

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
SHELBY COUNTY**

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**KIMBERLY WALL,**

**PLAINTIFF-APPELLEE/  
CROSS-APPELLANT,**

**CASE NO. 17-14-33**

**v.**

**OHIO STATE BOARD OF EDUCATION,**

**DEFENDANT-APPELLANT/  
CROSS-APPELLEE.**

**OPINION**

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**Appeal from Shelby County Common Pleas Court  
Trial Court No. 14CV000077**

**Judgment Affirmed**

**Date of Decision: April 13, 2015**

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**APPEARANCES:**

***James D. Miller* for Appellant/Cross-Appellee, Ohio State Board  
of Education**

***Dennis L. Pergram* for Appellee/Cross-Appellant, Kimberly Wall**

**PRESTON, J.**

{¶1} Defendant-appellant/cross-appellee, the Ohio State Board of Education (the “Board”), and plaintiff-appellee/cross-appellant, Kimberly Wall (“Wall”), appeal the October 29, 2014 judgment entry of the Shelby County Court of Common Pleas. For the reasons that follow, we affirm.

{¶2} On November 28, 2011, two complaints were filed in the Sidney Municipal Court against Wall, who was then an adjunct instructor at Sinclair Community College teaching reading and first-year student success, charging her with criminal damaging in violation of R.C. 2909.06(A), a second-degree misdemeanor, and unlawful restraint in violation of R.C. 2905.03(A), a third-degree misdemeanor. (Admin. App. L). (*See also* Sept. 3, 2013 Tr. at 137-138). The complaints alleged that on November 25, 2011, Wall passed and pulled her vehicle in front of the vehicle belonging to Wall’s husband’s ex-wife, Carolyn Wall (“Carolyn”), causing Carolyn to slam on her brakes and stop in the roadway, providing her no safe alternative to escape from Wall. (Admin. App. K). The complaints also alleged that Wall with a hammer broke the driver-side window and struck the front and rear driver-side doors of Carolyn’s vehicle. (*Id.*). On March 16, 2012, Wall pled guilty to a lesser offense—one count of “Dis. Conduct” in violation of “[R.C.] 2917.11,” a “M4.” (*Id.*). The court fined her \$75 and

sentenced her to 10 days in jail with 5 days suspended on the condition that she complete counseling and observe the terms of probation for one year. (*Id.*).

{¶3} On March 4, 2013, the Ohio Department of Education (the “Department”) sent Wall a “Notice of Opportunity for Hearing” notifying her that the Department intended “to determine whether to limit, suspend, revoke, or permanently revoke [her] five-year professional elementary teaching license issued in 2010” because Wall’s “disorderly conduct” conviction constituted conduct unbecoming to the teaching profession in violation of R.C. 3319.31(B)(1). (Admin. App. L). The Department held an administrative hearing before a hearing officer on September 3, 2013. (Sept. 3, 2013 Tr. at 1).

{¶4} At the hearing, the Department called Michelle F. Atkinson (“Atkinson”), a staff attorney with the Department’s Office of Professional Conduct, to testify on its behalf. (*Id.* at 11-12). Atkinson testified that the Department received notice of “a pending criminal charge against” Wall, which led the Department to initiate an investigation and issue the March 4, 2013 notice to Wall. (*Id.* at 13). The Department next called Deputy Brian J. Strunk (“Deputy Strunk”) of the Shelby County Sheriff’s Department to testify about the November 25, 2011 incident involving Wall. (*Id.* at 19-20). Finally, the Department called Carolyn to testify about the November 25, 2011 incident. (*Id.* at 76).

{¶5} Wall called Anne Scaperoth (“Scaperoth”), a clinical social worker and psychotherapist, who testified that she counseled Wall for approximately one year. (*Id.* at 116). Scaperoth opined that Wall presented a “low-risk” to the well-being of children in the school setting because the November 25, 2011 incident was not triggered by Wall’s work with children. (*Id.* at 118, 123). Wall next called Sara Mitchell (“Mitchell”), a personal acquaintance. (*Id.* at 127). Mitchell testified that she became acquainted with Wall through their volunteer work with Big Brothers Big Sisters. (*Id.*). Mitchell further testified that she was aware of the November 25, 2011 incident, but that she had no concerns about Wall being with Mitchell’s children. (*Id.* at 132). Last, Wall testified on her own behalf . (*Id.* at 136).

