

# When is an opposing party's conduct frivolous? The Bullet Point: Volume 2, Issue 3

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*The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of commercial litigation.*

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[Bilbaran Farm, Inc. v. Sandusky Street Invest., LLC, 5th Dist. Delaware No. 17 CAE 06 042, 2018-Ohio-299.](#)

This action involved a challenge to an easement between two parties. The defendant filed counterclaims and then abruptly dismissed them. In response, the plaintiff sought sanctions against the defendant and its counsel under Ohio's frivolous conduct statute. After a hearing, the trial court denied the motion for sanctions and plaintiff appealed.

On appeal, the Fifth Appellate District affirmed the trial court's decision. In so ruling, the court found that counsel was not unreasonable in relying on his client to file the counterclaim, and that no evidence was presented that the counterclaim was designed merely to harass the plaintiff.

**The Bullet Point:** Ohio's frivolous conduct statute, codified at R.C. 2323.51, provides redress in the way of costs, attorneys' fees, and other relief for a party who is subject to frivolous conduct in a lawsuit. Frivolous conduct is statutorily defined as conduct that: (1) serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation; (2) conduct that is not warranted under existing law, or cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law; or (3) conduct that consists of allegations that have no evidentiary support. This is necessarily a case-specific analysis.

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[Parker v. ACE Hardware Corp., 2d Dist. Champaign No. 16-cv-131, 2018-Ohio-320.](#)

This was an appeal of the trial court's order granting ACE Hardware summary judgment in a negligence action. The plaintiff had been assisting a friend with household chores after his friend's surgery. His friend needed some brush cleared from his property, so the plaintiff went to ACE Hardware to purchase kerosene to start a fire. An ACE Hardware employee assisted the plaintiff in purchasing the product. However, it turned out it was not

kerosene, but camp lighter fluid, and when plaintiff started a brush fire, the fumes caught fire, and he suffered extensive burns over his body.

Plaintiff then filed suit against ACE Hardware alleging various negligence theories, failure to warn, and breach of warranty claims. Eventually, ACE Hardware moved for summary judgment arguing, among other things, that plaintiff assumed the risk, failed to read the warnings on the product before using it, and his claims were abrogated by the Ohio Products Liability Act. The trial court agreed and plaintiff appealed.

On appeal, the Second Appellate District affirmed. The court found that the plaintiff's claims were all precluded by the Ohio Product Liabilities Act.

**The Bullet Point:** When the Ohio General Assembly enacted the current version of the [Ohio Products Liability Act, R.C. 2307.71 et seq.], it abrogated all common law claims relating to product liability causes of actions." This includes any and all claims that can be asserted in a civil action for damages from a manufacturer or supplier for death, physical injury, damage, or distress from the design or formulation of a product, any warning or instruction, or lack of instruction, on the product, or a failure of the product to meet a stated representation or warranty.

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[City of Cleveland v. Laborers International Union, 8th Dist. Cuyahoga No. 105378, 2018-Ohio-161.](#)

The City of Cleveland appealed a trial court's decision to modify an arbitrator's award for back pay with a union. During arbitration, the arbitrator awarded the union members "reasonable and demonstrable lost back pay." After various appeals, the arbitrator then held a hearing on the amount of back pay. The arbitrator determined he lacked jurisdiction to decide the issue, and so the union filed a motion with the trial court seeking a post-judgment award in excess of \$309,000 to cover back pay. The trial court ultimately granted the request and the city appealed.

On appeal, the Eighth Appellate District affirmed, finding that while a trial court's jurisdiction to modify an arbitrator's award is very limited, the court had the authority to reduce the award of "reasonable and demonstrable lost back pay" to a sum certain.

**The Bullet Point:** Once an arbitration is completed, the jurisdiction of the trial court is limited to confirmation, vacation, modification, or enforcement of the award, and only on the terms provided by the statute. "The agreement to submit to arbitration describes the issues and defines the perimeters of the arbitration tribunal's powers with respect to them. When the submitted issues are decided, the arbitrators' powers expire." That being said, a trial court has the powers to enforce its own judgments and issue rules in accordance with the Ohio Rules of Civil Procedure. To that end, R.C. 2711.12 provides that "[u]pon the granting of an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding, the court must enter judgment in conformity therewith."

[Multibank 2009-1CML-ADC Venture LLC v. South Bass Island Resort, 6th Dist. Ottawa No. OT-17-005, 2018-Ohio-120.](#)

In this case, appellee agreed to loan \$8.6 million to the appellant for a real estate development. In exchange, the appellant granted the appellee a mortgage on the real property. Appellee then filed a foreclosure complaint against appellant. It also filed a separate action on the note. It eventually obtained judgment on the note. Thereafter, appellee moved for judgment in the foreclosure action and its motion was granted.

The appellant appealed arguing that appellee was precluded from obtaining judgment in the foreclosure because judgment had already been entered in the note action. The Sixth Appellate District disagreed, noting that actions on notes and mortgages are separate and distinct actions that can be brought together or concurrently.

**The Bullet Point:** Notes and Mortgages are separate and distinct instruments and separate and distinct causes of action. While they are typically filed together in a single lawsuit, it is not required. Because “a foreclosure action is a separate and distinct action from a complaint on a note, res judicata and/or collateral estoppel does not apply, and a plaintiff need not include both in a single complaint in order to preserve all issues.”