17. Similarly, plaintiffs alleged that Webb's testimony was necessary to show whether there was a "resolution from the Board of Health ordering Mr. Bell to destroy" his on-site sewer system, and that Sabin's testimony was necessary because plaintiffs had filed a "criminal complaint for trespass against Mid-Ohio" Pipeline, and Sabin "basically, apparently, pocket — pocket vetoed that." (Quash Tr. 21, 25.) As these examples demonstrate, plaintiffs sought testimony from the subpoenaed witnesses regarding the merits of the underlying appropriations case. *See Siemientkowski v. Moreland Homes, Inc.*, 8th Dist. No. 84758, 2005-Ohio-515, ¶ 29 (noting that the "[a]ppellants never attempted to introduce any relevant evidence to rebut the frivolous conduct claim; instead, appellants used the hearing to yet again argue that their property was improperly graded").

{¶ 41} Plaintiffs acknowledge that the magistrate addressed each subpoenaed witness and allowed plaintiffs to explain why they believed each witness's testimony was necessary. Plaintiffs assert, however, that "an attorney cannot be forced to disclose his work product and trial strategy beforehand, simply in order to be allowed to compel a complaining witness to take the stand and be cross-examined." (Appellants' brief, 4.) Plaintiffs did not assert below that, in order to explain why a particular subpoenaed witness's testimony was necessary, they would be forced to disclose privileged materials. "It is well-established that a party cannot raise new issues or legal theories for the first time on appeal." *Sain*, citing *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 43 (1975). Accordingly, plaintiffs' assertions regarding work product and trial strategy lack merit.

{¶ 42} The magistrate concluded that calling the Madison County public officials to testify constituted an "extraordinary request" and an unreasonable burden to place on public officials. (Quash Tr. 14.) Regarding the subpoenaed witnesses who were not public officials, the magistrate concluded that plaintiffs failed to identify any relevant issues those individuals could testify to. Plaintiffs failed to demonstrate how the testimony of any of the 11 witnesses would be relevant to the issues of res judicata, collateral attack, or the attorney fees, the only relevant issues for the sanctions hearing. Based on our review of the hearing transcript on the motions to quash, it is apparent that the magistrate did not abuse its discretion in quashing the 11 subpoenas.

#### B. Amending the Motion for Sanctions

{¶ 43} Plaintiffs assert that, over their objection, the movants "were allowed to improperly amend their motion midway into the sanctions proceeding, under the guise of a supplemental brief," and that the amended motion deprived plaintiffs "of defenses to which they were entitled." (Appellants' brief, 3.)

{¶ 44} The movants alleged in their original motion for sanctions that the filing of plaintiffs' complaint was frivolous and in violation of R.C. 2323.51(A)(2)(a)(ii), and that the complaint, various other pleadings, and even the appeal were done "solely to harass or maliciously injure the Defendants and/or to cause unnecessary delay or needless expense," in violation of R.C. 2323.51(A)(2)(a)(i). (Original Motion for Sanctions, 2.) In the supplemental motion for sanctions, the movants alleged only that plaintiffs violated R.C. 2323.51(A)(2)(a)(ii) by filing their complaint in Franklin County.

{¶ 45} Prior to the hearing on the motions to quash, the magistrate noted that, during an April 2, 2010 telephone conference, the magistrate "suggested to the parties \* \* \* that the scope of the hearing on the motion for sanctions would be obviously tied to what issues in particular are raised by the motion for sanctions." (Quash Tr. 3.) Accordingly, the magistrate asked the moving parties "to be prepared to identify specifically the bases on which sanctions are being sought." (Quash Tr. 3.) In response to that request, the movants filed the supplemental motion.

{¶ 46} On May 17, 2010, plaintiffs filed a motion seeking to set aside the magistrate's orders and stay their effectiveness, and to stay the proceedings. Plaintiffs alleged that the magistrate verbally ordered that plaintiffs could not "pursue various

defenses against the Joint Sanctions Motion," in violation of Civ.R. 53(D)(2)(a)(i), and violated plaintiffs due process rights by failing to put the verbal order in writing. (Motion to Set Aside, 2.) The trial court denied the motion, noting that plaintiffs failed to explain what defenses they had lost, and that Civ.R. 53(D)(2)(a)(i) did "not preclude a Magistrate from issuing preliminary rulings." (Entry Denying Plaintiffs' Motion to Set Aside, 4-5.)

