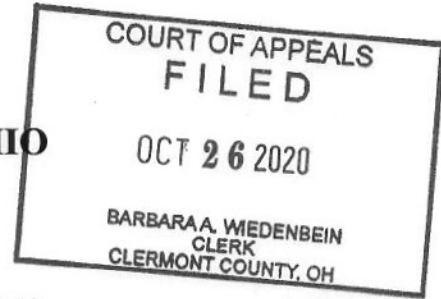


**IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY**



<b>STATE OF OHIO, ex rel. JOHN BECKER</b>	:	Case No. 2020 CA 10 058
	:	
	:	
Relator,	:	Original Action in Mandamus
	:	
vs.	:	
	:	
<b>D. VINCENT FARIS</b>	:	RELATOR’S MOTION TO STRIKE AND
	:	REQUEST FOR SANCTIONS AGAINST
	:	OHIO ATTORNEY GENERAL YOST
Respondent.	:	FOR FRIVOLOUS FILINGS

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Now comes, John Becker (“Relator”), by and through his undersigned counsel, and hereby respectfully moves this court, pursuant to Civ.R. 12(F), to strike the brief of Ohio Attorney General Dave Yost (“AG Yost”) as amicus curiae in support of Clermont County Prosecuting Attorney D. Vincent Faris (“Respondent”). Additionally, Relator requests this court to issue appropriate sanctions against AG Yost, pursuant to Civ.R. 11 and Ohio Revised Code (R.C.) 2323.51, for his bad faith and willful filing of the aforementioned amicus curiae brief that was frivolous and not warranted under existing law and was purely meant to intimidate, harass, and bully.

**I. STATEMENT OF FACTS**

On September 28, 2020, Relator filed with the Clerk of the Clermont County Municipal Court a private citizen affidavit (“PCA”), pursuant to R.C. 2935.09(D), against Governor Mike DeWine alleging seven felony and three misdemeanor criminal offenses regarding his handling of the State of Ohio’s COVID-19 (also commonly referred to as coronavirus) response. Irrespective of Relator’s written request, the Clerk of the Clermont County Municipal Court referred Relator’s

PCA directly to Respondent instead of the Administrative Judge of the Clermont County Municipal Court. Respondent within five hours of receiving Relator's PCA sent the Clerk an email communication stating, "I have reviewed the paperwork and do not find a basis for the filing of a complaint pursuant to this Private Citizen's Affidavit."

As a result of Respondent's lack of an actual and legitimate investigation, which is required by Respondent's clear legal duty under R.C. 2935.10(A), Relator filed a complaint for a writ of mandamus in this court on October 6, 2020, which was served on Respondent via certified mail on October 13, 2020. On October 22, 2020, AG Yost filed a motion for leave to file an amicus brief in support of Respondent and a brief as amicus curiae in support of Respondent. At the time of this filing, Respondent has yet to file an answer to Relator's complaint.

## **II. LAW AND ARGUMENT**

As an initial matter it must be stated that original actions, pursuant to Rule 21(A) of the Twelfth Appellate District Local Rules, "shall proceed as any civil action under the Ohio Rules of Civil Procedure." In other words, this court in original actions acts as a trial rather than an appeals court.

### **A. Attorney General Yost Improperly Interjected as Amicus Curiae**

Since Relator's original action in mandamus shall proceed under the Ohio Rules of Civil Procedure, AG Yost's request to file an amicus curiae brief under App. R. 9 is inapplicable, inappropriate, and frivolous in this matter. Theoretically speaking, AG Yost could have asked this court to allow him to intervene pursuant to Civ.R. 24. However, the denial of a motion to intervene is warranted on the basis of a failure to comply with the pleading requirement alone. *See State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, para. 21-22. Assuming this court treated AG Yost's filing as a motion to intervene, he must still file a

responsive pleading, which he has not done. Simply put, AG Yost’s motion for leave and amicus curiae brief shall be stricken and sanctioned on these grounds alone.

