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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CITY OF MADEIRA,	)	
	:	**Appeal No. C-200458**
Plaintiff-Appellant,	)	
	:	
vs.	)	**Trial No. A1802415**
	:	
PHILIP DOUGLAS OPPENHEIMER,	)	
	:	
Defendant-Appellee.	)	

Appeal from the Hamilton County Court of Common Pleas

BRIEF OF PLAINTIFF-APPELLANT THE CITY F MADEIRA

Michael A. Roberts (Ohio # 0047129)
Brian W. Fox (Ohio # 0086851)
GRAYDON HEAD & RITCHEY LLP
312 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
Phone: (513) 629-2799
Fax: (513) 333-4330
Email: mroberts@graydon.law
Counsel For The City of Madeira

Curt C. Hartman (Ohio # 0064242)
THE LAW FIRM OF CURT C. HARTMAN
7394 Ridgepoint Drive, Suite 8
Cincinnati, OH 45230
Phone: (513) 379-2923
Email: hartmanlawfirm@fuse.net
Counsel For Defendant-Appellee

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II. STATEMENT OF THE CASE

Defendant-Appellee Philip Douglas Oppenheimer ("Mr. Oppenheimer") is consumed by an unhealthy and adversarial obsession with Plaintiff-Appellant City of Madeira ("Madeira"). While the emotional toll of Mr. Oppenheimer's obsession is, unquestionably, substantial upon all parties involved, the financial burden of his litigation hobby – which has been outsourced to Madeira taxpayers – may be even more profound. This well-intended (and reluctantly undertaken) litigation was designed to put in place a single statutory safeguard; one adopted by the General Assembly for individuals just like Mr. Oppenheimer, who litigate personal and political grudges, waste taxpayer money, and stress judicial resources.

Based on the record before this District, the trial court erred by granting Mr. Oppenheimer summary judgment on the question of whether he should be declared a vexatious litigator. The trial court's Decision and Judgment Entry should be reversed and the matter should be remanded for the completion of discovery and a trial on the merits.

A. STATEMENT OF JURISDICTION

This appeal was timely filed on December 3, 2020. (T.d. 59). It was taken from the trial court's Decision granting summary judgment and its corresponding December 1, 2020, Judgment Entry. (T.d. 57, 58). Entry of summary judgment is a final appealable order. R.C. 2505.02.

B. PROCEDURAL POSTURE

On May 11, 2018, Madeira filed a one-count Complaint seeking to declare Mr. Oppenheimer a vexatious litigator. (T.d. 2). Madeira alleged that "Mr. Oppenheimer's continued threats against the City and public servants evidence an imminent intent to pursue additional frivolous litigation." (T.d. 2 ¶ 49). As predicted, since that time, Mr. Oppenheimer has filed two more lawsuits against Madeira in The United States District Court for the Southern District of

Ohio. On September 12, 2019, Mr. Oppenheimer filed Case No. 19-770, presently pending before Judge Cole. On May 8, 2020, Mr. Oppenheimer filed Case No. 20-371, presently pending before Judge Barrett.

Mr. Oppenheimer was served with a summons in this action at a home he rents, 7431 Mar Del Drive, Cincinnati, Ohio 45243. (T.d. 3). On February 4, 2019, after having answered the Complaint and changing counsel, Mr. Oppenheimer filed three (3) motions for sanctions all on the same day that he moved the trial court to join all "members of the Madeira City Council and/or other public officials" as parties. (T.d. 5, 9, 10, 11, 12, and 13). The trial court denied all of these meritless motions. (T.d. 45).

On February 26, 2019, Mr. Oppenheimer filed a 192-page motion for summary judgment, his first. (T.d. 17). Madeira sought additional time to perform discovery for purposes of opposing that first motion for summary judgment. (T.d 18). Mr. Oppenheimer opposed that request. (T.d. 30). The court denied that motion for summary judgment. (T.d. 45).

On September 24, 2019, Madeira filed its First Amended Complaint. (T.d. 42). On March 27, 2020, Mr. Oppenheimer filed his second 197-page motion for summary judgment. (T.d. 49).

Madeira then filed a motion to compel as Mr. Oppenheimer had, *inter alia*, failed to verify Rule 33 responses, failed to respond to Rule 36 requests, and failed to even produce a single document in response to Rule 34 requests served over 18 month earlier. (T.d. 50). The trial court ultimately denied the motion to compel and proceeded to the Decision and Judgment Entry compelling this appeal.

