Case No. C-20-00458

In the Court of Appeals
First Appellate District
Hamilton County, Ohio

CITY OF MADEIRA,

Plaintiff-Appellant,

v.

PHILLIP DOUGLAS OPPENHEIMER,

Defendant-Appellee.

BRIEF OF APPELLEE

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The granting of summary judgment is subject to *de novo* review.

Issue Presented for Review No. 2 8
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In assessing the existence *vel non* of excusable neglect, the neglect of an attorney is imputed to the client.

Authorities:

Hillman v. Edwards, 2010-Ohio-3524 (10th Dist.)

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Sell v. Brockway, 2012-Ohio-4552 (7th Dist.)

Simpson v. Ison, 2020-Ohio-1582 (1st Dist.)

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Authorities:

Callen v. International Bhd. of Teamsters, Local 100, 144 Ohio App.3d 575, 761 N.E.2d 51 (1st Dist. 2001)

Flannery v. Ohio Elections Comm'n, 156 Ohio App.3d 134, 804 N.E.2d 1032, 2004-Ohio-582 (10th Dist. 2004)

Hoeber on Behalf of NLRB v. Local 30, 939 F.2d 118 (3d Cir. 1991)

Myocare Nursing Home, Inc. v. Fifth Third Bank, 98 Ohio St.3d 545, 787 N.E.2d 1217, 2003-Ohio-2287

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Authorities:

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Authorities:

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Conley v. Shearer, 64 Ohio St.3d 284, 595 N.E.2d 862 (1992)

Cseplo v. Steinfels, 116 Ohio App.3d 384, 688 N.E.2d 292 (10th Dist. 1996)

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Authorities:

Huntington National Bank v. 199 South Fifth Street Co. LLC, 2011-Ohio-3707 (10th Dist.)

State v. Steele, 2017-Ohio-7605 (8th Dist.)

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Authorities:

Johnson v. H&M Auto Serv., 2007-Ohio-5794 (10th Dist.)

Kingsville Township Bd. of Trustees v. Kingsville Township Bd. of Zoning Appeals, 2011-Ohio-6517 (11th Dist.)

State ex rel. Bunting v. Styer, 147 Ohio St.3d 462, 67 N.E.3d 755, 2016-Ohio-5781

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Issue Presented for Review No. 11 20
To constitute vexatious conduct, there must be evidence that the filing of frivolous and outright baseless claims or filings was habitual in nature.

Authorities:

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Issue Presented for Review No. 12 20

To constitute vexatious conduct, there must be evidence that the filing of frivolous and outright baseless claims or filings was persistent in nature.

Authorities:

Davie v. Nationwide Ins. Co. of Am., 2017-Ohio-7721 (8th Dist.)

Hall v. Forsyth, 2002-Ohio-5129 (2d Dist.)

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I. STATEMENT OF THE CASE

A. Procedural Posture

On May 11, 2018, the CITY OF MADEIRA filed a lawsuit seeking to have one of its residents, DOUG OPPENHEIMER,[1] declared a vexatious litigator. *Complaint* (*T.d.2).* Eventually, on March 27, 2020, Mr. OPPENHEIMER filed a *Motion for Summary Judgment (T.d.49).*[2] On the same day, the Ohio Supreme Court issued an order tolling the time requirements for responding to motions in civil cases, *03/27/2020 Administrative Actions, 2020-Ohio-1166,* so that the response to the *Motion* would then be due on August 31, 2020.

The CITY OF MADEIRA filed no opposition to the *Motion for Summary Judgment* by August 31, 2020. And by the time the trial court conducted a previously-scheduled oral argument on the *Motion for Summary Judgment* on September 30, 2020, the CITY OF MADEIRA still had yet to file any opposition nor had it sought leave to file a response out of time. At this hearing, counsel for the CITY OF MADEIRA acknowledged that "we have no real excuse" for failing to respond by the deadline (let alone 30 days thereafter). *9/30/20 T.p., at 11*.

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[1] While his full given name is PHILLIP DOUGLAS OPPENHEIMER, he is generally known by and goes by the name of DOUG OPPENHEIMER.

[2] Earlier in the case, Mr. OPPENHEIMER had filed a *Motion for Summary Judgment (T.d.17)* on February 26, 2019. In response, the CITY OF MADEIRA claimed the need for additional discovery pursuant to Ohio R. Civ. P. 56(F), *see City's Memorandum in Opposition to Motion for Summary Judgment or, Alternatively, Rule 56(F) Motion for Additional Time (T.d.18).* Even though the CITY OF MADEIRA only claimed a generalized desire for additional time, *but see Juergens v. The House of Larose, Inc.*, 2019- Ohio-94 ¶52 (8th Dist.)("[t]he party seeking additional time to respond to a motion for summary judgment must … do more than merely assert generally the need for additional discovery"), and the supporting affidavit lacked any specificity as to how additional discovery was actually needed, *see Mowbray v. Waste Mgmt. Holdings, Inc*., 45 F.Supp.2d 132, 143 (D. Mass. 1999)("[a] 'Rule 56(f) affidavit [that] merely conjectures that something might be discovered but provides no realistic basis for believing that further discovery would disclose evidence' is insufficient to delay summary judgment" (quoting *Mattoon v. City of Pittsfield*, 980 F.2d 1, 8 (1st Cir.1992)), the trial court still granted the request for additional time. *Entry (T.d.45).*

