COMMONWEALTH OF KENTUCK
SUPREME COURT OF KENTUCKY
NO. 2023-SC-0156

DONNA MILLER BRUENGER, APPELLANT

APPEAL FROM
JEFFERSON CIRCUIT COURT
CASE NO: 19-CI-4039

v.

and

KENTUCKY COURT OF APPEALS
NO. 2022-CA-0701

COURTENAY ANN MILLER, APPELLEE

APPELLEE'S RESPONSE BRIEF

Submitted by:

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CERTIFICATE OF SERVICE

The undersigned certifies that this Appellee's Brief has been electronically filed via the Kentucky Court of Justice electronic filing system on this 2nd day of December, 2023; and copies have been served electronically via said system upon Hon. Kirk Hoskins, counsel for the Appellant, Hoskins@Kirk.win.net; and upon Jennifer Bryant Wilcox, Judge, Jefferson County Circuit Court, Div. 8, jenniferwilcox@kycourts.net. The undersigned further certifies that, if the record on appeal was withdrawn by the Appellee, it has been returned to the clerk of the trial court and/or the Court of Appeals.

/s/ Stephen P. Imhoff
Stephen P. Imhoff
Counsel for Appellee

STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not believe oral argument is necessary. However, Appellee would be happy to provide oral argument for any points of this appeal for which the Court may desire clarification or additional detail, particularly if the Court desires or intends to address any facts or issues presented in the Appellant's "Statement of the Case" (*Brief for Movants/Appellants*, at pp. 1-16), but that are not presented or discussed in the Appellant's "Argument" (*id.* at pp. 17-23).

INTRODUCTION

This case concerns the conduct of Appellant Donna Miller Bruenger ("Donna") and her counsel before the Kentucky Court of Appeals. The Court of Appeals sanctioned Donna's counsel for filing a frivolous appeal, and awarded to Appellee Courtenay Ann Miller "the costs of this appeal, including her attorney fees." *Court of Appeals' March 10, 2023 Opinion and Order Dismissing* (No. 2022-CA-0701), at p. 13.

Unhappy with that result, Donna has appealed to this Court. Below, Appellee Courtenay Ann Miller has attempted to carefully, directly and respectfully address each of Donna's concerns, as expressed in Donna's "Argument" section of her brief, and to provide several alternative grounds or bases upon which this Court can affirm the Court of Appeals' order.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee Courtenay Ann Miller ("Courtenay") does not accept Appellant Donna Miller Bruenger ("Donna")'s Statement of the Case, which is not, as required per RAP 32(A)(3), "a summary of the facts and procedural events relevant and necessary to an understanding of the issues presented by the appeal, with ample references to the specific location in the record supporting each of the statements contained in the summary," but instead consists largely of 16 pages of conclusory disquisitions into matters that are decidedly neither relevant nor necessary for the disposition of this appeal.[1]

For her part, Courtenay would simply incorporate here by reference the very able procedural histories of this case provided by Judge Goodwine in the Kentucky Court of Appeals' September 14, 2021 *Order Dismissing Appeal* (No. 2021-CA-0382) and by Judge Combs in the Court of Appeals' March 10, 2023 *Opinion and Order Dismissing* (No. 2022-CA-0701), both of which are included within Appellant's Exhibit "A".

To the extent that this Court should desire any counterstatement or counter-argument regarding any of the topics presented in Donna's "Statement of the Case" (but not in her "Argument"), Courtenay would also incorporate here by reference her Appellee's Brief filed with the Court of Appeals on December 19, 2022 (No. 2022-CA-0701), which directly addressed the merits, if any, of Donna's arguments as presented in her October 20, 2022 Appellant's Brief to the Court of Appeals, and many of which Donna has now repeated in her "Statement of the Case" for the instant appeal.