On October 28, 2020, the trial court erroneously granted Mr. Oppenheimer's motion for summary judgment. (T.d. 57). On December 1, 2020, the trial court issued a Judgment Entry. (T.d. 58). On December 3, 2020, the City of Madeira timely filed a Notice of Appeal. (T.d. 59).

C. STATEMENT OF THE FACTS.

Prior to the initiation of this action in the trial court, Mr. Oppenheimer had a history (at least since 2014) of filing, or causing to be filed, numerous lawsuits against the City of Madeira ("Madeira") and its officials. (*See,* T.d. 49, Exhs. A, G & H). Those attempts to harass Madeira and its officials with allegations of fraud, collusion, dishonesty, and corruption have been dismissed by various trial courts—without exception—at the pleading stage. (*Id*. at Ex. F; T.d. 42 ¶ 31, Ex. 15, and T.d. 44 Ex. 14, ¶ 22; T.d. 42, ¶ 38, Ex. 17 & T.d. 44 ¶ 38). Both appeals were denied. And, as indicated above, after this action was initiated, Mr. Oppenheimer proceeded to file two more lawsuits in Federal Court that are presently pending.

A. OPPENHEIMER'S MERITLESS LAWSUITS AGAINST MADEIRA AND ITS OFFICIALS.

1. THE "HISTORIC DISTRICT LAWSUIT."

On or about November 4, 2014, Madeira voters adopted Article XVI of the City Charter to amend the City Charter to designate certain properties as the "Madeira Historic District." (T.d. 42 ¶ 14 and T.d. 44 ¶ 14). Article XVI of the City Charter, entitled "Madeira Historic District/Preservation," provides:

> The City of Madeira was deeded and assumed ownership of the 'Hosbrook House' . . . and the 'Muchmore House.' In addition to these two properties the City also has ownership of the historic Railroad Depot . . . . These three important and historic properties are to be preserved, protected, and left standing on the same ground that the structures were built upon. These three historic structures will be included in the 'Historic District.'

(T.d. 42 ¶ 15; T.d. 44 ¶ 15).

In November 2015, City Council adopted Ordinance No. 15-30, authorizing Madeira's City Manager to enter into a contract for sale and purchase of a portion of vacant land next to the Muchmore House. (T.d. 42, ¶ 16; T.d. 44, ¶ 16). Three weeks later, Mr. Oppenheimer delivered a written demand to the Madeira Law Director to "make application to a court of competent

jurisdiction for an order of injunction to restrain the abuse of corporate powers of the City of Madeira as it relates to the effort to sell or transfer a portion of the Muchmore House property . . . ." (T.d. 42, ¶ 17; T.d. 44, ¶ 17).

On December 8, 2015, Madeira's attorney responded to Mr. Oppenheimer's demand letter explaining that Article XVI of the Charter did not prohibit Madeira from selling the vacant portion of land, and declined to institute unnecessary legal proceedings. (T.d. 42, ¶ 18; T.d. 44 ¶ 18). Ten days later, Mr. Oppenheimer filed a lawsuit seeking an injunction to restrain Madeira from executing or engaging in any acts in furtherance of any contract authorized by Ordinance No. 15-30 ("Historic District Lawsuit"). (T.d. 49, Ex. A). Madeira filed a Rule 12(C) Motion for Judgment on the Pleadings, which the court granted. (*Id*., Ex. F).

Mr. Oppenheimer appealed the decision, and this District affirmed, overruling every one of Mr. Oppenheimer's assignments of error. (T.d. 42, ¶ 22, Ex. 14 ; T.d. 44, ¶ 22). This District held that, "after taking the complaint's allegations as true and making all reasonable inferences in favor of Oppenheimer, the trial court correctly determined that he could prove no set of facts entitling him to relief." (T.d. 42, ¶ 22, Ex. 14, at 4). This District further determined that the "plain language of the . . . Madeira City Charter establishes that it is not in conflict with Ordinance No. 15-30, and that it does not restrict Madeira from contracting to sell vacant land. . . ." (*Id*.).

The Historic District Lawsuit consumed two years of time and effort at the expense of Madeira taxpayers.

2. THE "ORDINANCE CORRECTION LAWSUIT" – A PATTERN EMERGES.

On March 2, 2017, while the Historic District Lawsuit was still pending, City Council passed two ordinances to present Charter amendments to the voters. (T.d. 42, ¶ 24; T.d. 44, ¶ 24).