{¶6} The Department’s hearing officer concluded that Wall’s actions constituted conduct unbecoming a teacher in violation of R.C. 3319.31(B)(1) and recommended that the Board issue her a letter of admonishment because “there is no nexus between Ms. Wall’s conviction and her future employment as a teacher.” (Admin. App. P). In making her conclusion, the Department’s hearing officer considered that this was Wall’s only criminal offense, that she successfully completed the terms of her probation, that she is well-regarded as a teacher, that she has not been previously disciplined, and that her “licensure will not negatively

impact the health, safety and welfare of the school community and/or statewide education community.” (*Id.*).

{¶7} The Department filed objections to its hearing officer’s recommendations on October 31, 2013. (Admin. App. R).

{¶8} On January 14, 2014, the Board adopted a resolution to suspend Wall’s license until June 30, 2015 instead of issuing Wall a letter of admonishment as recommended by the Department’s hearing officer. (Admin. App. V).

{¶9} Wall appealed the Board’s resolution to the Shelby County Court of Common Pleas on April 1, 2014 under R.C. 119.12. (Doc. No. 1). On August 19, 2014, the trial court reversed the Board’s resolution because it was not based on reliable, probative, and substantial evidence that there was a nexus between Wall’s conduct and her ability to perform as a teacher. (Doc. No. 38). The trial court ordered that Wall be issued a letter of admonishment as recommended by the Department’s hearing officer. (*Id.*).

{¶10} The Board filed its notice of appeal to this court on September 18, 2014. (Doc. No. 57). Also on September 18, 2014, Wall filed a motion for attorney fees. (Doc. No. 64). Because Wall filed a motion for attorney fees the same day the Board filed its appeal of the trial court’s August 19, 2014 judgment entry, we dismissed the Board’s appeal for lack of a final, appealable order.

{¶11} The Board filed a memorandum in opposition to Wall's motion for attorney fees on October 2, 2014. (Doc. No. 70). On October 29, 2014, the trial court denied Wall's motion for attorney fees. (Doc. No. 74).

{¶12} On November 19, 2014, the Board filed its notice of appeal. (Doc. No. 81). On November 25, 2014, Wall filed her notice of cross appeal. (Doc. No. 86). The Board raises two assignments of error for our review. Wall raises one assignment of error in her cross-appeal for our review. For ease of our discussion, we will address the Board's assignments of error together, followed by Wall's assignment of error.

#### **Board's Assignment of Error No. I**

**The Trial Court abused its discretion in finding that there was no nexus between Appellee's violation of R.C. § 3319.31(B)(1) and her ability to teach by failing to properly apply the nexus standard in conjunction with the Licensure Code of Professional Conduct, which was promulgated subsequent to the case law applying the nexus standard relied upon by the Trial Court.**

#### **Board's Assignment of Error No. II**

**The Trial Court abused its discretion by substituting its judgment for that of the Board.**

{¶13} In its first assignment of error, the Board argues that the trial court abused its discretion in finding that there was no reliable, probative, and substantial evidence that there was a nexus between Wall's violation of R.C. 3319.31(B)(1) and her ability to teach because the trial court failed to properly

apply the nexus standard in conjunction with its Licensure Code of Professional Conduct. Specifically, the Board argues that the trial court abused its discretion in interpreting R.C. 119, R.C. 3319.31, and Ohio Adm.Code 3301-73-21. In its second assignment of error, the Board argues that the trial court abused its discretion in substituting its judgment for that of the Board under R.C. 119.12.

{¶14} R.C. 3319.31 describes the circumstances under which the Board may suspend, revoke, or limit a teaching license and provides, in relevant part:

For any of the following reasons, the state board of education, in accordance with Chapter 119. and section 3319.311 of the Revised Code, may refuse to issue a license to an applicant; may limit a license it issues to an applicant; may suspend, revoke, or limit a license that has been issued to any person; or may revoke a license that has been issued to any person and has expired:

(1) Engaging in an immoral act, incompetence, negligence, or conduct that is unbecoming to the applicant's or person's position.

R.C. 3319.31(B)(1).

{¶15} R.C. 119.12 permits the appeal of an agency's decision to the court of common pleas and provides, in relevant part:

The [trial] court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any

additional evidence the court has admitted, *that the order is supported by reliable, probative, and substantial evidence and is in accordance with law*. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

(Emphasis added.) “Reliable, probative and substantial evidence has been defined as: ‘(1) “Reliable” evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) “Probative” evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) “Substantial” evidence is evidence with some weight; it must have importance and value.’” *Contini v. Ohio State Bd. of Edn.*, 5th Dist. Licking No. 2007CA0136, 2008-Ohio-5710, ¶ 16, quoting *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