[1] The irrelevance and lack of necessity for most of the matters detailed in Donna's "Statement of the Case" (*Brief for Movants/Appellants*, at pp. 1-16) are brought into particularly sharp relief when viewed in relation to Donna's "Argument" (*id.* at pp. 17-23), which only concerns RAP 11.

COUNTERARGUMENT

I. The Court of Appeals acted in accordance with RAP 11 and with Kentucky law in awarding attorney fees as a sanction for Donna's frivolous appeal.

A. The Court of Appeals' March 10, 2023 *Opinion and Order Dismissing* unambiguously sanctioned Donna and her counsel for their frivolous appeal, not for their circuit court motion.

Donna's first argument (*Brief for Movants/Appellants*, at p. 17) is a rather frenzied and willful misreading of a *dictum* in the Court of Appeals' March 10, 2023 opinion (No. 2022-CA-0701). Specifically, Donna appears possessed of the notion that the Court of Appeals sanctioned her for signing and filing a CR 60.02 motion in the Jefferson Circuit Court, rather than for signing and filing a frivolous appeal in the Court of Appeals. *See Brief for Movants/Appellants*, at pp. 17-18.

Donna's alleged concerns could have been easily allayed by simply glancing at the signature block of her October 20, 2022 Appellant's Brief to the Court of Appeals, which her attorney signed on her behalf. The Court of Appeals was unambiguous in its March 10, 2023 *Opinion and Order Dismissing* that it was citing to RAP 11(A) and RAP 11(B) because it found that "**this appeal** is wholly frivolous." *See Court of Appeals' March 10, 2023 Opinion and Order Dismissing*, Appellant's Exhibit "A," at p. 12 (emphasis added). "We conclude that **it** [*i.e.*, Donna's appeal] was undertaken in bad faith and in derogation of the rules governing **appellate** practice." *Id*. (emphasis added). "Therefore, we elect to impose subsection (3) of RAP 11(B) and award costs, including attorney fees, expended by Appellee in defending **this appeal**." *Id*. at pp. 12-13 (emphasis added). Likewise, in its "Order Dismissing," the Court of Appeals made clear that the sanction it was imposing concerned the *appeal* of the circuit court's denial of Donna's CR 60.02 motion, *not* the CR 60.02 motion itself:

> Having concluded that **this appeal** was frivolous and that it is wholly lacking in merit, we order that it be, and it is, hereby DISMISSED. In addition, pursuant to RAP 11(B)(3), we sanction counsel for the Appellant by awarding to Appellee the costs of **this appeal**, including her attorney's fees.

Court of Appeals' March 10, 2023 Opinion and Order Dismissing, Appellant's Exhibit "A," at p. 13 (emphasis added).

Intentionally or not, Donna has conflated two separate aspects of the Court of Appeals' March 10, 2023 *Opinion and Order Dismissing*, namely, the Court of Appeals' criticisms of the conduct of Donna's counsel in the trial court, and its sanctioning of Donna and her counsel for filing a frivolous appeal.

More specifically, Donna has conflated [1] the Court of Appeals' finding that Donna's counsel's "shenanigans" in persuading the Jefferson Circuit Court to re-issue its December 9, 2020 final order by using "the very same arguments that [the Court of Appeals] had considered and clearly rejected" were "an attempt to outmaneuver this Court" that was "an egregious affront to our authority" and "made a mockery of the judicial system" (*see Court of Appeals' March 10, 2023 Opinion and Order Dismissing*, at p. 11), with a different aspect, *viz*., [2] the Court of Appeals' sanctioning Donna's counsel under RAP 11 for filing an appeal that was "wholly frivolous" (*id*. at p. 12).