In response, Madeira's City Council passed Ordinance No. 17-06, correcting a minor typographical error in Ordinance No. 17-03. (T.d. 42, ¶ 26; T.d. 44, ¶ 26).

On April 4, 2017, thirty-three days after the ordinances were enacted, and well after absentee voting had already begun, Mr. Oppenheimer submitted a letter to the Board of Elections protesting the inclusion of the proposed Charter amendments on the ballot for the May 2017 Special Election. (T.d. 42, ¶ 27; T.d. 44, ¶ 27). The Board of Elections met on April 7, 2017 to conduct an administrative hearing. (T.d. 42, ¶ 28; T.d. 44, ¶ 28). The Board unanimously denied Mr. Oppenheimer's request to remove the proposed Charter amendments from the ballot. (T.d. 42, ¶ 28; T.d. 44, ¶ 28).

On April 11, 2017, less than one month before the May 2, 2017 Special Election, Mr. Oppenheimer filed a Verified Complaint for Declaratory Judgment and Injunctive Relief, requesting that the Hamilton County Court of Common Pleas prevent Madeira and the Board of Elections from submitting the Charter amendments to Madeira's voters ("Ordinance Amendment Lawsuit"). (T.d. 49, Exh. G). On April 27, 2017, a multi-hour hearing on Mr. Oppenheimer's claims was held, and on May 1, 2017, the Court entered judgment in favor of Madeira. (T.d. 42, ¶ 31, Ex. 15; T.d. 44, ¶ 31). Further, the Court dismissed Mr. Oppenheimer's claims in their entirety, and with prejudice. (T.d. 42, Ex. 15). Madeira voters then approved both proposed Charter amendments at the Special Election. (T.d. 42, ¶ 34; T.d. 44, ¶ 34).

Despite the Court's clear ruling that Madeira had indeed fully complied with its Charter and Ohio's Constitution, Mr. Oppenheimer filed a Notice of Appeal on May 8, 2017, six days after all the votes were tallied for the Special Election he sought to enjoin. (T.d. 42, ¶ 33; T.d. 44, ¶ 33). In the appeal, Mr. Oppenheimer argued:

- The City Clerk's one-time usage of the term "citizens" on the witness stand during the hearing before the trial court provided conclusive evidence that Madeira failed to follow the electoral provisions of the City Charter;

- Madeira's use of a third-party mailing service to send notice of the proposed Charter amendments to the electors amounted to constitutional error; and

- Madeira, acting through its City Manager, conspired with the Board of Elections to facilitate a fraudulent and "sham" election.

(*See,* T.d. 53, Second Affidavit of Fox, Ex. A.).

This District issued a judgment entry on March 30, 2018, dismissing Mr. Oppenheimer's appeal as moot and cited to well-established black letter law (*State ex rel. Hills Communities, Inc. v. Clermont Cty. Bd. Of Elections*, 91 Ohio St.3d 465, 746 N.E.2d 1115 (2001)). (T.d. 42, ¶ 36, Ex. 16, at 2; T.d. 44, ¶ 36). On April 10, 2018, Mr. Oppenheimer filed a Motion for Reconsideration *En Banc* with this District. (T.d. 42, ¶ 38; T.d. 44 ¶ 38.) This District overruled Mr. Oppenheimer's motion on May 9, 2018. (T.d. 42, ¶ 38, Ex. 17; T.d. 44, ¶ 38).

3. THE "PLANNING COMMISSION APPEAL" – ANOTHER BASELESS SUIT.

On November 16, 2016, Mr. Oppenheimer filed an administrative appeal of a decision by Madeira's Planning Commission ("Planning Commission Appeal"). (*See*, T.d. 49, Ex. H). In a footnote to that Notice of Appeal, Mr. Oppenheimer acknowledged that, at the time of filing, Madeira Planning Commission had not issued any written decision with respect to the subject zoning application. (*Id*.).

Madeira filed a Rule 12(B)(1) Motion to Dismiss Mr. Oppenheimer's Notice of Appeal, arguing that Ohio law clearly required a written decision from an administrative body for there to be a "final, appealable order" under R.C. 2506.01, *et seq*. (*Id*., Ex. I). On March 14, 2017, after Madeira's Planning Commission had issued its written denial of the zoning application, Madeira filed a Supplemental Memorandum in support of its Motion to Dismiss. (*See*, T.d. 53, Ex. A,

attachment B). Despite Madeira's Supplemental Memorandum, Mr. Oppenheimer continued to vigorously litigate the case for an additional three months. (*Id*., attachment C). On June 12, 2017, the Court granted Madeira's Motion to Dismiss. (T.d. 42, ¶ 44, Ex. 18; T.d. 44, ¶ 44).