{¶16} “In reviewing the trial court’s determination on whether the order was supported by reliable, probative, and substantial evidence, the appellate court is limited to determining whether the trial court abused its discretion.” *Robinson v. Ohio Dept. of Edn.*, 2d Dist. Montgomery No. 24808, 2012-Ohio-1982, ¶ 14, citing *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.*, 63

Ohio St.3d 705, 707 (1992), citing *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988). See also *Freisthler v. State Bd. of Edn.*, 3d Dist. Allen No. 1-02-36, 2002-Ohio-4941, ¶ 19, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). “When reviewing whether the Board’s, or the trial court’s, order was in accordance with the law, however, an appellate court’s review is de novo.” *Id.* at ¶ 15, citing *Spitznagel v. State Bd. of Edn.*, 126 Ohio St.3d 174, 2010-Ohio-2715, ¶ 14. See also *Freisthler* at ¶ 19, citing *Kohl v. Perry County Bd. of Mental Retardation and Dev. Disabilities*, 10th Dist. Franklin No. 94APE01-122, 1994 WL 530296, \*2 (Sept. 29, 1994).

{¶17} The Board argues that because R.C. 3319.31(B)(1) and Ohio Adm.Code 3301-73-21 do not discuss the requirement of demonstrating a nexus, the trial court erred in reversing its suspension of Wall’s teaching license for failing to demonstrate such nexus. However, we are bound by *Freisthler*, in which this court found “implicit in the wording ‘conduct that is unbecoming to the person’s profession, i.e. teaching’ is a requirement that the conduct in some way affect the individual’s ability to *teach*.” (Emphasis sic.) *Freisthler* at ¶ 21.

{¶18} The trial court did not err in reversing the Board’s suspension of Wall’s license because it was not supported by reliable, probative, and substantial evidence and is not in accordance with law—namely, the Board did not present *any* reliable, probative, or substantial evidence demonstrating a nexus between

Wall's conduct and her performance as a teacher. In *Freisthler*, we found “the criteria [used by the Supreme Court of California] in *Morrison* [*v. State Board of Education*] helpful in making [the] determination” “as to what constitutes conduct unbecoming a teacher.” *Id.* at ¶ 22, citing *Morrison v. State Bd. of Edn.*, 1 Cal.3d 214, 239, 82 Cal.Rptr. 175, 461 P.2d 375 (1969). Those criteria include:

likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuation or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling affect [sic] upon the constitutional rights of the teacher involved or other teachers.

*Id.*, quoting *Morrison* at 239.

{¶19} None of the evidence presented by the Department implicated any of those criteria indicating that Wall is unfit to teach. The Department offered the testimony of Atkinson, Deputy Strunk, and Carolyn, none of whom presented any evidence of a nexus between Wall's conduct and performance as a teacher.

Likewise, the Department did not offer any other evidence establishing that Wall is unfit to teach. Rather, the only evidence that the Department presented was evidence of Wall's conduct on November 25, 2011. In *Freisthler*, we concluded that the Board's decision not to renew Freisthler's teaching license after his arrest for sexual imposition and guilty plea to persistent disorderly conduct was conduct unbecoming a teacher was not supported by reliable, substantial, and probative evidence when considering the totality of the circumstances. *Freisthler*, 2002-Ohio-4941, at 23-24.

{¶20} Because evidence of Wall's conduct on November 25, 2011 was the only evidence offered by the Department, the Department's hearing officer concluded that the Department did not establish a nexus between Wall's conduct and her performance as a teacher. However, in its resolution suspending Wall's license, the Board specifically rejected the Department's hearing officer's conclusion that there is no nexus between Wall's conduct and her future employment as a teacher. (Admin. App. V). Yet, the Board did not replace the rejected hearing officer's finding with any finding of its own establishing a nexus between Wall's conduct and her performance as a teacher.

{¶21} We cannot discern a nexus from the record because Wall's offense did not involve children, did not occur during school hours, and did not occur on school grounds. *Compare Hoffman v. State Bd. of Edn.*, 145 Ohio App.3d 392,

396 (8th Dist.2001) (nexus inferred because teacher solicited students to write letters on his behalf); *Sayers v. Ohio State Bd. of Edn.*, 8th Dist. Cuyahoga No. 66578, 1994 WL 676869, \* 4 (Dec. 1, 1994) (teacher's offense involved children). Moreover, there is no evidence that any of Wall's students are aware of the incident or subsequent administrative proceedings. Likewise, Scaperoth testified that the incident was not triggered by Wall's interaction with children, that Wall's stressors are not caused by her interactions with children, and that Wall self-reported that she was using the skills she learned from Scaperoth to better cope with conflicts in her life. (Sept. 3, 2013 Tr. at 114, 116, 118, 123).