This is all to say, the Court of Appeals first made clear that it found Donna's counsel's "conduct" before the circuit court in arguing to that court that the Court of Appeals "had erred in [its] determination on appeal and that Donna could be afforded another chance to appeal if the trial court order were simply 're-issued'" "constitute[d] a patent indifference to and contempt for the objectives of our appellate procedure," because that "conduct" was carried out "in disregard of the clear hierarchy of the court

system." *Court of Appeals' March 10, 2023 Opinion and Order Dismissing*, at p. 11. The Court of Appeals then made it equally clear that it was imposing a sanction under RAP 11 because Donna's "appeal" was "undertaken in bad faith and in derogation of the rules governing appellate practice." *Id*. at p. 12. Thus, while the Court of Appeals certainly found that Donna's counsel's December 3, 2021 CR 60.02 "motion to vacate the underlying December 9, 2020, order was made in an effort to circumvent the substance and consequences of" (*id*. at p. 11) the Court of Appeals' September 14, 2021 *Order Dismissing Appeal*, the <u>*sanction*</u> per RAP 11 was issued because of the "wholly frivolous" <u>*appeal*</u>, not because of the CR 60.02 motion in the trial court. Donna's attempt to confuse this issue in the instant appeal is meritless.

B. RAP 11(B) provides a <u>non-exhaustive</u> list of "appropriate sanctions" available to an appellate court, therefore a sanction of attorney fees need not be specifically listed in that rule for an appellate court to issue such a sanction.

Donna's next argument is that "RAP 11 sets forth the sanctions the COA can impose. Attorney fees is not one of them." *Brief for Movants/Appellants*, at p. 18. Yet RAP 11(B)'s plain language makes clear that the listing of sanctions found therein is not to be considered exhaustive or exclusive, to wit:

> (B) Frivolous filings. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith. If an appellate court determines that an appeal or appellate filing is frivolous, it may impose an **<u>appropriate sanction</u>**, **<u>including but not limited to</u>**:
>
> (1) Striking of filings or briefs or portions thereof;
> (2) A dismissal of the appeal or denial of the motion;
> (3) Awarding just monetary sanctions and single or double costs to the opposing party;
> (4) Imposition of fines on counsel of not more than $1,000; and
> (5) Such further remedies as are specified in any applicable rule.

RAP 11(B) (emphasis added). Any attorney will know that the phrase "included but not limited to" – despite its almost reflexive use in legal practice – is not meaningless; it signals that the list that follows is not intended to be exhaustive. Here, the determinative phrase of the Rule is "appropriate sanction." RAP 11(B), *supra*. Accordingly, the fact that "attorney fees" is not specifically listed in the Rule does nothing to show that such a sanction is not "appropriate," or not available, to the Court of Appeals, or to this Court.

A review of Kentucky case law confirms that an award of attorney's fees by an appellate court has long been recognized as an "appropriate sanction" in the Commonwealth. "In numerous instances, this Court has determined that the appropriate sanction for a violation of CR 73.02[2] is the imposition of attorney's fees against the party who filed the frivolous appeal." *Angel v. Harlan Cty. Bd. of Educ.*, 14 S.W.3d 559, 562 n. 11 (Ky. App. 2000), citing *Young v. Edward Tech. Group, Inc.*, 918 S.W.2d 229 (Ky. App. 1995) (ordering the appellant to pay all of appellee's court costs from the beginning to the end of the appeal); *Lake Village Water Ass'n v. Sorrell*, 815 S.W.2d 418 (Ky. App. 1991) (imposing court costs after a local government filed a frivolous appeal). In fact, the Court of Appeals in *Sorrell*, *supra*, emphasized that an award of attorney's fees for a frivolous appeal was part of the "inherent" authority of Kentucky's courts:

> Under [CR 73.02(4)],[3] an appeal is frivolous, justifying an award of damages and costs to the appellee, if the court finds that the appeal is so totally lacking in merit that it appears to have been taken in bad faith.

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[2] The former CR 73.02(4) read in full as follows: "If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith." All of this language has been preserved either *verbatim* or in substance in RAP 11(B), *supra*.

[3] *See* footnote 2, above.