Nonetheless, the trial court orally granted leave for the CITY OF MADEIRA to file an opposing memorandum over a month after it was due. *9/30/20 T.p., at 19-20.*

Following the belated filing of the *Opposition to Motion for Summary Judgment (T.d.52)*, Mr. OPPENEHIMER formally moved to strike the untimely filing due to the failure of the CITY OF MADEIRA to claim, let alone demonstrate, excusable neglect, *Motion to Stike (T.d.55)*, which the trial court summarily denied without any finding of excusable neglect. *See Decision on Motion for Summary Judgment (T.d.57), at 1.*

On October 28, 2020, the trial court ruled in favor of Mr. OPPENHEIMER, *see Decision on Motion for Summary Judgment (T.d.57),* and entered a *Final Judgment Entry (T.d.58)* on December 1, 2020. The CITY OF MADEIRA filed a timely *Notice of Appeal (T.d.59)* on December 28, 2020.

B. Statement of the Facts

In the *Complaint*, the CITY OF MADEIRA cites to the commencement of three legal proceedings filed and pursued *by attorneys* on behalf their client, DOUG OPPENHEIMER, as warranting the designation of Mr. OPPENHEIMER as a vexatious litigator.

Lawsuit No. 1. The first legal proceeding upon which the CITY OF MADEIRA relies to support its claim is *City of Madeira ex rel. Oppenheimer v. City of Madeira*, Hamilton County Common Pleas Court, Case No. A-15-06891 ("*Lawsuit No. 1*"). A statutory taxpayer lawsuit brought on behalf of the CITY OF MADEIRA itself and in which Mr. OPPENHEIMER simply served as the relator represented by legal counsel, *Lawsuit No. 1* concerned a dispute over the interpretation of a provision of the Madeira City Charter that required certain historical properties owned by the City to be "preserved [and] protect". *Exhibit A (Complaint filed in*

Lawsuit No. 1) to Motion for Summary Judgment (T.d.49), at 28-62.[3] The dispute in *Lawsuit No. 1* arose due to the prospective sale by the City of a portion of one of those historic properties. Thus, the complaint in *Lawsuit No. 1* simply sought a declaratory judgment as to the legal meaning of the pertinent City Charter provision and, based upon that declaratory judgment, an injunction against the prospective sale proceeding forward.

In response, the CITY OF MADEIRA filed to *Lawsuit No. 1* its own counterclaim wherein it also sought a declaratory judgment concerning its authority under the City Charter:

> A real and justiciable dispute exists between the parties regarding the rights, status and other legal relationship arising from the foregoing facts. [The City of Madeira and its city manager] seek a declaratory judgment regarding said rights, status and other legal relations, including a declaratory judgment that they have every right under the law to proceed with the sale of a vacant portion of [its] [historic properties].

Exhibit B (Counterclaim ¶13 in Lawsuit No. 1) to Motion for Summary Judgment (T.d.49), at 67-68. And in opposing a motion to dismiss that counterclaim, the CITY OF MADEIRA doubled down on the existence of a justiciable dispute and the need for clarification, declaring that it was:

> seeking a declaration as to what rights [it] [has] to convey the small portion of vacant land at issue in this case and their rights with regard to the subject properties located within the historical areas…
> There is a justicable controversy between the parties.

Exhibit C (Memorandum in Opposition to Motion to Dismiss in Lawsuit No. 1, at 2-3) to Motion for Summary Judgment (T.d.49), at 79-80.

Additionally, the CITY OF MADEIRA also agreed to a preliminary injunction precluding it from executing or implementing any contract to sell any portion of the historical property at issue until the meaning of the provision in the City Charter could be resolved.

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[3] The evidence in support of the *Motion for Summary Judgment (T.d.49)*, including affidavits and certified copies of court filings, were attached to the *Motion*. References to specific pages are made to the pertinent pages within the 197-page *Motion* and the supporting evidence attached thereto.

Exhibit D (Agreed Preliminary Injunction in Lawsuit No. 1) to Motion for Summary Judgment (T.d.49), at 82-83.

Ultimately, even when the underlying prospective deal giving rise to the dispute ended up not proceeding forward, the CITY OF MADEIRA still argued for the court and the case to proceed:

> … we do believe we are here properly…. [S]o we maintain declaratory judgment can be rendered now as a matter of law for the City of Madeira.

Exhibit E (Transcript of Sept. 6, 2016 in Lawsuit No. 1, at 6-7) to Motion for Summary Judgment (T.d.49), at 85. And counsel for the CITY OF MADEIRA continued to advocate for the issuance of a declaratory judgment as to the meaning of the City Charter:

> MR. GOODIN: … So we are, essentially, Judge, trying to call the question.…
>
> … We believe there is a broader issue as to whether another contract could be entered into. And that's what we are asking the Court, in its discretion, to take up.
> …
> The way we see it, Judge, under Ohio law, the Court has two choices, or three choices. One would be to rule for the relator and issue declaratory judgment saying that there is some sort of public ownership, people are required to comply here, which we strongly disagree with.
>
> Secondarily, the Court could find the matter to be moot because the contract is dead and simply dismiss the case.
>
> Or, third, we could issue a declaratory judgment in Madeira's favor saying that there is no public ownership requirement and dismiss the case that way. So we think there are really three paths under Ohio law the Court could go down.

Exhibit E (Transcript of Sept. 6, 2016 in Lawsuit No. 1, at 9-13) to Motion for Summary Judgment (T.d.49), at 86-87.