{¶22} Therefore, the trial court did not abuse its discretion in reversing the Board's suspension of Wall's license because it is not supported by reliable, probative, and substantial evidence. Nor did the trial court err in reversing the Board's suspension of Wall's license because it is not in accordance with the law—specifically, our holding in *Freisthler*. As such, the trial court did not abuse its discretion by reversing the Board's suspension of Wall's license, as it is permitted to do under R.C. 119.12, and reinstating the Department's hearing officer's recommendation that Wall be issued a letter of admonishment.

{¶23} Nonetheless, the Board argues that the trial court misapplied the nexus standard because the Board adopted its Licensure Code of Professional Conduct since this court established the nexus requirement in *Freisthler*. In

particular, the Board argues that because the Licensure Code of Professional Conduct defines “conduct unbecoming to the profession” as including “[c]ommitting any violation of state or federal laws, statutes, or rules, although the conduct may not have resulted in a criminal charge, indictment, prosecution, or conviction,” the Licensure Code of Professional Conduct is sufficient to demonstrate the nexus requirement. However, the Board did not raise with the trial court its argument concerning its Licensure Code of Professional Conduct. The Board’s failure to raise the argument regarding its Licensure Code of Professional Conduct establishing a nexus with the trial court waives appellate review of that argument. *Zeallear v. F & W Properties*, 10th Dist. Franklin No. 99AP-1215, 2000 WL 1015345, \*5 (July 25, 2000) (“Issues not timely raised in the trial court and presented for the first time on appeal shall not be considered.”); *Gangale v. State Bur. of Motor Vehicles*, 10th Dist. Franklin No. 01AP-1406, 2002-Ohio-2936, ¶ 58 (“The failure to raise an issue at the trial level waives it on appeal.”).

{¶24} The Board’s assignments of error are overruled.

#### **Wall’s Assignment of Error**

**There was no substantial justification for the State Board to disregard the Hearing Officer’s recommendation. Therefore, the common pleas court erred by not awarding attorney’s fees to Appellee/Cross-Appellant for the time period following the State Board’s order (Decision/Order of Appellant’s Motion for Attorney Fees).**

{¶25} In her assignment of error, Wall argues that the trial court erred by not awarding her attorney fees because there was no substantial justification for the Board to disregard the Department’s hearing officer’s recommendation.

{¶26} “Appellate courts review a trial court’s ruling on a motion for attorney fees for abuse of discretion.” *Penix v. Ohio Real Estate Appraiser Bd.*, 5th Dist. Fairfield No. 10-CA-19, 2011-Ohio-191, ¶ 13, citing R.C. 2335.39(B)(2) and *In re Williams*, 78 Ohio App.3d 556, 558 (1992). An abuse of discretion suggests the trial court’s decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). A reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

{¶27} Under R.C. 119.12, a trial “court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party \* \* \* in an appeal filed pursuant to this section.” R.C. 2335.39(B)(1) states, in relevant part: “Except as provided in divisions (B)(2) and (F) of this section \* \* \* the prevailing eligible party is entitled, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the action or appeal.”

{¶28} R.C. 2335.39(B)(2) states that after a party files a motion for attorney fees under R.C. 2335.39(B)(1):

the court shall review the request for the award of compensation for fees and determine whether the position of the state in initiating the matter in controversy was substantially justified, whether special circumstances make an award unjust, and whether the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy.

{¶29} “The intent of the attorney-fees subsection of R.C. 2335.39 is to protect citizens from unjustified state action and to censure frivolous government action.” *Penix*, 2011-Ohio-191, at ¶ 18, quoting *Gilmore v. Ohio State Dental Bd.*, 161 Ohio App.3d 551, 2005-Ohio-2856, ¶ 13 (1st Dist.), citing *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, ¶ 68. “[T]he State must pay attorney fees if ‘(1) the state was not substantially justified in initiating the matter in controversy, (2) there are no special circumstances that make the award unjust, (3) the moving party is not the state but is a party to the legal action at issue, and (4) the moving party prevailed in the legal action.’” *Id.* at ¶ 17, quoting *R.T.G.* at ¶ 63.

{¶30} “[T]he state has the burden of proving that its position in initiating the matter in controversy was substantially justified [or] that special circumstances make an award unjust \* \* \*.” R.C. 2335.39(B)(2). “If the court determines that

the state has sustained its burden of proving that its position in initiating the underlying matter was substantially justified or that special circumstances otherwise make an award of fees unjust, the court must deny the motion for attorney fees.” R.C. 2335.39(B)(2)(a).