{¶ 47} In overruling plaintiffs' objections to the magistrate's decision, the court noted that plaintiffs' objection to the supplemental motion for sanctions was illogical. The magistrate, "in the efficient performance of his responsibilities, properly asked Defendants to identify the bases upon which sanctions were being sought, and, \* \* \* Defendants actually narrowed the issues to be decided," resulting in no discernable prejudice to the plaintiffs. (Decision and Entry Overruling Plaintiffs' Objections, 30.) The court further noted that any viable defenses which plaintiffs had to the sanctions motion would be primarily legal in nature, such that any ruling from the magistrate would not have disposed of those defenses.

{¶ 48} We agree with the trial court's rulings. Both the original and the supplemental motions for sanctions alleged that the filing of the complaint was frivolous in violation of R.C. 2323.51(A)(2)(a)(ii). Through the supplemental motion defendants removed alternate, and potentially viable, bases for seeking sanctions against plaintiffs, thus relieving plaintiffs from the obligation to defend against additional claims of frivolous conduct. While plaintiffs continue to allege that the narrowing of the grounds for sanctions deprived them of defenses, plaintiffs fail to explain what defenses they lost, or how those defenses would have changed the outcome of the sanctions hearing. Absent some showing of prejudice, plaintiffs' contentions regarding the narrowing of the sanctions motion lack merit.

### C. Injury or Harm

{¶ 49} Plaintiffs assert that "[n]o moving party ever testified as to any injury allegedly suffered" thus leaving "no legitimate basis for the trial court to have awarded sanctions." (Appellants' brief, 5.)

{¶ 50} The defendants in this action each had insurance and the respective insurers, Columbia, on behalf of Judge Nichols, and CORSA, on behalf of the remaining Madison County defendants, financed the defendants' representation. At the sanctions

hearing, Rankin and Woeber testified regarding the fees their clients incurred in defending against the plaintiffs' frivolous claims. Rankin and Woeber presented competent, credible evidence of the fees incurred, including their own testimonies, as well as invoices detailing the fees charged and the labor required to defend against plaintiffs' complaint. (Sanctions Tr. 39-43; 49-52.) The attorneys also submitted additional evidence in their written closing arguments to support the \$92,601.32 in fees incurred by CORSA and the \$22,112.40 incurred by Columbia in defending against plaintiffs' frivolous filing. Based on the evidence in the record before us, defendants suffered substantial harm in defending against plaintiffs' action.

{¶ 51} To the extent plaintiffs assert that the attorneys were not competent to testify regarding the fees their clients incurred, such contention lacks merit. Attorneys typically testify at R.C. 2323.51 sanctions hearing, as they are in the best position to address the reasonableness and necessity of their fees. *See* R.C. 2323.51(B)(3); *Mitchell v. Mid-Ohio Emergency Servs., L.L.C.*, 10th Dist. No. 10AP-374, 2010-Ohio-6350, ¶ 13.

{¶ 52} The magistrate noted that "[w]hile the Bells objected to presentation of any evidence of attorney's fees, the Bells did not address the reasonableness of the hourly rates charged or the amount of attorney's fees" or "challenge the reasonableness or necessity of particular services or charges included in the itemizations." (Magistrate's Decision, 17.) The magistrate found the attorney fees and expenses requested by the movants reasonable and necessary "given the amount of work done in this case." (Magistrate's Decision, 20.) Based on our review of the record, we find no error in the magistrate's award of fees, or the trial court's adoption of the same.

{¶ 53} The gist of plaintiffs' contention regarding the absence of harm seems to emanate from plaintiffs' belief that, because the moving parties in the case before us had insurance, the moving parties have suffered no harm. This contention lacks merit. Where an insurance company finances an insured's defense against frivolous conduct, "the insurance carrier \* \* \* is entitled to recoup the rewards if sanctions are granted." *State ex rel. Striker v. Cline*, 5th Dist. No. 09CA107, 2011-Ohio-983, ¶ 31 (noting the relators argument that "a third party will benefit by not having to pay for the law firm work in defense of frivolous conduct," was illogical as the respondent had "paid for the insurance contract and is entitled to their defense"). Moreover, to find that the moving defendants

were not injured simply because their insurer financed their defense "would penalize parties that have the foresight to obtain liability insurance and would condone frivolous conduct against them." *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, ¶ 25. The Supreme Court of Ohio "refuse[d] to construe the frivolous-conduct statute to produce such an unreasonable result." *Id.*