Ultimately, the Court in *Lawsuit No. 1* dismissed the complaint. But the Court expressly recognized that there was a "justiciable controversy" and that the dismissal of the complaint

therein was "without prejudice". *Exhibit F (Nunc Pro Tunc Entry/Order in Lawsuit No. 1, at 9-13) to Motion for Summary Judgment (T.d.49), at* 93-94.

Lawsuit No. 2. The second legal proceeding which the CITY OF MADEIRA maintains supported its claim is *City of Madeira ex rel. Oppenheimer v. City of Madeira*, Hamilton County Common Pleas Court, Case No. A-17-02034 ("*Lawsuit No. 2*"). Also a statutory taxpayer lawsuit brought on behalf of the CITY OF MADEIRA itself and in which Mr. OPPENHEIMER as the relator was represented by legal counsel, *Lawsuit No. 2* sought judicial review of the decision of the Hamilton County Board of Election over the placement of proposed charter amendments on the ballot at the then-forthcoming election, as well as the validity of the underlying ordinance to place such proposed amendments on the ballot and the City's compliance *vel non* of mailing notice to each resident. *Exhibit G (Complaint filed in Lawsuit No. 2) to Motion for Summary Judgment (T.d.49), at 95-153.*

Lawsuit No. 2 was based, in part, upon another case Mr. OPPENHEIMER had previously filed against the CITY OF MADEIRA that also involved a similar issue of non-compliance with the requirement to mail notice of a proposed charter amendment to residents and wherein this Court found the CITY OF MADEIRA violated the law and, even though the election had already occurred, invalidated the election results. *See Oppenheimer v. City of Madeira*, 1 Ohio App.3d 44, 439 N.E.2d 440 (1st Dist. 1981)("[Mr. Oppenheimer] was, as a matter of law, entitled to judgment in his favor prior to the election, and the only method now available to give him the relief to which he was then entitled is to invalidate the vote on this issue. We…hereby declare that the vote on the proposed amendment to the Charter of the city of Madeira, as contained in Ordinance No. 1420, held on November 6, 1979, and the results thereof, are a nullity and without effect").

Prior to the filing of *Lawsuit No. 2*, the Hamilton County Board of Elections had rejected the protest that had been filed. *See Exhibit G (Complaint ¶12 filed in Lawsuit No. 2) to Motion for Summary Judgment (T.d.49), at 99.* The gist of the protest concerned the validity of the ordinances authorizing the placement of the proposed charter amendments on the ballot as presented to the Board of Elections by the CITY OF MADEIRA. As there is no direct appeal from a decision of a board of elections, *State ex rel. Holwadel v. Hamilton County Bd. of Elec*., 2015-Ohio-87 ¶3 (1st Dist.), *Lawsuit No. 2* sought judicial review of the decision of the Board of Elections, as well as whether the CITY OF MADEIRA complied with other municipal and state ordinances, through a declaratory judgment and injunctive action.

Administrative Appeal. The third and final legal proceeding which the CITY OF MADEIRA posits supports its claim is *Robert McCabe Co. v. City of Madeira*, Hamilton County Common Pleas Court, Case No. A-16-06293 (the "*Administrative Appeal*"). Unlike *Lawsuit No. 1* and *Lawsuit No. 2*, the *Administrative Appeal* was not even a civil action but, instead, an administrative appeal of a decision of the Madeira Planning Commission filed by legal counsel not only on behalf of Mr. OPPENHEIMER, but also on behalf of The Robert McCabe Company, Inc., and Woellner Enterprises, LLC. *Exhibit H (Notice of Appeal in Administrative Appeal) to Motion for Summary Judgment (T.d.49), at 154-58.*

While the *Administrative Appeal* was filed by legal counsel prior to the issuance of a formal written decision of the Madeira Planning Commission (but after its vote to approve a zone change so a project could proceed forward), legal counsel specifically noted in the notice of appeal premature nature of the filing. And the clear explanation provided by legal counsel in the notice of appeal was that it was being filed "[o]ut of an abundance of caution to ensure [the] timely appeal of the involved Decision" because the Madeira Law Director would not provide a

firm commitment on the issuance of a written decision; instead, the Madeira Law Director was being coy in declaring that the Planning Commission "may" issue a written decision and would approve its minutes at some future indeterminate date. *Exhibit H (Notice of Appeal, at 2 n.1, in Administrative Appeal) to Motion for Summary Judgment (T.d.49), at 155*. However, in the notice of appeal, counsel for all three appellants indicated that the notice would be supplemented or filed anew "if and when any written minutes and/or written decisions are issued by the City Planning Commission."

Even though the initial decision of the Madeira Planning Commission was orally voted upon and decided at a meeting held on October 17, 2016, no written decision had issued nearly two months later. Whether that delay in the issuance of a written decision was actually justified or the result of design or gamesmanship, the CITY OF MADEIRA sought dismissal of the prematurely-filed appeal on December 9, 2016. *Exhibit I (Motion to Dismiss in Administrative Appeal) to Motion for Summary Judgment (T.d.49), at 159-65*. But in seeking dismissal, the CITY OF MADEIRA also requested, in the alternative, that the administrative appeal simply be stayed until a written decision issue, clearly recognizing a stay pending issuance of a final decision was also appropriate.