> In addition to express authority to award fees and costs, the United States Supreme Court has recently held that a *federal* court may invoke its ***inherent*** **power to impose attorney's fees and related expenses on a party as a sanction for bad faith conduct, regardless of the existence of statutory authority or remedial rules**. *Chambers v. Nasco,* 501 U.S. , 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). **We believe that the courts of this Commonwealth have similar authority**.

Lake Vill. Water Ass'n v. Sorrell, 815 S.W.2d 418, 421 (Ky. App. 1991) (italicized emphasis in original; bold emphasis added).

In sum, given that RAP 11(B) encompasses and expands on the language of the former CR 73.02(4), per the reasoning of *Angel* and *Sorrell*, both *supra*, it would follow that the Court of Appeals may still order an award of attorney's fees for a frivolous appeal under the new appellate rules, just as it could under the former appellate rules.

II. This Court can affirm the Court of Appeals' March 10, 2023 *Opinion and Order Dismissing* while easily addressing Donna's concerns for "due process."

A. Donna's "due process" arguments are unsupported by Kentucky or federal law, and do not accurately reflect the record of this case.

Donna's next argument is that she was not afforded "due process" because no notice or hearing was provided regarding the Court of Appeals' sanction of attorney fees. *Brief for Movants/Appellants*, at pp. 18-22. Courtenay will here address Donna's points in the order in which they appear in Donna's brief.

First, Donna begins her argument with a bolded heading: "**RAP 11 AS APPLIED PROVIDES NO DUE PROCESS GUARANTEES**." *Brief for Movants/Appellants*, at p. 18. In the pages of her brief that follow, Donna presents a series of arguments that suggest she believes that RAP 11 is unconstitutional, although Donna appears to consciously avoid using the term "unconstitutional" in her brief, and she cites to no cases from Kentucky or elsewhere in which a court's procedural rule has been deemed

unconstitutional. *See id*. at pp. 18-22. Further, Donna's suggestion that RAP 11(B) is unconstitutional because it does not expressly provide for notice and a hearing in its text is wholly undermined by her concession that "these due process protection [*sic*] have been incorporated into the rule [CR 11] via common law." *Id*. at p. 18. Thus, if such common-law due process rights have been established for CR 11 – all without CR 11's having any explicit due process protections in its text – then the same common-law protections can be fairly assumed to apply to RAP 11(B) – which also has no explicit due process procedures listed in its text – without rendering that Rule unconstitutional.

Second, for her "due process" argument, Donna had taken the Kentucky case on which she primarily relies, *Clark Equip. Co. v. Bowman*, 762 S.W.2d 417 (Ky. App. 1988),[4] out of context. In *Bowman*, a plaintiff filed an employment discrimination case against her employer, and, after a trial, a jury returned a verdict of nine to three in the employer's favor. *Bowman*, *supra*, 762 S.W.2d at 419. After trial, the employer moved under CR 11 for attorney fees. *Id*. The trial court denied the employer's motion, and the employer appealed, solely on the issue of whether the plaintiff's lawsuit exemplified a "per se" violation of CR 11. *Id*. On appeal, the *Bowman* court engaged in a review of the purpose of CR 11, and used the opportunity to clarify that the standard of review for the denial of a CR 11 motion should not be simply "abuse of discretion" in all instances, but should instead consist of "a multi-standard approach, that is, a clearly erroneous standard to the trial court's findings in support of sanctions, a de novo review of the legal

[4] Somewhat confusingly, Donna refers to this case as "Clark Equipment Co. v. Richey" (*Brief for Movants/ Appellants*, at p. 18); however, "Richey" was the middle name of the appellee in that case, Rita Richey Bowman. A more accurate title of the case would be *Clark Equip. Co. v. Bowman*, 762 S.W.2d 417 (Ky. App. 1988).

conclusion that a violation occurred, and an abuse of discretion standard on the type and/or amount of sanctions imposed." *Id*. at 421. It was in this context that the *Bowman* court stated, *obiter dictum*, "Considering the punitive nature of sanctions and the impact sanctions may have on a party or an attorney's career and personal well-being, a trial court should not impose sanctions without a hearing and without rendering findings of fact." *Id*. at 420-21 (emphasis added; internal citation and quotation marks omitted). Notably, then, *Bowman* did not actually address a situation where sanctions had been imposed by a trial court without a hearing, and its holding concerns how a trial court's decision to deny CR 11 sanctions should be reviewed on appeal. *Bowman* says nothing about an appellate court's inherent authority to impose sanctions on an appellant for filing a frivolous appeal, as discussed in *Angel* and *Sorrell*, both *supra*.