For a third time, Mr. Oppenheimer had initiated litigation, without reasonable grounds to do so, and pursued that litigation despite facts that clearly showed the suit lacked merit.

B. OPPENHEIMER'S PRIVATE CONDUCT CONFIRMS HIS PATTERN OF USING LITIGATION TO HARASS MADEIRA AND ITS OFFICIALS.

During the past five years, Mr. Oppenheimer has published scurrilous allegations about Madeira and its officials on social media and his personal website. (*See,* T.d. 42, ¶ 9, Exs. 1-12; T.d. 44, ¶ 9). Mr. Oppenheimer's attacks against Madeira and its officials provide context for the motivations behind his lawsuits. Mr. Oppenheimer baselessly, falsely and publicly alleged that City officials:

- covered up the attempted rape of a local high school student (T.d. 42, Ex. 1);
- engaged in tax evasion (T.d. 42, Ex. 2);
- intentionally defrauded public utilities (T.d. 42, Ex. 3);
- swindled money from the local school district (T.d. 42, Ex. 4);
- committed perjury and falsified an ordinance (T.d. 42, Ex. 5);
- engaged in election fraud (T.d. 42, Ex. 6);
- provided local media with false information about proposed charter amendments (T.d. 42, Ex. 7);
- instructed subordinates to lie (T.d. 42, Ex. 8);
- illegally interfered with city zoning decisions (T.d. 42, Ex. 9);
- behaved as "bank robbers" who "kept robbing banks" without fear of being captured (T.d. 42, Ex. 10);
- illegally altered public records and "cooking the books" (T.d. 42, Ex. 11);

- colluded with local developers (T.d. 42, Ex. 12); and
- engaged in general corruption and theft of City resources (T.d. 42, Ex. 13).

(*See also*, T.d. 53 [pp. 82-84 of PDF], Amended Discovery and www.MadeiraMessenger.com.) In light of Mr. Oppenheimer's repeated filings of civil actions against Madeira, all of which had been unceremoniously dismissed, Madeira filed the current action to have the trial court declare Mr. Oppenheimer a vexatious litigator pursuant to R.C. 2323.52. (T.d. 2).

III. ASSIGNMENTS OF ERROR AND ARGUMENT

FIRST ASSIGNMENT OF ERROR

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 NO. 1 PRESENTED FOR REVIEW AND ARGUMENT

The Trial Court erred in finding that no genuine issue of material fact existed as to whether Mr. Oppenheimer is a vexatious litigator under R.C. 2323.52.

Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party. See, *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994). "The principal purpose of Civ. R. 56(E) is to enable movement beyond allegations in pleadings and to analyze the evidence so as to ascertain whether an actual need for a trial exists." *Ormet Primary Aluminum Corp. v. Employers Ins. Co. of Wausau*, 725 N.E.2d 646, 653 (Ohio 2000). This District reviews a ruling on summary judgment *de novo*. *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781 (1st Dist.).

Ohio's vexatious litigator statute "is not designed, nor does it operate, to preclude vexatious litigators from proceeding forward on their legitimate claims." See, *Mayer v. Bristow*, 740 N.E.2d 656 (Ohio 2000). And Madeira's burden of proof is a preponderance of the evidence. See, *Howdyshell v. Battle*, 5th Dist. Stark No. 19AP0001, 2019 WL 6906997, ¶ 16 (Dec. 12, 2019)(observing that court found defendant to be a vexatious litigator by a preponderance of the evidence).[1]

The Ohio Supreme Court in *Mayer* set forth the purposes and objectives of the vexatious litigator statute. 740 N.E.2d at 664-65. One of the primary problems the General Assembly sought to address with the statute was the use of litigation by vexatious litigators "to intimidate public officials and employees or cause the emotional and financial decimation of their targets." *Id*. at 665.

Accordingly, under R.C. 2323.52, "[a] person . . . or a . . . city director of law . . . who has defended against habitual and persistent vexatious conduct . . . in a court of appeals [or] court of common pleas . . . may commence a civil action in a court of common pleas with jurisdiction over the person who allegedly engaged in the habitual and persistent vexatious conduct to have that person declared a vexatious litigator." A vexatious litigator is defined by R.C. 2323.52 as "any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or country court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions."