The next month, *i.e.*, on January 9, 2017, the Madeira Planning Commission issued a letter to the applicant for the zone change which it approved at the meeting of October 17, 2016, simply requesting him to resubmit the application. *Exhibit J (Supplemental Memorandum in Administrative Appeal) to Motion for Summary Judgment (T.d.49), at 166-91*. This letter made no reference whatsoever to the vote actually conducted on October 17, 2016, let alone documenting the underlying decision.

Ultimately, the court in the *Administrative Appeal* dismissed the administrative appeal, but specifically did so without prejudice; stated otherwise, the dismissal wasn't because there were no reasonable grounds for the administrative appeal (which would be with prejudice) but simply that it was premature. *Exhibit K (Entry of Dismissal in Administrative Appeal) to Motion for Summary Judgment (T.d.49), at 192-93.*

II. ARGUMENT

<u>APPELLANT'S ASSIGNMENT OF ERROR</u>: The Trial Court erred in finding that summary judgment should be granted on the issue of whether Mr. Oppenheimer should be declared a vexatious litigator under Ohio law.

Issue Presented for Review No. 1
The granting of summary judgment is subject to *de novo* review.

Issue Presented for Review No. 2
Arguments of counsel are not evidence.

"An appellate court reviews a trial court's ruling on a motion for summary judgment *de novo*." *Maas v. Maas*, 2020-Ohio-5160 ¶13 (1st Dist.). "Proper evidentiary materials include only 'the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact.'" *Allstate Ins. Co. v. Campbell*, 2009-Ohio-6055 ¶29 (10th Dist.)(quoting Ohio R. Civ. P. 56(C)). Thus, "[t]he arguments of counsel in the role of advocate, whether presented at trial or in a pretrial or a post-trial writing, are not evidence and the lawyers in making those arguments are not witnesses." *Bank One Lima, N.A. v. Altenburger*, 84 Ohio App.3d 250, 258, 616 N.E.2d 954 (3d Dist. 1992).

Issue Presented for Review No. 3
Under Civ. R. 6(B)(2), a party must demonstrate excusable neglect in order to file an untimely motion or opposition.

Issue Presented for Review No. 4
In assessing the existence *vel non* of excusable neglect, the neglect of an attorney is imputed to the client.

The *Opposition to Motion for Summary Judgment (T.d.52)* filed by the CITY OF MADEIRA should not have even be considered by the trial court as it was filed over 30 days after the applicable deadline and the CITY OF MADEIRA failed to demonstrate excusable neglect. Thus, the trial court abused its discretion in allowing the filing of the opposition out of time without excusable neglect being demonstrated. *See Simpson v. Ison*, 2020-Ohio-1582 ¶8 (1st Dist.)("review of a trial court's decision to either grant or deny the defending party the ability to submit a late response pursuant to Civ.R. 6(B) is for an abuse of discretion").

While trial courts have "broad discretion in settling procedural matters, such discretion, as evidenced by Civ. R. 6(B), is not unlimited." *Miller v. Lint*, 62 Ohio St.2d 209, 214, 404 N.E.2d 752 (1980). Under Civ. R. 6(B)(2), a court may extend time for any action "upon motion made after the expiration of the specified period…where the failure to act was the result of excusable neglect." As this Court has recognized, "[m]any of the cases finding excusable neglect have found unusual or special circumstances that justified the neglect of the party or the party's attorney." *Simpson*, 2020-Ohio-1582 ¶9. But "[n]eglect is inexcusable if it reflects a complete disregard for the judicial system. Furthermore, excusable neglect does not exist if the party or his attorney could have controlled or guarded against the event that led to the untimely answer." *Hillman v. Edwards*, 2010-Ohio-3524 ¶10 (10th Dist.). And "[c]ourts ordinarily impute the neglect of a party's attorney to that party when determining whether the facts demonstrate excusable neglect." *Sell v. Brockway*, 2012-Ohio-4552 ¶24 (7th Dist.).

The CITY OF MADERIA, through its counsel, repeatedly demonstrated a complete disregard for the judicial system and the Civil Rules. As the trial court explained at the outset of oral argument on the *Motion for Summary Judgment,* counsel failed to timely call into an earlier status conference in late June. *9/30/20 T.p., at 2-3.* And when counsel was finally tracked down

and joined that conference call, he "stated he wanted all of his time which the Court granted, indicating that the motions would be due August 28th." *9/30/20 T.p., at 3.* And with respect to opposing the *Motion for Summary Judgment,* the deadline came and passed with no opposition being filed. Furthermore, a month later (and with no opposition still not filed), counsel acknowledged unequivocally "we have no real excuse" for not responding by the deadline, *9/30/20 T.p., at 11.* "[T]he integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment." *Miller,* 62 Ohio St.2d at 615. In light of the lack of evidence of excusable neglect and the admission in open court, the trial court should have proceeded (as this Court should also in its *de novo* review) as though no opposition had been filed.[4]

Issue Presented for Review No. 5
When First Amendment rights are implicated in a vexatious litigator lawsuit, the actual malice standard of *New York Time v. Sullivan* must be applied when at least one of the underlying alleged instances of vexatious conduct challenged or criticized governmental actions or when it is the government or a public official seeking to have a critic designated as a vexatious litigator.