Third, Donna's contentions that RAP 11(B) "contains no mechanism for appellate review" (*Brief for Movants/Appellants*, at p. 19) and that "A sanction imposed by the trial court per CR 11 is of course subject to appeal. A sanction imposed by RAP 11 is not" (*id*. at p. 21) are steeped in – apparently unwitting – irony, because, of course, Donna is before this Court precisely because she has appealed the sanction imposed on her per RAP 11. If Donna truly believes that RAP 11(B) "contains no mechanism for appellate review," then she should abandon her present appeal to this Court as a nullity.

Fourth, "due process" means "an opportunity to be heard." "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Ford Motor Co. v. Duckworth*, 615 S.W.3d 26, 33 (Ky. 2021), citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (internal quotation marks omitted). Here, Donna has had opportunity after opportunity to

be heard on her arguments in this case. The Jefferson Circuit Court heard those arguments over the course of more than a year, and ultimately rejected them in its December 9, 2020 final order. The Court of Appeals has also considered Donna's arguments – twice – and rejected them – twice. The instant appeal represents Donna's (at least) fourth bite at the same rotting apple. An "opportunity to be heard" cannot reasonably be construed to mean "unlimited, endless opportunities to be re-heard each time you don't like your result," especially when an appellate court has told you to stop.

Fifth, Donna's contention that "the due process violation is compounded in that no appeal was taken from the grant of CR 60.02 relief nor was it made an issue in Courtenay's Brief" (*Brief for Movants/Appellants*, at p. 19), respectfully, makes no sense. Donna filed her second appeal to the Court of Appeals less than two weeks after the trial court "re-issued" its December 9, 2020 final order on June 2, 2022. *See Court of Appeals' March 10, 2023 Opinion and Order Dismissing*, Appellant's Exhibit "A," at p. 10. And by that time, the Court of Appeals had *already* determined that "the trial court had acted outside its jurisdiction when it attempted to modify its final order entered on December 9, 2020, and that counsel [for Donna] had failed, thereafter, to invoke [the Court of Appeals'] jurisdiction." *Id*. at p. 11. In other words, the trial court's "CR 60.02 relief" was a legal nullity to begin with, as the Court of Appeals has so ably articulated, therefore there was no reason or need for Courtenay to appeal it, especially because she had already been granted the relief she sought in her declaratory judgment action. As to the "grant of CR 60.02 relief" not being "made an issue" in "Courtenay's Brief," it is Donna who has initiated these appeals, not Courtenay, therefore it is Donna – not Courtenay – who has the burden of articulating the "issues" she is appealing.

Finally on this point, and again with respect, Donna's brief seems to veer into misrepresentation with its assertions that "the COA Order contains no consideration of the propriety of CR 60.02 relief. The Order simply concludes it was frivolous absent discussion. […] "Simply labeling the CR 60.02 motion a 'frivolous filing' is a conclusion not a standard. […] The underlying facts in support of CR 60.02 relief as determined by the Circuit Court were not contested. [… and] The COA took issue with the 'facts' only inasmuch as they were repetitive of those considered by it in its dismissal of the initial appeal." *Brief for Movants/Appellants*, at pp. 19-20. Each one of these statements and insinuations is, respectfully, false, and can be easily dispensed with by reading the Court of Appeals' March 10, 2023 *Opinion and Order Dismissing*, Appellant's Exhibit "A". In a word, the Court of Appeals went out of its way to discuss – in detail – exactly why CR 60.02 relief was not warranted for Donna, and why it was Donna's appeal – and not her CR 60.02 motion – that the Court of Appeals determined to be "frivolous." *See Court of Appeals' March 10, 2023 Opinion and Order Dismissing* at pp. 5-11.[5] As such, Donna's "due process" arguments are unsupported by the record, as well as by any Kentucky or federal law.