**B. Civil Sanctions Do Not Apply to the Filing of a Private Citizen Affidavit**

“R.C. 2323.51(B)(1) permits a trial court to assess and make an award of reasonable attorney fees and expenses ‘to any party to [a] civil action or appeal.’ Civ.R. 11, as an Ohio Rule of Civil Procedure, applies only when courts exercise ‘civil jurisdiction at law or in equity.’” *State v. Fraley*, 2020-Ohio-3763,<sup>1</sup> at para. 24. “An affidavit filed pursuant to R.C. 2935.09(D) seeks to cause a person’s arrest and criminal prosecution. Such an affidavit cannot be used to obtain a private remedy or enforce a private right of action, so it cannot originate a civil action. To the contrary, by filing an R.C. 2935.09(D) affidavit, a private citizen initiates a proceeding that has the capacity to become a criminal action, if the prosecuting attorney files a complaint based on the allegations contained in the affidavit.” *Id.*, para. 25. “Thus, in adopting R.C. 2935.09(D) and 2935.10(A) and (B), the General Assembly has created a proto-criminal action, a statutory stage that precedes the potential commencement of a criminal action. Given the nature and purpose of the R.C. 2935.09(D) affidavit, the proceedings following the filing of such an affidavit are not civil in nature.” *Id.*

AG Yost in his brief calls Relator’s PCA filing a “political stunt” and states that this court “should set a precedent that such political stunts will be met with sanctions.” However, AG Yost’s filing in and of itself is a frivolous political stunt seeking media attention that should be met with sanctions. “R.C. 2323.51(B)(1) provides that a trial court may award court costs, reasonable attorney fees, and other reasonable expenses to any party in an action who has been adversely affected by ‘frivolous conduct.’” *See Jones v. Nichols*, 2012-Ohio-4344. Effectively since this

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<sup>1</sup> It should be clearly noted that AG Yost’s Office was directly involved as Special Prosecutor in *State v. Fraley*, which was a decision recently issued by this court on July 20, 2020.

court is acting as a trial court and not an appellate court AG Yost should be the one sanctioned for his conduct which is not warranted under existing law. Less than four months ago, this court held in *Fraley*, a case where AG Yost's Office was acting as Special Prosecutor, that civil sanctions are not applicable to the filing of a PCA because such actions are considered criminal and not civil. Plainly stated, the filing of a PCA can never be deemed legally frivolous and subject to *civil* sanctions.

AG Yost is well within his right to have the *personal opinion* that this court "should order Becker to pay attorney's fees to Prosecutor Faris" or "order Becker to spend a day observing criminal trials in open court." However, AG Yost's filing in this court is not a personal opinion but the official position of the chief law officer for the State of Ohio. Unlike, Relator who has acted in his private capacity throughout these proceedings including using his private funds; AG Yost is using his public office and taxpayer dollars not as the chief law officer of Ohio but rather the chief defense attorney for Governor Mike DeWine.

As this court is aware, there is an old adage among lawyers that says, "If you have the facts on your side, pound the facts; if you have the law on your side, pound the law; if you have neither the facts nor the law, pound the table." AG Yost is pounding the proverbial table in his frivolous filing against Relator. AG Yost ignores the fact that the Ohio Constitution and Revised Code clearly prohibits Governor DeWine from such unlawful actions, through his specious usage of R.C. 3701.13,<sup>2</sup> by shutting down election polling places, closing private businesses, and depriving citizens of their right to purchase healthcare. AG Yost's Office or outside legal counsel appointed by his office are currently defending countless lawsuits across Ohio against Governor DeWine

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<sup>2</sup> At least in the past twenty years, no appellate court in Ohio has ruled upon the now seemingly limitless authority of R.C. 3701.13 as interpreted by AG Yost. Unlike R.C. 2935.09(D), where there have been nearly 100 appellate decisions (including 7 cases in the Ohio Supreme Court) discussing or interpreting the statutory right of a private citizen to pursue criminal charges by filing an affidavit.

involving his management of the State of Ohio's COVID-19 response through the Ohio Department of Health orders issued under the authority of R.C. 3701.13.