In *Myocare Nursing Home, Inc. v. Fifth Third Bank,* 98 Ohio St.3d 545, 787 N.E.2d 1217, 2003-Ohio-2287, the Ohio Supreme Court recognized that the evidentiary burden at trial must be considered even at the summary-judgment stage. *Accord Callen v. International Bhd. of Teamsters, Local 100,* 144 Ohio App.3d 575, 579, 761 N.E.2d 51 (1st Dist. 2001). And because the claims made by the CITY OF MADEIRA implicate the First Amendment, the constitutional requirements of *New York Times v. Sullivan,* 376 U.S. 254 (1964), are applicable and must be

[4] "[A] party's failure to file a response to a motion for summary judgment waives any arguments for purposes of appeal." *U.S. Specialty Ins. Co. v. Hoffman,* 2020-Ohio-4114 ¶20 (10th Dist.). And while it is true that "[a]ppellate courts review summary judgment decisions de novo[,] …the parties are not given a second chance to raise arguments that they should have raised below." *Whitson v. One Stop Rental Tool & Party,* 2017-Ohio-418 ¶18 (12th Dist.).

considered vis-à-vis a motion for summary judgment. *See Hoeber on Behalf of NLRB v. Local 30,* 939 F.2d 118, 126 (3d Cir. 1991)("[t]he filing of a lawsuit carries significant constitutional protections, implicating the First Amendment right to petition the government for redress of grievances, and the right of access to courts").

In *New York Times,* the Supreme Court recognized that libelous statements were not entitled to constitutional protection, but such a proposition "[did] not foreclose [the Court's] inquiry here." *New York Times,* 376 U.S. at 269. Instead, the Court proceeded to explain that:

> In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

Id. (internal citation and footnotes omitted).

Similarly, the "'mere labels' of state law", including the talismanic invocation of "vexatious litigator", does not save R.C. 2323.52 from the need to satisfy First Amendment standards under *New York Times* when at least one of the underlying alleged instances of vexatious conduct challenged or criticized governmental actions or when it is the government or a public official seeking to have a critic designated as a vexatious litigator. As a result, the CITY OF MADEIRA must demonstrate "actual malice" on the part of Mr. OPPENHEIMER in the context of R.C. 2323.52, *i.e.*, that he actually knew or was reckless with respect to whether he was "habitually, persistently, and without reasonable grounds engaging in vexatious conduct" when various legal counsel filed on his behalf the legal proceedings upon which the CITY OF MADEIRA bases its claim. Additionally, the actual-malice standard must be established by

clear and convincing evidence. *See Flannery v. Ohio Elections Comm'n*, 156 Ohio App.3d 134, 804 N.E.2d 1032, 2004-Ohio-582 ¶13 (10th Dist. 2004).

Issue Presented for Review No. 6
As numerous statutory definitions establish what is required for a person to be considered a vexatious litigator, the person seeking to designate another as a vexatious litigator must present evidence going to each and every element required by such statutory definitions.

"Declaring a [litigant] to be a vexatious litigator is 'an extreme measure' that should be granted only 'when there is no nexus' between 'the filings made by the [litigant] and [his or her] 'intended claims.'" *Mansour v. Croushore*, 2009-Ohio-2627 ¶50 (12th Dist.)(quoting *McClure v. Fischer Attached Homes*, 145 Ohio Misc.2d 38, 2007-Ohio-7259 ¶33). And, thus, the summary-judgment evidence (or lack thereof) must be considered in strict appreciation of the specific statutory definition of "vexatious litigator":

> any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions…

R.C. 2323.52(A)(3). Thus, the initial elements in order to find a person to be a vexatious litigator is that: (i) the *person engaged*; (ii) in *vexatious conduct* and did so (iii) *habitually*; (iv) *persistently*; and (v) *without reasonable grounds*. But as these terms and phrases also have their own statutory definitions, a person must also establish the elements of those other statutory definitions.

Statutorily defined, "vexatious conduct" occurs when any of the following elements are met:

> (a) The *conduct* obviously serves merely to harass or maliciously injure another party to the civil action.
> (b) The *conduct* is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.
> (c) The *conduct* is imposed solely for delay.

R.C. 2323.52(A)(2). And, in turn, yet another statutory definition must also be satisfied, *i.e.*, the definition of "conduct":

> the filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action…or the taking of any other action in connection with a civil action.

R.C. 2323.51(A)(1)(a); *see* R.C. 2323.52(A)(1)(defining "conduct" in the vexatious litigator statute as having "the same meaning as in section 2323.51 of the Revised Code").

Coalescing all of the foregoing statutory definitions together, the elements that must be proven before a person, other than an inmate, may potentially be subject to the "extreme measure" authorized by R.C. 2323.52 is that:

(i) the *person* accused of being a vexatious litigator *engaged*;
(ii) the person accused of being a vexatious litigator engaged *in conduct* which consisted of the filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action…or the taking of any other action in connection with a civil action;
(iii) the *conduct* engaged in was *vexatious* in that the *conduct* obviously served merely to harass or maliciously injure another party to a civil action; was not warranted under existing law and not supported by a good faith argument for an extension, modification, or reversal of existing law; or (c) was imposed solely for delay.
(iv) the engagement of *vexatious conduct* was *habitual*;
(v) the engagement of *vexatious conduct* was *persistent*; and
(vi) the engagement of *vexatious conduct* was *without reasonable grounds*,

The CITY OF MADEIRA failed to present evidence going to any, let alone, all of these elements and, thus, the trial court properly granted summary judgment in favor of Mr. OPPENHEIMER. *See Colburn v. Maynard*, 111 Ohio App.3d 246, 248 n.2, 675 N.E.2d 1333 (4th Dist. 1996) ("[t]he court looks only to whether any evidence exists on all elements of the alleged action").