B. Donna's argument that the Court of Appeals "lacked jurisdiction to review" the Jefferson Circuit Court's "order granting CR 60.02 relief" is without merit.

Donna's final argument (*Brief for Movants/Appellants*, at pp. 22-23) is premised on the same unfounded and, frankly, non-legal reasoning that provoked the ire of the

[5] Reading Donna's repeated suggestions that the Court of Appeals engaged in no analysis of the CR 60.02 proceedings below, one might be reminded of Upton Sinclair's oft-cited quip, "It is difficult to get a man to understand something when his salary depends on his not understanding it." Upton Sinclair, *I, Candidate for Governor* (1935).

Court of Appeals to begin with, namely, Donna's contention that she was free to ignore the Court of Appeals' September 14, 2021 *Order Dismissing Appeal* (included in the Appellant's Appendix at Exhibit "A"). In that Order, the Court of Appeals had patiently explained to Donna exactly why the circuit court's December 9, 2020 order had been final and appealable; why it had been incumbent on Donna to timely appeal that order, or otherwise file a motion that would toll the time for filing such an appeal; and why her April 4, 2021 appeal of that final order was untimely. *See id*. at pp. 3-9.

However, instead of taking the ruling of the Court of Appeals to heart, Donna and her counsel then chose to go back to the Jefferson Circuit Court and engage in "motion practice" that "was aimed directly and solely at avoiding **the law of the case** irrefutably established by [the Court of Appeals' September 14, 2021 *Order Dismissing Appeal*]" in a move that "constitute[d] a scandalous attempt to undermine [the Court of Appeals'] jurisdiction." *Court of Appeals' March 10, 2023 Opinion and Order Dismissing*, Appellant's Exhibit "A," at p. 10 (emphasis added).

Now, before this honorable Court, Donna has taken the same attitude, treating the "law of the case" as if it simply weren't there. Perhaps worse, as noted above, Donna has also repeatedly misrepresented the findings and holdings of the Court of Appeals in this case, and has even resorted to willfully misrepresenting the rulings of this Court in other matters. To take but one more example, at pages 22 and 23 of her brief, Donna cites to *Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982), and argues that said case would require that Courtenay have preemptively filed a "cross-appeal" regarding the Jefferson Circuit Court's June 2, 2022 ruling on Donna's CR 60.02 motion, otherwise that ruling from the circuit court would unassailably stand, and the Court of Appeals would thereby be

(somehow) rendered without jurisdiction to further review the circuit court's order. *Brief for Movants/Appellants*, at pp. 22-23.

This fanciful argument is belied by the unambiguous language that this Court used in *Brown* – the very case on which Donna hangs her hat – when discussing the nature of cross-appeals and when they are necessary: "**A cross-appeal is appropriate only when the judgment fails to give the cross-appellant all the relief he has demanded** or subjects him to some degree of relief he seeks to avoid." *Brown v. Barkley*, 628 S.W.2d 616, 618 (Ky. 1982) (emphasis added). Thus, in *Brown*, "[i]t was not necessary for Barkley to cross-appeal in order to preserve his contention that the statute is unconstitutional." *Id*. at 619.