It seems that AG Yost forgets “[a] fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch is ‘the ultimate arbiter of public policy.’” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 quoting *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio7041, 781 N.E.2d 163, para. 21. “It necessarily follows that the legislature has the power to continually create and refine the laws to meet the needs of the citizens of Ohio.” *Id.*

It is not the role of the courts to establish legislative policies or to second-guess the General Assembly's policy choices. The General Assembly is responsible for weighing [policy] concerns and making policy decisions. *Gabbard v. Madison Local School Dist. Bd. of Edn.*, 2020-Ohio-1180. It is clear that AG Yost does not believe in a private citizen's statutory right to pursue criminal charges pursuant to R.C. 2935.09(D) and 2935.10(A), which requires a prosecutor to conduct an investigation if the affidavit alleges a felony offense. It is also clear that AG Yost believes that reading a document constitutes an investigation.<sup>3</sup> Conversely, R.C. 2935.10(A) states:

“Upon the filing of an affidavit or complaint as provided by section 2935.09 of the Revised Code, if it charges the commission of a felony, such judge, clerk, or magistrate, unless he has reason to believe that it was not filed in good faith, or the claim is not meritorious, shall forthwith issue a warrant for the arrest of the person charged in the affidavit, and directed to a peace officer; otherwise he shall forthwith refer the matter to the prosecuting attorney or other attorney charged by law with

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<sup>3</sup> AG Yost ignores the fact, or is unaware, that his office through the Ohio Bureau of Criminal Investigation has been asked by the Respondent on at least two occasions to conduct actual and legitimate investigations involving the filing of a PCA in the Clermont County Municipal Court. See Clermont County Municipal Court cases: *State of Ohio v. Linda L. Fraley*, case number 2018 PC 00002 and *State of Ohio v. David L. Painter*, 2020 PC 00001.

prosecution **for investigation** prior to the issuance of warrant.” (Bold Emphasis added).

The “duty in construing a statute is to determine and give effect to the intent of the General Assembly as expressed in the language it enacted.” *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, para. 14, citing *Griffith v. Aultman Hosp.*, 146 Ohio St.3d 196, 2016-Ohio-1138, para.18; *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, para. 20. “To discern legislative intent, we read words and phrases in context and construe them in accordance with rules of grammar and common usage.” *Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd.*, 137 Ohio St.3d 257, 2013-Ohio-4654, para. 15. This means that “[w]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation.” *McConnell v. Dudley*, 2019-Ohio-4740, para. 19, quoting *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553 (2000). This is because “an unambiguous statute is to be applied, not interpreted.” *Id.*, quoting *Sears v. Weimer*, 143 Ohio St. 312 (1944), para. five of the syllabus; *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, para. 20.

The definition of the word “investigation” clearly *does not* mean to review by reading. Merriam Webster’s definition of “investigate”<sup>4</sup> is “to observe or study by close examination and systematic inquiry.” Most certainly, if the General Assembly wanted to make the policy decision that felony offenses alleged by private citizens via affidavits were not to be investigated, they could have done so. However, the General Assembly has created a clear legal duty on prosecuting attorneys to conduct an investigation. It should be noted that if a private citizen alleges a

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<sup>4</sup> <https://www.merriam-webster.com/dictionary/investigate> (last accessed October 26, 2020).

misdemeanor offense via an affidavit the prosecuting attorney *is not required* to conduct an investigation. *See* R.C. 2935.10(B), *see also Fraley* at para. 14.

### **C. Relator Has Standing to Challenge the Lack of Investigation by Respondent**

AG Yost states in his purported amicus curiae that “Becker lacks standing to seek this relief.” These comments are ironic considering AG Yost in the subsequent page of his filing cites the Ohio Supreme Court case, *State ex rel. Bunting v. Styer*, 147 Ohio St.3d 462, 2016-Ohio-5781, which was a mandamus action where a citizen in fact questions the lack of an investigation by a Prosecuting Attorney after the filing of a PCA. In *Styer*, the Ohio Supreme Court held that a Prosecutor’s reliance on a previous investigation by the Sheriff’s Office was sufficient to satisfy the Prosecutor’s clear legal duty under R.C. 2935.10(A) to conduct an investigation. In this matter, Relator would have never filed a mandamus action if Respondent would have at least made his charging decision after a Sheriff’s Office investigation.

Before Relator filed his mandamus action, Relator made a public records request of Respondent’s office for any records of an investigation. Respondent’s office responded to Relator’s undersigned counsel that there were no records responsive to Relator’s request. *See* Relator’s Exhibit 4.