Issue Presented for Review No. 7
When a defendant offers unrefuted evidence going to at least one of the elements of a plaintiff's claim, the defendant is entitled to summary judgment.

"When a motion for summary judgment has been supported by proper evidence, the nonmoving party may not rest on the mere allegations of the pleading, but must set forth specific

facts, by affidavit or otherwise, demonstrating that there is a genuine triable issue." *CitiMortgage, Inc. v. Bennett*, 2013-Ohio-4062 ¶9 (10th Dist.); *accord* Ohio R. Civ. P. 56(E). Mr. OPPENHEIMER supported the *Motion for Summary Judgment* with evidence, both factual and expert opinion, addressing the various elements for which the CITY OF MADEIRA would have the burden of proof. *See Oppenheimer Affidavit attached to Motion for Summary Judgment (T.d.49), at 194; Parker Affidavit attached to Motion for Summary Judgment (T.d.49), at 195-97.* In opposition to the *Motion*, the CITY OF MADEIRA did not tender any evidence, *e.g.*, affidavits, deposition transcripts, *etc.* Instead, the CITY OF MADEIRA simply and improperly rested upon the allegations of the pleadings and *ipse dixit*, neither of which is sufficient to rebut a motion for summary judgment. *See Martinez v. Yoho's Fast Food Equip.*, 2002-Ohio-6756 ¶38 (10th Dist.)("[b]ecause plaintiffs failed to submit evidence…, the trial court properly granted summary judgment to Century Tool").

Issue Presented for Review No. 8
The vexatious litigator statute (R.C. 2323.52) is limited to *pro se* plaintiffs who repeatedly abuse the legal process, not plaintiffs represented by legal counsel.

The designation of a vexatious litigator is "applied in very limited circumstances" when "a pro se litigant" persistently and habitually misused the legal system. *Lasson v. Coleman*, 2008-Ohio-4140 ¶33 (2d Dist.). Thus, the first element of establishing one to be a vexatious litigator is that "the person" actually "engaged" in the putatively vexatious conduct. This is consistent with the purpose, as well as the language, of R.C. 2323.52.

The vexatious litigator statute (R.C. 2323.52) and the frivolous conduct statute (R.C. 2323.51) are companion and related statutes. *See Rogers v. Olt*, 2018-Ohio-2110 ¶31 (2d Dist.)("[a]kin to a claim for frivolous conduct, the vexatious-litigator statute…"); *Ogle v. Greco*, 2015-Ohio-4841 ¶33 (4th Dist.); *Catudal v. Netcare Corp.*, 2015-Ohio-4044 ¶19 (10th

Dist.)("R.C. 2323.51 and 2323.52 sanction similar conduct"). And the key with respect to claims under either statute is to hold accountable the person actually responsible for the conduct at issue – "for the court to place the blame directly where the fault lies." *See Estep v. Kasparian*, 79 Ohio App.3d 313, 317, 607 N.E.2d 109 (10th Dist. 1992).[5]

With the focus being to hold accountable the person actually responsible for the conduct, courts of appeal have reversed the imposition of frivolous-conduct sanctions against the client-plaintiff in the context of R.C. § 2323.51 (the statute with significantly more case law than R.C. § 2323.52) when they had legal counsel bringing the action. *See, e.g., Estep*, 79 Ohio App.3d at 317; *see also Cseplo v. Steinfels*, 116 Ohio App.3d 384, 388, 688 N.E.2d 292 (10th Dist. 1996)("[w]hile we agree with the referee and trial court that the filing of the third-party complaint in the instant case was arguably frivolous conduct, the allocation of liability for attorney fees to the parties, as opposed to counsel, is not appropriate in this case").

With respect to the legal proceedings upon which it bases its claim, the CITY OF MADEIRA has no evidence to warrant the imposition of responsibility upon Mr.

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[5] Additionally, within the definition of "vexatious litigator", an attorney is expressly excluded from the definition "unless that person is representing or has represented self pro se in the civil action or actions." R.C. 2323.52(A)(3). Thus, even if an attorney is a party to a lawsuit, he or she cannot be a "vexatious litigator" if he or she is represented by legal counsel in that lawsuit, *i.e.*, he or she is not proceeding *pro se.* Accordingly, the statute is limited to *pro se* plaintiffs.

As an attorney, by definition, cannot be a vexatious litigator unless he or she is proceeding *pro se,* to treat non-attorneys differently, *i.e.,* allowing non-attorneys to be declared vexatious litigators even when they are represented by legal counsel, would also constitute a violation of the Equal Protection Clause as such an interpretation treats similarly situated persons differently. *See Conley v. Shearer*, 64 Ohio St.3d 284, 288-289, 595 N.E.2d 862 (1992)("[s]o long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws". Because "[i]t is a maxim of statutory construction that a court will not adopt an unconstitutional interpretation of a statute if constitutional alternatives are available," *State v. Perkins*, 40 Ohio App.2d 406, 410, 320 N.E.2d 698 (8th Dist. 1974), R.C. 2323.52 must be limited to instances of *pro se* representation less an unconstitutional construction be adopted.

OPPENHEIMER for "engaging" in conduct when he was represented by legal counsel in all three proceedings. *See Oppenheimer Affidavit ¶2 attached to Motion for Summary Judgment (T.d.49), at 194.* Accordingly, the trial court properly granted summary judgment in favor of Mr. OPPENHEIMER.

Issue Presented for Review No. 9
An administrative appeal cannot be the basis for a claim against a person, other than an inmate, under R.C. 2323.52.