{¶ 54} The defendants herein had the foresight to obtain and pay for liability insurance before litigation actually occurred. Accordingly, any assertion by plaintiffs that defendants suffered no harm simply because defendants had their legal representation financed through an insurance policy lacks merit. Defendants suffered harm because their insurers were forced to pay the legal fees which resulted from plaintiffs' frivolous conduct. Columbia and CORSA were entitled to recoup the rewards when the court awarded sanctions.

#### D. Motion to Substitute

{¶ 55} Plaintiffs allege that "Defendant-Appellee, Robert D. Nichols, implicitly admitted he had not been injured, because he \* \* \* moved to substitute a theretofore concealed, foreign insurance corporation – Columbia Casualty Company – as the real party in interest." (Appellants' brief, 5.) Plaintiffs allege the trial court violated their right to due process because the court "withheld approving said substitution until after the proceedings, simultaneous with awarding sanctions against Appellants." (Appellants' brief, 5.)

{¶ 56} The memorandum in support of the motion to substitute Columbia as the real party in interest explained that the Supreme Court of Ohio had purchased an insurance policy through Columbia for the benefit of Ohio state court judges, and that Judge Nichols was an insured under that policy. The memorandum asserted that "[i]f Judge Nichols [was] awarded sanctions in this matter, those funds will be owed to Columbia, as it has paid and will continue to be responsible for paying Judge Nichols' legal fees." (Motion to Substitute, 2.)

{¶ 57} Civ.R. 17 requires every civil action to be prosecuted in the name of the real party in interest. *Ohio Cent. RR. Sys. v. Mason Law Firm Co., L.P.A.*, 182 Ohio App.3d 814, 2009-Ohio-3238, ¶ 32 (10th Dist.). "The purpose behind [Civ.R. 17] is "to enable the defendant to avail himself of evidence and defenses that the defendant has against the

real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party in interest on the same matter." " " *Id.* at ¶ 33, quoting *Agri-Mark, Inc. v. Niro, Inc.*, 190 F.R.D. 293, 295 (D.Mass.2000), citing *Shealy v. Campbell*, 20 Ohio St.3d 23, 24-25 (1985). " 'The real party in interest is the party who will directly be helped or harmed by the outcome of the action.' " *Id.* at ¶ 34, quoting *Zuckerman v. Gray*, 11th Dist. No. 2008-T-0022, 2009-Ohio-1319, ¶ 13.

{¶ 58} In *Smith v. Travelers Ins. Co.*, 50 Ohio St.2d 43, 45 (1977), the Supreme Court of Ohio determined that, when an insured executes a subrogation agreement with an insurer, "the subrogee, upon such assignment, would become the real party in interest and have the right to maintain an action in the name of the subrogee as against the tortfeasor for damages sustained to personal property of the insured, as well as for personal medical expenses as suffered by the insured." *Id.* See also *Ohio Cent. RR. Sys.* at ¶ 35, citing *Cleveland Paint & Color Co. v. Bauer Mfg. Co.*, 155 Ohio St. 17 (1951) (noting that "where an insurance company pays the entire amount of a judgment, pursuant to a policy issued to an insured tortfeasor, and thereby becomes subrogated to that claim, the insurance company is the sole real party in interest in a subsequent action brought to recover the amount of that loss"). Furthermore, while a "plaintiff may bring a suit for the entire amount of her damages solely in her own name, despite having assigned at least a portion of her loss to her insurer" the "assignee insurer must be joined in the action if the plaintiff or tortfeasor raise the issue of joinder." *Banford v. State Farm Ins. Co.*, 2d Dist. No. 18464 (Jun. 22, 2001), citing *Holibaugh v. Cox*, 167 Ohio St. 340, 345-46 (1958).