Additionally, AG Yost states in his filing that “[i]t would be a strange proposition that a private citizen could compel action by a prosecuting attorney.” This is in fact a strange comment by AG Yost. Considering again *Styer*, the case AG Yost relies on in his filing, the Ohio Supreme Court held that a prosecutor *can* be compelled to prosecute if its failure to prosecute constitutes an abuse of discretion. An abuse of discretion is more than merely an error of judgment; it connotes a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). It is the position of Relator that it was unreasonable, arbitrary, or

unconscionable for Respondent not to conduct an actual and legitimate investigation after receiving Relator's PCA. Respondent by simply reviewing the paperwork did not satisfy his clear legal duty, pursuant to R.C. 2935.10(A), to conduct an investigation as a result of Relator's filed PCA. Respondent's office admitted in response to Relator's public records request that no records related to an investigation exist – therefore, no police reports, no recorded interviews, no email inquiries, or other records reflecting an investigation took place.

#### **D. Attorney General Yost's Amicus Curiae Filing Shall be Sanctioned**

Civ.R. 11 requires that any attorney or pro se party who has signed a pleading, motion, or other document certifies that the party has (1) read the document; (2) to the best of his or her knowledge, harbored good grounds to support the document; and (3) did not file the document for purposes of delay. *Long v. Rhein*, 2003-Ohio-711, para. 15. Civ.R. 11 employs a subjective bad faith standard, so it is the party's actual intent or belief that determines whether or not his conduct was willful. *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 127 Ohio St.3d 202, 2010-Ohio-5073, para. 8.

Additionally, "R.C. 2323.51(B)(1) provides that a trial court may award court costs, reasonable attorney fees, and other reasonable expenses to any party in an action who has been adversely affected by 'frivolous conduct.'" *Jones v. Nichols*, 2012-Ohio-4344. Willfulness is not required under R.C. 2323.51, so the determination to be made is (1) whether the conduct is frivolous, and (2) the amount, if any, of court costs, reasonable attorney fees, and other reasonable expenses that should be awarded. *Smallwood v. State*, 2011-Ohio-3910, para. 20.

AG Yost willfully and in bad faith filed with this court a motion that was completely devoid of law, and in contradiction to this court's recent ruling in *Fraley*, seemingly with the sole purpose of harassing, intimidating, and bullying Relator from continuing to pursue this mandamus action.



First, AG Yost filed a motion for leave and an amicus curiae brief under the Ohio Rules of Appellate Procedure seeking to have Relator sanctioned; however, Relator's original action in mandamus is governed under the Ohio Rules of Civil Procedure. Second, AG Yost asks this court to sanction Relator for filing his PCA against Governor DeWine. This action is wholly unwarranted under existing law as *this court* recently held that civil sanctions do not apply to the filing of a PCA (again, in a case where AG Yost's Office was acting as Special Prosecutor). It is hard to believe that AG Yost was not aware of this court's ruling in *Fraleley* since his office served as Special Prosecutor in that case and it very much appears that his conduct is in bad faith (if his conduct was in good faith, he would have acknowledged the existence of this court's recent decision and argued for a reversal in applying the law).

### III. CONCLUSION

Relator requests this court, to strike the purported amicus curiae brief of AG Yost in support of Respondent, as such filing is inappropriate under the Ohio Rules of Civil Procedure. Additionally, Relator requests this court issue appropriate sanctions against AG Yost, pursuant to Civ.R. 11 and R.C. 2323.51, for his bad faith filing that was frivolous and not warranted under existing law and meant merely to harass, intimidate, and bully Relator from further pursuing a writ of mandamus requiring the Respondent to perform a clear legal duty, which is simply conducting an investigation.

Respectfully submitted,



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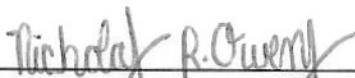
*Counsel for Relator, John Becker*

**CERTIFICATE OF SERVICE**

I certify that a copy of the Motion to Strike and Request for Sanctions by the above signed on behalf of Relator, John Becker has been served upon the following persons via electronic mail or regular U.S. mail this 26<sup>th</sup> day of October, 2020:

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