Likewise, in the case at bar, the circuit court's final judgment on December 9, 2020 – as well as the circuit court's attempted "re-issuance" of that final judgment on June 2, 2022, which repeated *verbatim* the court's judgment of December 9, 2020 (*see* Appellant's Exhibit "B") – gave Courtenay all the relief she had demanded in her declaratory judgment action, *viz*., the circuit court had awarded her the proceeds of her father's life insurance policy pursuant to 5 U.S.C.A. §8705(a) and other federal and Kentucky law. Accordingly, neither under *Brown*, nor under any other Kentucky authority, has there ever been any reason for Courtenay to appeal or cross-appeal anything in this matter, including the circuit court's June 2, 2022 order.[6]

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[6] To top it off, Donna makes the following claim regarding this Court's "holding" in *Brown*: "Brown, supra, concludes its necessity of a cross-appeal discussion by holding an appellate court can never consider an argument not contained in the appellee's brief. Id. 598 [*sic*]." *Brief for Movants/ Appellants*, at p. 23. It may be needless to say, but *Brown* nowhere contains any such holding, and indeed *Brown* has no page "598." *See Brown*, *supra*, 628 S.W.2d at 616-625.

In sum, Donna's argument that Courtenay was required to file a cross-appeal, or that the Court of Appeals somehow "lacked jurisdiction" because she did not do so, is completely without merit.

C. As an alternative to affirming the Court of Appeals outright, this Court could remand this matter for a determination of the amount of costs and attorney fees.

In the instant case, the Court of Appeals "sanction[ed] counsel for the Appellant by awarding to Appellee the costs of this appeal, including her attorney fees." *Court of Appeals' March 10, 2023 Opinion and Order Dismissing* (No. 2022-CA-0701), at p. 13. In its Order, the Court of Appeals did not specifically indicate whether it would further address the payment of attorney's fees itself, or whether it was remanding this case to the trial court for a determination of the amount of attorney's fees that Courtenay should be awarded because of Donna's frivolous appeal.

As a matter of procedure, it would appear from Kentucky case law that the Court of Appeals can itself – without remand to the trial court – determine the amount to be paid where it has ordered attorney's fees as a sanction for the filing of a frivolous appeal. *See*, *e.g.*, *Angel v. Harlan Cty. Bd. of Educ*., 14 S.W.3d 559 (Ky. App. 2000):

> Angel's appeal against the Fiscal Court completely lacks merit and, in light of her attorney's concession to the trial court, appears to have been taken in bad faith. […W]e believe it is appropriate to impose sanctions pursuant to CR 73.02 [now RAP 11(B); *see* footnote 2, *supra*]. In numerous instances, this Court has determined that **the appropriate sanction** for a violation of CR 73.02 [now RAP 11(B)] **is the imposition of attorney's fees against the party who filed the frivolous appeal** [citations omitted]. Therefore, **we impose the sanction** of assessing against Angel the Fiscal Court's legal costs associated with this appeal from the beginning to its conclusion, including the cost of preparing its brief and reasonable attorney's fees. **We direct the Fiscal Court to submit** within fifteen days following rendition of this decision **an affidavit** detailing the costs it incurred in defending against this appeal.

> Angel will have ten days thereafter to respond before **we** **fix the amount of the sanctions**.

Angel, *supra*, 14 S.W.3d at 562 (emphasis added). *See also Leasor v. Redmon*, 734 S.W.2d 462 (Ky. 1987), where this Court affirmed an order by the Court of Appeals assessing "damages and attorney fees" against the appellants and their attorney for the filing of a frivolous appeal:

> …After the decision by the Court of Appeals affirming, Redmon and the Baileys filed CR 73.02(4) motions seeking damages and attorney fees against the Leasors and their attorney. After considering the response to the motion, **the Court of Appeals** denied the motion filed by the Baileys, but granted the motion filed by Redmon and **assessed damages and attorney fees against the Leasors and their attorney, jointly and severally**.
> The Leasors and Shuster, their attorney, appeal the order to this court. We affirm the order of the Court of Appeals. […]
> We are of the opinion there is a total lack of merit in the appeal to the Court of Appeals. The Code of Conduct applicable to members of the bar recognizes that a client is entitled to zealous representation by a lawyer. The Code also demands that the argument by counsel have support in the law or be an argument for extension, modification, or reversal of existing law. None of the assertions in the Court of Appeals or here meets the obligations of the Code of Conduct.
> **The Court of Appeals characterized the appeal as a complete and utter waste of time for the court and counsel. We agree with this observation and cannot improve on it as comment on this appeal**.