{¶ 59} Here, Judge Nichols' insurance policy with Columbia provided for subrogation, stating that "[i]n the event of any payment under this policy, the Company shall be subrogated to all of the Insured's rights of recovery thereof against any person or organization." (Motion to Substitute, exhibit A, 7.) Thus, pursuant to the subrogation agreement, Columbia could be the real party in interest in the action to recover the attorney fees Columbia expended in defending Judge Nichols against plaintiffs' claims. Although Judge Nichols could have prosecuted the action in his own name, and Columbia would have become entitled to reimbursement after the court awarded sanctions, because Judge Nichols raised the issue by filing the motion to substitute, the trial court was

obligated to substitute Columbia into the action as the real party in interest. *Banford*. Accordingly, the trial court did not err in granting Judge Nichols motion to substitute.

{¶ 60} Plaintiffs assert that their right to due process was violated because the timing of the substitution prevented plaintiffs from "obtaining any discovery or testimony" from Columbia. (Appellants' brief, 5.) "An appellant bears the burden of affirmatively demonstrating error on appeal. App.R. 16(A)(7). It is not the duty of this court to construct legal arguments in support of an appellant's appeal." *Camp v. Star Leasing Co.*, 10th Dist. No. 11AP-977, 2012-Ohio-3650, ¶ 67. Plaintiffs do not explain what discovery they would have sought from Columbia, or how such discovery would have proved beneficial to them at the sanctions hearing. As such, plaintiffs have failed to demonstrate any prejudice resulting from the substitution of Columbia as the real party in interest.

{¶ 61} Finally, plaintiffs allege that because Columbia "fail[ed] to ratify its substitution into [the] case, \* \* \* therefore, the award of sanctions \* \* \* was plainly a violation of Appellants' and their counsel's rights to due process of law." (Appellants' brief, 6.) Civ.R. 17(A) provides that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." Thus, " 'Civ.R. 17 \* \* \* only allows a plaintiff to cure a real-party-in-interest problem by (1) showing that the real party in interest has ratified the commencement of the action, or (2) joining or substituting the real party in interest.' " *Ohio Cent. RR. Sys.* at ¶ 37, quoting *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, ¶ 11 (1st Dist.). Accordingly, ratification is unnecessary where a party cures the real party in interest problem through substitution, as Judge Nichols did here.

{¶ 62} Based on the foregoing, plaintiffs' first assignment of error is overruled.

#### **V. THIRD ASSIGNMENT OF ERROR—MANIFEST WEIGHT OF THE EVIDENCE**

{¶ 63} Plaintiffs' third assignment of error asserts the trial court's award of sanctions was against the manifest weight of the evidence. "Where an appellant challenges a civil judgment as being against the manifest weight of the evidence, the

appellate court's function is limited to examining the record to determine if there is any competent, credible evidence to support the judgment." *Burr v. Ohio State Hwy. Patrol*, 10th Dist. No. 12AP-26, 2012-Ohio-4906, ¶ 22.

{¶ 64} Based on our review of the record, as detailed throughout this decision, there was competent, credible evidence in the record to support the trial court's award of sanctions. Plaintiffs' attempt to re-litigate the Madison County appropriations case in Franklin County was barred by the doctrine of res judicata. Plaintiffs' assertion that res judicata does not apply to cases involving fundamental rights, such as the taking of property, wholly lacks merit, and in practice would prevent any case involving a fundamental right from reaching a final judgment. Plaintiffs' contention that the Madison County court lacked jurisdiction due to the courts alleged failure to follow certain statutory requirements lacked merit, as any error in failing to follow the statutes did not deprive the Madison County court of jurisdiction, which it already possessed. *Pratts*. Because plaintiffs' complaint in Franklin County was clearly barred by res judicata, the filing of the complaint was frivolous pursuant to R.C. 2323.51(A)(2)(a)(ii). At the sanctions hearing, the moving defendants presented evidence of the attorney fees they incurred in defending against plaintiffs' frivolous filings, the magistrate and trial court found those fees to be both reasonable and necessary, and based on our review of the record, we similarly find the fees charged to be reasonable. Accordingly, the award of sanctions was not against the manifest weight of the evidence.