{¶31} The parties do not dispute that Wall was the prevailing party; therefore, the critical issue is whether the Board was substantially justified in initiating the matter in controversy. Wall argues that the Board was not substantially justified in overruling the Department’s hearing officer’s recommendation and replacing it with its decision to suspend her license because its decision was not supported by reliable, probative, and substantial evidence and not in accordance with the law. Therefore, she argues that she is entitled to attorney fees that she incurred with her appeal of the Board’s rejection of the Department’s hearing officer’s recommendation.

{¶32} Wall’s argument that she is entitled to attorney fees because the Board was not substantially justified in rejecting the Department’s hearing officer’s recommendation is erroneous. The trial court did not abuse its discretion in concluding that Wall is not entitled to attorney fees because the Board was substantially justified in *initiating* the administrative action against Wall.

{¶33} “In order to determine whether an administrative board was “substantially justified,” a court must “look at the information the Board had in its

possession and the investigation the Board conducted at the time the action was initiated.”” *Gilmore*, 161 Ohio App.3d 551, 2005-Ohio-2856, at ¶ 14, quoting *Linden Med. Pharmacy, Inc. v. Ohio State Bd. of Pharmacy*, 10th Dist. Franklin No. 02AP-1234, 2003-Ohio-6657, ¶ 28, quoting *Harrison v. Ohio Veterinary Med. Licensing Bd.*, 10th Dist. Franklin App. No. 02AP-955, 2003-Ohio-3816, ¶ 11. “‘To initiate’ means to commence an action, *not to continue a proceeding already begun.*” (Emphasis added.) *Penix* at ¶ 19, citing *State ex rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338, 342 (1992).

“‘[A] position may be justified even though it is not correct if there is a genuine pretrial dispute concerning the propriety of the state’s action from the facts of the case or the law applicable thereto. \* \* [\*] If a reasonable person, knowledgeable in the area of law, believes that the state’s position is correct, then the substantially justified standard has been met.’ \* \* \* Hence, if the ‘board’s actions were supported by an articulated rationale that a reasonable person, being fully aware of the situation, could find substantially justified,’ then the board is substantially justified in bringing the administrative action.”

*Id.*, quoting *In re Williams*, 78 Ohio App.3d at 558, quoting *Boyle v. Ohio State Med. Bd.*, 10th Dist. Franklin No. 89AP-1186, 1990 WL 113575, \*3 (Aug. 7, 1990).

{¶34} The Department initiated the action when it issued Wall the March 4, 2013 notice. *See Sowald* at 343 (letter initiated the matter in controversy because it notified the nursing home of decertification and the notice led directly to the formal evidentiary hearing). At the time Wall was issued the March 4, 2013 notice, the Department had Wall's criminal conviction as evidence that she engaged in conduct unbecoming a teacher in violation of R.C. 3319.13(B)(1). A misdemeanor conviction can serve as the basis to revoke a teaching license for conduct unbecoming to the teacher's position. *See, e.g., Friesthler*, 2002-Ohio-4941, at ¶ 5; *Cleveland Hts. v. Lewis*, 129 Ohio St.3d 389, 2011-Ohio-2673, ¶ 29 (Lundberg Stratton, J., concurring). A reasonable person, knowledgeable in the area of law could believe that Wall's November 25, 2011 conduct and subsequent misdemeanor conviction is conduct unbecoming a teacher in violation of R.C. 3319.13(B)(1)—that is, it is reasonable to believe that the Department could establish a nexus between Wall's conduct on November 25, 2011 and her fitness to teach. Therefore, the Department was substantially justified in initiating the disciplinary action against Wall. *Compare Penix* at ¶ 22 (the Board was substantially justified in initiating the charge against Penix because

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she failed to provide a copy of her work file); *Malik v. State Med. Bd.*, 10th Dist. Franklin No. 88AP-741, 1989 WL 112346, \*3 (Sept. 28, 1989) (the Board was substantially justified in initiating the action because the original charge had merit).

{¶35} In rejecting the Department’s hearing officer’s recommendation, the Board was continuing a proceeding that was already begun. Because the Department was substantially justified in initiating the disciplinary action against Wall, the Board’s decision to reject the Department’s hearing officer’s recommendation is immaterial to an attorney-fee determination under R.C. 2335.39. *See Sowald* at 342-343 (“the decision to proceed with the hearing after the resurveys” was “a continuation of the process, not its initiation”). Therefore, the trial court did not abuse its discretion in denying Wall’s motion for attorney fees.

{¶36} Wall’s assignment of error is overruled.

{¶37} Having found no error prejudicial to the appellant or cross-appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

***Judgment Affirmed***

**ROGERS, P.J. and SHAW, J., concur.**

/jlr