R.C. 2323.52(A)(1) defines "conduct" as having the same meaning in R.C. 2323.51. In turn, R.C. § 2323.51(A) posits two alternative definitions – one involving filings by "an inmate" and the other for filings by non-inmates. The definition concerning filings by "an inmate" involves two distinct types of legal proceedings within the ambit of "conduct": the filing of (i) a "civil action"; or (ii) an "appeal against a government entity or employee". R.C. 2323.51(A)(1)(b). In contrast, under R.C. 2323.51(A)(1)(a), only the filing of a civil action (but not an appeal against a government entity or employee) are included within that definition.

Thus, as used in the definition of "conduct" in R.C. 2323.51, a "civil action" cannot be the same thing as an "appeal against a government entity or employee"; they are separate and distinct legal proceedings, less the latter be redundant or surplusage or as used in R.C. 2323.51(A)(1)(b). *See State v. Steele*, 2017-Ohio-7605 ¶15 (8th Dist.)("[a]s a general principle of statutory construction, we presume that the use of different words indicates an intention that the words possess different meanings"); *Huntington National Bank v. 199 South Fifth Street Co. LLC*, 2011-Ohio-3707 ¶18 (10th Dist.)("[b]ecause the legislature used different language in the first and last sentences of R.C. § 2323.13(A), we must assume it intended different results from the different words employed").

As such, and consistent with *expressio unius est exclusio alterius*, when R.C. 2323.51(A)(1)(a) only lists a "civil action" but does not include an "appeal against a government entity or employee", an "appeal against a government entity or employee" is not within the ambit of the statutory definition of "conduct" under R.C. 2323.51(A)(1)(a), *i.e.*, the definition of "conduct" potentially applicable to Mr. OPPENHEIMER. Accordingly, the *Administrative Appeal* cannot serve as a premise to support a claim of vexatious litigator against Mr. OPPENHEIMER and those proceedings must be excluded from consideration whatsoever.

Issue Presented for Review No. 10
Simply filing losing or unsuccessful cases does not constitute vexatious conduct.

The entire theory and argument posited by the CITY OF MADEIRA is that, because Mr. OPPENHEIMER failed to obtain a judgment in his favor in *Lawsuit No. 1, Lawsuit No.2* and the *Administrative Appeal*, the bringing and pursuit of those three proceedings by legal counsel was so egregious that the "extreme measure" of declaring Mr. OPPENHEIMER a vexatious litigator should be imposed.

In addressing the vexatious litigator provisions of S. Ct. Prac. R. 4.03 (comparable to R.C. 2323.52), the Ohio Supreme Court confronted a situation where a prospective vexatious litigator filed what the Court characterized as "numerous cases, including six in this court, that were all unsuccessful and 'readily deemed to be frivolous.'" *State ex rel. Bunting v. Styer*, 147 Ohio St.3d 462, 67 N.E.3d 755, 2016-Ohio-5781 ¶6. Nonetheless, the Ohio Supreme Court reiterated a well-established proposition (continually ignored by the CITY OF MADEIRA) that "[s]imply filing a losing case or appeal is not automatically 'frivolous'." *Id.* ¶7.

Additionally, two of the legal proceedings upon which the CITY OF MADEIRA bases it claims were dismissed by the trial court *without prejudice. See Exhibit G (Complaint filed in Lawsuit No. 2) to Motion for Summary Judgment (T.d.49), at 95-153); Exhibit K (Entry of*

Dismissal in Administrative Appeal) to Motion for Summary Judgment (T.d.49), at 192-93.) "Generally, a dismissal without prejudice constitutes 'an adjudication otherwise than on the merits' with no res judicata bar to refiling the suit." *Johnson v. H&M Auto Serv.*, 2007-Ohio-5794 ¶7 (10th Dist.)(quoting *Thomas v. Freeman*, 79 Ohio St.3d 221, 225 n.2 (1997)). Thus, the trial judges handling *Lawsuit No. 1* and the *Administrative Appeal* did not view them so without merit such that Mr. OPPENHEIMER's claims should have been resolved on the merits; the trial judges simply dismissed them "without prejudice", leaving open the door for refiling. But even consideration of the merits of *Lawsuit No. 1, Lawsuit No. 2* and the *Administrative Appeal,* the CITY OF MADEIRA cannot demonstrate the filing and prosecution of any of those actions was so egregious so as to be vexatious.

Lawsuit No. 1 not vexatious. *Lawsuit No. 1* involved a dispute regarding the scope and meaning of a provision of the Madeira City Charter. Beyond that, the CITY OF MADIERA itself was also seeking in *Lawsuit No. 1* a determination of the scope of its authority under the Madeira City Charter – from filing a counterclaim seeking a declaratory judgment on its authority under the Charter, to agreeing to a preliminary injunction, to its counsel in *Lawsuit No. 1* arguing and seeking to have the trial court declare the meaning of the Charter as it related the ability to dispose of the historic properties. The undisputed evidence of such actions by the CITY OF MADEIRA demonstrates a valid and viable dispute on the City Charter existed, and the effort of both Mr. OPPENHEIMER and the CITY OF MADEIRA to have a declaratory judgment on the meaning and scope of that charter provision was not out of ordinary, let alone, being such as to constitute vexatious conduct. The undisputed summary-judgment evidence did not establish a sufficient and genuine issue of material fact as to whether the filing and prosecution of *Lawsuit No. 1* was "vexatious conduct" under R.C. 2323.52; it was not vexatious,

a fact and conclusion further supported by the unrefuted *Parker Affidavit attached to Motion for Summary Judgment (T.d.49), at 195-97.*