{¶ 65} Plaintiffs substantively contend under this assignment of error that the magistrate relied on incorrect facts, failed to independently and objectively consider the facts before it, and prevented plaintiffs from obtaining discovery. Plaintiffs also assert that the magistrate improperly allowed defendants to narrow the bases on which they sought sanctions, that the moving parties failed to establish injury because they did not pay their own attorney fees, and that Woeber and Rankin were incompetent to testify at the sanctions hearing regarding their fees. *See* Appellants' brief, 12-14. These latter arguments were addressed under plaintiffs' first assignment of error, and lack merit for the reasons stated above.

{¶ 66} Plaintiffs assert that the trial court adduced facts from outside the record to support the award of sanctions. Plaintiffs cite to the magistrate's factual finding that the



Madison County "Commissioners needed to obtain a construction easement from each property owner," and contend the statement is false as the commissioners sought a fee simple absolute interest in their property. (Appellants' brief, 10, citing Magistrate's Decision, 2.) Plaintiffs similarly assert that the magistrate's decision "falsely state[d], 'a jury determined that the Commissioners were entitled to an easement on the Bells' property.'" (Appellants' brief, 10-11, quoting Magistrate's Decision, 2.)

{¶ 67} Although plaintiffs cite to these allegedly incorrect facts, plaintiffs fail to explain how the magistrate's recitation of these background facts regarding the Madison County litigation prejudiced them in any way. Whether the commissioners sought an easement or a fee simple absolute interest in plaintiffs' property is immaterial to the determination regarding whether plaintiffs had any viable argument to believe that their Franklin County action was not barred by *res judicata*. Because plaintiffs do not attempt to explain what prejudice they suffered as a result of these allegedly incorrect facts, we find none.

{¶ 68} Plaintiffs assert that "the trial magistrate failed to independently and objectively consider the relevant facts and evidence it did allow before it," because a factual statement in the magistrate's decision is similar to a portion of the trial court's summary judgment decision reciting the underlying facts from the Madison County case. (Emphasis sic.) (Appellants' brief, 11.) Plaintiffs' contention is illogical. The magistrate's recitation of the facts surrounding the Madison County litigation was merely for purposes of explaining the procedural background of the sanctions action. Moreover, the magistrate was entitled to rely on prior decisions from this court, the trial court, and the Madison County court, as those earlier decisions served as evidence "to demonstrate [plaintiffs'] claims were previously litigated and resolved." *Sain* (finding the magistrate properly relied on the complaint and judgment entries from the previous action, and "this court's [appellate] decision in *Sain I*," as evidence to establish that the case before it was indeed barred by *res judicata*).

{¶ 69} Lastly, plaintiffs assert that the magistrate "made it clear that he would not allow Appellants to obtain discovery, necessary to defend themselves against sanctions, on any matter related to the case-in-chief." (Appellants' brief, 10.) Plaintiffs further allege that "the transcripts make clear that the Magistrate would not allow Appellants to

undertake general discovery on any issue already adjudicated." (Appellants' brief, 14-15.) Plaintiffs' claims regarding discovery lack merit. For purposes of the sanctions hearing, plaintiffs were not entitled to obtain discovery on the underlying issues in the case, which the trial court already decided, as such evidence was not relevant to the sanctions hearing. *See* Civ.R. 26(B)(1).

{¶ 70} The magistrate provided the plaintiffs with ample opportunity during the April 16, 2010 telephone conference to explain what items plaintiffs sought through discovery. Aside from the contract between Woeber and Judge Nichols, plaintiffs were unable to identify any relevant item they wanted to obtain through discovery. Instead, plaintiffs made broad, sweeping statements, saying they wanted "to be able to do full discovery on these people," wanted "to be able to do depositions, do whatever with the other parties that you quashed the subpoenas on," and wanted "the full rights to have discovery with those other defendant parties which are all federal claims." (Discovery Tr. 6-9.) The magistrate noted that, to the extent plaintiffs were "referring to the subpoenas that we've already had a hearing about," the magistrate had granted those motions to quash. (Discovery Tr. 9.) The magistrate did not err in prohibiting plaintiffs from conducting discovery on matters which were either already adjudicated or were not relevant to the sanctions hearing.

{¶ 71} The trial court's order awarding sanctions was not against the manifest weight of the evidence. Based on the foregoing, plaintiffs' third assignment of error is overruled.

## **VI. CONCLUSION**

{¶ 72} Having overruled plaintiffs' three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

KLATT, P.J., and DORRIAN, J., concur.

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