[1] Mr. Oppenheimer erroneously argues that Madeira must prove its vexatious litigator claim by clear and convincing evidence and "actual malice." Mr. Oppenheimer offered no citation to Ohio case law to support this novel argument, which is devoid of merit.

The term "vexatious conduct" is defined as:

> conduct of a party in a civil action that satisfies any of the following:
>
> (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). The term "conduct" is defined by R.C. 2323.51(A)(1), and means:

> 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, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action includes . . .

See, R.C. 2323.52(A)(1) (holding "conduct" has the same meaning as in section 2323.51).

To obtain a declaration that Mr. Oppenheimer is a vexatious litigator, Madeira must demonstrate that it "has defended against habitual and persistent vexatious conduct" by Mr. Oppenheimer in a "court of appeals" or "court of common pleas." R.C. 2323.52(B). Proof of any of the types of conduct identified in R.C. 2323.52(A)(2) is sufficient to satisfy the "vexatious conduct" requirement. And as this District has observed, "[i]t is the nature of the conduct, not the number of actions, that determines whether a person is a vexatious litigator." *Borger v McErlane*, 2001-Ohio-4030, ¶ 3 (1st Dist.). The straightforward inquiry is: Has Mr. Oppenheimer engaged in habitual and persistent vexatious conduct against Madeira in a court of appeals or court of common pleas? When the record is viewed in a light most favorable to Madeira, the answer to that question is yes.

Over a number of years, Mr. Oppenheimer has pursued a strategy of filing baseless lawsuits against Madeira, and its City Manager, Thomas Moeller, and then pursuing meritless

appeals. Mr. Oppenheimer's personal animosity towards Madeira and its city officials (both elected and appointed) is not seriously in dispute, as made clear by the many vicious and scurrilous allegations he has posted to his website www.MadeiraMessenger.com, which he admits he controls. (*See*, T.d. 53 at 82-84 of PDF).

The outcomes of each of the lawsuits Mr. Oppenheimer filed against Madeira predating the instant suit speak for themselves. In each case, this Court deemed Mr. Oppenheimer's suits meritless, and the subsequent appeals he took from two of those decisions failed. Thus, in none of his lawsuits did Mr. Oppenheimer accomplish anything other than wasting taxpayer money and the judicial resources of this county.

1. THE THREE PRIOR ACTIONS.

A. The Historic District Lawsuit.

In the Historic District Lawsuit, Mr. Oppenheimer pursued a claim to prevent Madeira from selling land, alleging that the Madeira City Council had engaged in an "abuse" of corporate power. (*See*, T.d. 49, Ex. A, at 2: requesting an injunction "in order to restrain the abuse of corporate . . ."). The trial court dismissed Oppenheimer's Complaint on a Motion for Judgment on the Pleadings, and it took the court of appeals no more than a paragraph to dispense with Mr. Oppenheimer's legal theory, holding that "the clear and unambiguous language of the charter" did not preclude the sale of vacant land the city sought to sell. (T.d. 42, ¶ 20, Ex. 13; T.d. 44, ¶ 13; T.D. 42, ¶ 22, Ex. 14, at 4; T.d. 44, ¶ 22). Two years after filing suit Mr. Oppenheimer had nothing to show for his baseless lawsuit, while the Madeira taxpayers were stuck with a legal bill for defending a case that should never have been brought.

That matter was not a "bona fide dispute" simply because Madeira sought a ruling from the trial court after the sale fell through. Rather, Madeira's desire to put an end to any further disputes regarding the ability of the City to sell the subject property—since it could likely

reoccur—was pragmatic and no concession that Mr. Oppenheimer's claims were evenly arguably meritorious. Further, in Mr. Oppenheimer's appeal, this Court made clear that the trial court's ruling on Madeira's Rule 12(C) motion was "with prejudice," and thus, on the merits. (T.d. 42, ¶ 22, Ex. 14, at 4; T.d. 44, ¶ 22).