Lawsuit No. 2 not vexatious. *Lawsuit No. 2* sought judicial review of a decision of the Hamilton County Board of Elections on the placement on the ballot of proposed amendments to the City Charter, as well as compliance with certain provisions of state and municipal law. Again, while the parties disagree about the legal conclusions involved, there is no indication or evidence that the bringing of such action was so egregious as to be considered vexatious. In fact, it was not vexatious, a fact and conclusion further supported by the unrefuted *Parker Affidavit attached to Motion for Summary Judgment (T.d.49), at 195-97.*

Administrative Appeal not vexatious. Beside an administrative appeal not even within the ambit of "conduct" (*see Issue Presented for Review No. 9*), case law further supports that the simple act of an attorney prematurely filing a notice of appeal from an administrative appeal is not out of ordinary, let alone, being so to such a degree as to constitute frivolous or vexatious conduct. *See Kingsville Township Bd. of Trustees v. Kingsville Township Bd. of Zoning Appeals*, 2011-Ohio-6517 ¶19 (11th Dist.)(when a premature notice of appeal from an administrative hearing was filed, when the administrative agency ultimately approved and journalized its meeting minutes, the administrative appeal was already perfect in light of the prior filing and service of the notice of appeal). Again, the undisputed summary-judgment evidence, together with clear case law, does not establish a genuine issue of material fact as to whether the filing and prosecution of the *Administrative Appeal* was "vexatious conduct" under R.C. § 2323.52; it was not vexatious, a fact and conclusion further supported by the unrefuted *Parker Affidavit attached to Motion for Summary Judgment (T.d.49), at 195-97.*

Issue Presented for Review No. 11
To constitute vexatious conduct, there must be evidence that the filing of frivolous and outright baseless claims or filings was habitual in nature.

"*Webster's Third New International Dictionary* defines 'habitual,' in relevant part, as 'of the nature of a habit; according to habit; established by or repeated by force of habit' or 'doing, practicing, or acting in some matter by force of habit; customarily doing a certain thing.'" *Davie v. Nationwide Ins. Co. of Am.*, 2017-Ohio-7721 ¶63 (8th Dist.). Yet, the CITY OF MADEIRA failed to tender any evidence demonstrating the filings of all three legal proceedings was undertaken by Mr. OPPENHEIMER in a manner akin to a "force of habit" form, especially in light of consulting and relying upon legal counsel. *See Oppenheimer Affidavit ¶2.*

Issue Presented for Review No. 12
To constitute vexatious conduct, there must be evidence that the filing of frivolous and outright baseless claims or filings was persistent in nature.

"[In] *Webster's Third New International Dictionary* … 'Persistent' is defined, in relevant part, as 'continuing in a course of action without regard to opposition or previous failure; tenacious of position or purpose." *Davie*, 2017-Ohio-7721 ¶63. Per the explicit statutory language of R.C. 2323.52, persistence is a separate and distinct element that also must be established before a person may be declared a vexatious litigator. But there is no evidence that the claims or issue Mr. OPPENHEIMER asserted in *Lawsuit No. 1, Lawsuit No. 2* or the *Administrative Appeals* had previously been adjudicated and that he was still fighting-the-fight notwithstanding the clear prior disposition of the issues. *See Hall v. Forsyth*, 2002-Ohio-5129 ¶8 (2d Dist.)("Mr. Forsyth is hereby cautioned that if he elects to resume his litigious ways on the same issue, he could be subject to sanctions as a vexatious litigator. R.C. 2323.52"). The issues in the three legal proceedings were unrelated and Mr. OPPENHEIMER never brought any prior legal proceedings on any of those issues where the court had clearly pronounced on the issue.

Thus, the undisputed evidence demonstrates that Mr. OPPENHEIMER has not, through attorneys filing and pursuing the three legal proceedings, engaged persistently in a course of action of vexatious conduct.

Issue Presented for Review No. 13
To constitute vexatious conduct, there must be evidence that the filing of frivolous and outright baseless claims or filings was without reasonable grounds.

In addition to requiring "habitual" and "persistent" vexatious conduct, R.C. 2323.52 also imposes the additional element that such conduct was "without reasonable grounds". Yet, in all three proceedings, Mr. OPPENHEIMER engaged and relied upon legal counsel to review and assess the claims being brought. *Oppenheimer Affidavit ¶2 attached to Motion for Summary Judgment (T.d.49), at 194.* There is no evidence establishing that Mr. OPPENHEIMER personally engaged in conduct without reasonable grounds.

III. CONCLUSION

When consideration is actually given to the legal standards under *New York Times* and all of the elements required under R.C. 2323.52, the undisputed summary-judgment evidence demonstrated that, despite the offense the CITY OF MADEIRA and its public officials may take to the criticisms of Mr. OPPENHEIMER, the undisputed and unrefuted summary-judgment evidence establishes that Mr. OPPENHEIMER does not meet all of the elements required before a person may be declared a vexatious litigator under R.C. 2323.52. Accordingly, the judgment of the trial court must be AFFIRMED.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon counsel for Appellant, Michael Roberts (*mroberts@graydon.law*) and Brian Fox (*bfox@graydon.law*), via e-mail on the 2nd day of April 2020.

/s/ Curt C. Hartman