Leasor v. Redmon, 734 S.W.2d 462, 464, 466 (Ky. 1987) (emphasis added).

From these precedents, it is reasonable to conclude that, where the Court of Appeals has issued a sanction of attorney's fees for the filing of a frivolous appeal, the ability to "fix the amount of the sanctions" (*Angel*, *supra*, 14 S.W.3d at 562) resides in the Court of Appeals. Under *Angel* and *Leasor*, both *supra*, it would be proper for this Court to remand the instant case to the Court of Appeals to determine by affidavit from counsel for Courtenay the appropriate amount of costs and attorney's fees. Indeed, that procedure would make the most sense, because it is Donna and her counsel's conduct

before the Court of Appeals – namely, the filing of a frivolous appeal – that is at issue with regard to the sanction under RAP 11, not their conduct before the trial court.

Alternatively, this matter could be remanded to the Court of Appeals to permit Courtenay the opportunity to move the Court of Appeals for attorney fees under RAP 11(B). The Court of Appeals entered its sanction against Donna without Courtenay actually having asked for it, but if this Court believes that the Court of Appeals' *sua sponte* award of attorney's fees was too procedurally abrupt, then that can be easily remedied by remanding and permitting Courtenay to make a RAP 11(B) motion below. There is no reason in law or logic that Courtenay should have her award of attorney fees taken from her simply because didn't ask for it by motion first.

As a final alternative, this Court could remand the case to the trial court, where the circuit court judge could consider evidence relating to the appropriate amount of attorney's fees that should be awarded to Courtenay. *See*, *e.g.*, *Lake Vill. Water Ass'n v. Sorrell*, 815 S.W.2d 418, 421 (Ky. App. 1991) ("We find that CR 73.02(4) is applicable in this case and direct that the trial court award the appellees reasonable attorney's fees and costs incurred in the prosecution of this appeal to be paid by Lake Village."). But again, because the sanction was for a frivolous appeal, the Court of Appeals, rather than the trial court, may be in the best position to fix the amount of the award.

WHEREFORE, Courtenay respectfully requests that this honorable Court:

(1) **DISMISS** this appeal, and permit Courtenay to present to this Supreme Court evidence of the costs and fees that she has expended in the defense of this appeal, so that this Supreme Court may award Courtenay the costs and

attorney's fees that were ordered as a sanction against Donna and her counsel by the Kentucky Court of Appeals; or in the alternative,

(2) **DISMISS** this appeal, and REMAND this matter to the Kentucky Court of Appeals, with instructions that Courtenay shall be permitted to present to the Court of Appeals evidence of the costs and fees that she has expended in the defense of this appeal, with the final amount of costs and fees that Donna and/or her counsel must pay to Courtenay to be determined by the Court of Appeals; or in the alternative,

(3) **DISMISS** this appeal, and REMAND this matter to the Kentucky Court of Appeals, with instructions that Courtenay shall be permitted to file a motion under RAP 11(B) in the Court of Appeals requesting that Donna and/or her counsel be made to pay Courtenay's costs and fees that she has expended in the defense of this appeal, including attorney's fees; or in the alternative,

(4) **DISMISS** this appeal, and REMAND this matter to the Jefferson Circuit Court, with instructions that Courtenay shall be permitted to present to the trial court evidence of the costs and fees that she has expended in the defense of this appeal, with the final amount of costs and fees that Donna and/or her counsel must pay to Courtenay to be determined by the Jefferson Circuit Court.

Respectfully submitted,

/s/ Stephen P. Imhoff
Stephen P. Imhoff
Counsel for Appellee