B. Ordinance Correction Lawsuit.

Mr. Oppenheimer's conduct in the Ordinance Correction Lawsuit was more egregious. In that case, Mr. Oppenheimer sought to interfere with an election, filing a baseless complaint based on unsupportable allegations of abuse of power, fraud, cover-up, and other criminal behavior, in which he accused officials of Madeira and the Hamilton County Board of Elections (BOE) of engaging. Specifically, in his complaint he alleged that:

- "The filing with the BOE is sham legal process and an abuse of corporate power of CITY OF MADEIRA" (¶ 6);
- "Thomas W. Moeller and Kristie L. Lowndes, committed fraud when filing ordinance 17-06 . . ." (¶ 11);
- ". . . [T]he ordinance is invalid and is an abuse of corporate power of CITY OF MADEIRA" (¶ 13);
- "Respondent City of Madeira engaged in a conspiracy to commit fraud against the BOE and the electors of Madeira, cover up the fact that the proposed charter amendments as enacted by the City Council of Madeira did not actually amend the charter, and continued to perpetuate the falsehood that the ordinances enacted to amend the charter were in fact permitted to be corrected after the deadline listed in the charter for proposed amendments" (¶ 21).

(*See,* T.d. 49, Ex. G ¶¶ 6, 11, 13, and 21, respectively).

Despite levying these serious allegations at Madeira and BOE officials, Mr. Oppenheimer offered no evidence to support them when put to his proof at the hearing on his motion for temporary restraining order or preliminary injunction. (T.d. 42, ¶ 31, Ex. 15; T.d. 44 ¶ 31). Judge Winkler specifically found that Mr. Oppenheimer presented "no evidence to corroborate his

claims" that Madeira "abused its corporate powers" or that the Madeira and BOE officials "were involved in any fraud, deceit or abuse of corporate powers." (T.d. 42, Ex. 15, at 2-3). Indeed, Judge Winkler went one step further and found that "[i]f anything the evidence and testimony adduced at the hearing demonstrate[d] the opposite . . ." (*Id*. at 3). Because Mr. Oppenheimer failed to prove his case, the Court denied his motion. The Court further granted Madeira's request for a declaration in its favor, allowing the election to proceed as planned. (*Id*. at 5-6).

Despite his failure to present evidence to corroborate his baseless allegations of fraud and abuse of power when afforded the opportunity, Mr. Oppenheimer nevertheless appealed the decision to the First District—forcing Madeira to spend yet more taxpayer dollars defending against Mr. Oppenheimer's unsupported claims. This District, when presented with Oppenheimer's appeal, once again affirmed. (T.d. 42, ¶ 36, Ex. 16; T.d. 44, ¶ 36.)

What the Ordinance Correction Lawsuit establishes is that Mr. Oppenheimer initiated litigation based on false allegations of abuse of power and fraud, allegations that when put to his proof, he could not substantiate. The fact that an attorney signed his name to Mr. Oppenheimer's lawsuit does not insulate that filing from a frivolous determination. This is particularly true because Mr. Oppenheimer verified the allegations on which the Ordinance Correction Lawsuit was based. Mr. Oppenheimer swore that the allegations on which his complaint was founded were true, and did not rely on his attorney to conduct an independent investigation. While the legal arguments in that complaint were ultimately deemed meritless, it is the false sworn statement made by Mr. Oppenheimer that demonstrate the vexatious nature of that lawsuit.

Mr. Oppenheimer's conduct in filing a complaint against Madeira based on false allegations, compelling a hearing on his baseless claims at which he failed to prove his allegations, and then pursuing an appeal, is sufficient alone to create a triable issue on whether

Mr. Oppenheimer engaged in habitual and persistent vexatious conduct without reasonable grounds within the meaning of R.C. 2323.52. Madeira's case is not, contrary to Mr. Oppenheimer's suggestion, based upon his merely filing a lawsuit and losing. And while the Historic District and Ordinance Correction Lawsuits alone would be sufficient to create a triable issue, these were not the only lawsuits Mr. Oppenheimer filed in this Court.

C. Planning Commission Appeal.

The last lawsuit is Mr. Oppenheimer's frivolous and premature appeal from the Madeira Planning Commission's decision in a zoning matter—a decision which Mr. Oppenheimer appealed before the Madeira Planning Commission had rendered a final written decision. As in the other cases, Mr. Oppenheimer pursued a baseless action in the court of common pleas, well after it became clear that it lacked merit. And he filed this baseless appeal while the other lawsuits were still pending, resulting in his having three lawsuits against Madeira—all of which failed—pending simultaneously.

Mr. Oppenheimer's decision to pursue yet another baseless and frivolous action in this Court while two others were pending further supports Madeira's allegation that Mr. Oppenheimer's real purpose in pursuing these lawsuits was to harass and annoy Madeira and its city manager by forcing them to dedicate time, money, and resources to litigation defense. At the very least, the question of Mr. Oppenheimer's motivations, particularly when combined with his contemporaneous website posts about the Madeira and its officials, creates a triable issue as to whether Mr. Oppenheimer may be declared a vexatious litigator.

2. MR. OPPENHEIMER'S VEXATIOUS CONDUCT IS HABITUAL.

Mr. Oppenheimer claims that his conduct in filing the three prior lawsuits was not "habitual" because he consulted and relied upon legal counsel. But Mr. Oppenheimer did not in fact rely on legal counsel when he verified the factual allegations in the Historic District and

Ordinance Correction Lawsuits. Rather, Mr. Oppenheimer's attorneys relied on his sworn verification of the facts alleged as true. This is a particularly important point with respect to the Historic District Lawsuit, because those factual allegations were tested, and found to be completely baseless. Mr. Oppenheimer—who swore under oath that the allegations were true—cannot hide behind lawyers, who relied upon that verification in filing the complaint.

3. MR. OPPENHEIMER'S VEXATIOUS CONDUCT WAS PERSISTENT.

Mr. Oppenheimer likewise argues that his conduct in filing the three prior lawsuits was not "persistent," claiming that there was "no evidence" that Mr. Oppenheimer's claims in the three lawsuits had previously been adjudicated. But Mr. Oppenheimer's persistence in pursuing baseless claims is born out in the fact that he took two of the lawsuits to the court of appeals, advancing the same unsubstantiated and unfounded claims he advanced in the trial court. The statute makes clear that a party's vexatious conduct may be based upon conduct in a court of appeals. R.C. 2323.52(B) (allowing action for vexatious conduct in "a court of appeals"). Further, "separate, repetitive actions are not necessary for a vexatious litigator finding, and such a finding can be based upon actions in a single case." *Roo v. Sain*, 10th Dist. Franklin No. 04AP-881, 2005-Ohio-2436, ¶ 18 (May 19, 2005). Thus, Mr. Oppenheimer's persistent pursuit of his baseless claims in the Ordinance Correction Lawsuit through a meritless appeal would be sufficient on their own to declare him a vexatious litigator.

4. MR. OPPENHEIMER DID NOT HAVE REASONABLE GROUNDS FOR PURSUING THE THREE LAWSUITS.

Mr. Oppenheimer argues that he had reasonable grounds for pursuing the lawsuits, yet this argument is belied by the outcome in all three cases. See *Hull v. Sawchyn*, 145 Ohio App.3d 193, 197 (8th Dist. 2001) (finding that defendant, alleged vexatious litigator, had failed to raise

actionable claims against plaintiff, and therefore, complaint "was not warranted under existing law").

As for the other two lawsuits, he cannot avoid the consequences of his failure to prove his factual allegations in the Historic District Lawsuit. Mr. Oppenheimer was afforded an opportunity to prove his allegations of an abuse of power and fraud—serious allegations by any standard—and failed to do so. Mr. Oppenheimer cannot argue that he had reasonable grounds for basing an action on allegations as serious as those when he failed to prove any of them when given the opportunity to do so.

5. THESE FACTS WARRANT A TRIAL

Ohio's "vexatious litigator" statute demands a fact-intensive inquiry. Every element set forth in § 2323.52 requires factual analysis. Accordingly, based on the facts above and the statute, the question of whether Mr. Oppenheimer engaged in "vexatious conduct" is a question of fact. Here, the record is rife with evidence sufficient to support factual findings of "vexatious" and "frivolous" conduct — despite Mr. Oppenheimer's refusal to provide any discovery.

Whether the litigant's conduct could be considered "malicious" is only one of several factors that are stated in the disjunctive as to whether such conduct is vexatious. Under R.C. 2323.52(A)(2) Madeira could satisfy the separately stated harassment prong of subpart (a), or the distinct requirements of subparts (b) or (c) without any determination of "malice." And as the Franklin County Court of Common Pleas explained, "Acts taken 'in good faith, without malice and to seek justice' can still constitute vexatious conduct if they are not warranted under existing law and cannot be supported by a good faith argument for its extension or reversal." *Ohio Attorney General v. Whiteside*, Franklin No. 09-CVH-04-5718, 2010 Ohio Misc. LEXIS 15863, *22 (May 4, 2010).

Importantly, the request to declare Mr. Oppenheimer a vexatious litigator does not seek to curtail vexatious conduct undertaken by Mr. Oppenheimer outside of the justice system. He may continue his campaign of haranguing Madeira through his website, records requests, and speeches at council meetings. Madeira only seeks to avail itself of the limited statutory protection under R.C. § 2323.52 in a good faith effort to erect some amount of procedural protection for taxpayers. (*See*, T.d. 2, ¶¶ 46-49).

In each of the three prior lawsuits (at trial and appellate levels), Mr. Oppenheimer advanced legal theories with no basis in Ohio law. Moreover, none of those complaints set forth theories for potentially expanding Ohio law. Instead, Mr. Oppenheimer advanced a patchwork of "legal" theories as cover for his true purpose — carrying on the nefarious, defamatory work of The Madeira Messenger in the improper forum of Hamilton County courthouses. By repeatedly attempting to litigate his personal and political grievances in the courts, Mr. Oppenheimer unwittingly violated R.C. §2323.52.

A trier of fact is obligated to assess the evidence attendant to each of Mr. Oppenheimer's lawsuits, including the court records, and must also take into account Mr. Oppenheimer's motives in bringing them. Mr. Oppenheimer sued Madeira three times in three years on matters in which he possessed, at best, a tangential personal interest. That, especially when paired with his years-long history of attacking Madeira officials in a variety of public forums, constitutes "persistent" conduct under Ohio law.

The question before this District is whether Madeira can put forth evidence on each element of its claim under R.C. 2323.52. The only element in dispute is whether Mr. Oppenheimer has engaged in habitual and persistent "vexatious conduct" within the meaning of R.C. 2323.52(A)(2). Because the record evidence, regardless of the burden of proof imposed,

supports a finding that Mr. Oppenheimer has engaged in vexatious conduct, this District must reverse the Decision of the trial court and remand the matter for further discovery and a trial on the merits.

IV. CONCLUSION

For the reasons set forth, a genuine issue of material fact exists as to whether Mr. Oppenheimer engaged in a habitual and persistent vexatious conduct so as to be declared a vexatious litigator by this Court. Accordingly, Madeira respectfully requests that this District reverse the decision of the trial court and remand the matter for a trial on the merits.

Respectfully submitted,

/s/ Michael A. Roberts
Michael A. Roberts (Ohio #: 0047129)
Brian W. Fox (Ohio #: 0086851)
GRAYDON HEAD & RITCHEY LLP
312 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
(513) 629-2799
Fax: (513) 333-4330
mroberts@graydon.law
Counsel For Plaintiff-Appellant City of Madeira

CERTIFICATE OF SERVICE

I certify that a copy of the Brief of Appellant City of Madeira has been served on Curt Hartman, Appellee's counsel, via ordinary U.S. mail and email this 16th day of March, 2021.

/s/ Michael A. Roberts

V. APPENDIX

A-1. Judgment Entry

FOR COURT USE ONLY
18

COURT OF COMMON PLEAS
ENTER
11/30/20
HON. MEGAN E. SHANAHAN
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED COSTS HEREIN.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF MADEIRA,	:	**Case No. A-18-02415**
Plaintiff,	:	**Judge Shanahan**
v.	:	
PHILIP DOUGLAS OPPENHEIMER,	:	**JUDGMENT ENTRY**
Defendant.	:	

ENTERED
DEC - 1 2020

Pursuant to and consistent with the Court's *Decision on Motion for Judgment on the Pleadings or, Alternatively, for Summary Judgment Based Upon the Commencement of This Action Without Legal Authority* and its *Decision on Defendant's Motion for Summary Judgment* (both entered on October 28, 2020), the Court hereby enters judgment in favor of Defendant PHILIP DOUGLAS OPPENHEIMER and against Plaintiff CITY OF MADEIRA for the reasons set forth in those decisions on all claims in the *First Amended Complaint*. This resolves all claims against all parties. Costs to Plaintiff.

SO ORDERED.

Megan Shanahan, Judge
Hamilton County Common Pleas Court

Have reviewed:

/s/ Steven P. Goodin
Steven P. Goodin
Attorney for Plaintiff

/s/ Curt C. Hartman
Curt C. Hartman
Attorney for Defendant

ENTERED
NOV 30 2020

D130454301

VERIFY RECORD