



11-12-1996

## Plaintiff's Brief in Response to Defendant's Motion to Dismiss

Terry H. Gilbert  
*Counsel for Sheppard Estate*

### **How does access to this work benefit you? Let us know!**

Follow this and additional works at: [https://engagedscholarship.csuohio.edu/sheppard\\_court\\_filings\\_2000](https://engagedscholarship.csuohio.edu/sheppard_court_filings_2000)

---

### Recommended Citation

Gilbert, Terry H., "Plaintiff's Brief in Response to Defendant's Motion to Dismiss" (1996). *1995-2002 Court Filings*. 121.  
[https://engagedscholarship.csuohio.edu/sheppard\\_court\\_filings\\_2000/121](https://engagedscholarship.csuohio.edu/sheppard_court_filings_2000/121)

This Davis v. State of Ohio, Cuyahoga County Common Pleas Case No. CV96-312322 is brought to you for free and open access by the 2000 Trial at EngagedScholarship@CSU. It has been accepted for inclusion in 1995-2002 Court Filings by an authorized administrator of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

FILED  
NOV 22 2022 P 1:22  
CLERK OF COURT  
CUYAHOGA COUNTY, OHIO

ALAN J. DAVIS, Special Administrator )  
of the Estate of SAMUEL H. )  
SHEPPARD )  
Plaintiff )  
-vs- )  
STATE OF OHIO )  
Defendant )

CASE NO. 96-312322-CV  
JUDGE RONALD SUSTER

PLAINTIFF'S BRIEF IN RESPONSE  
TO DEFENDANT'S MOTION TO  
DISMISS

INTRODUCTION

This is the second attempt by the State of Ohio to prevent this matter from proceeding on the merits. The Court has already overruled the State's Motion to Strike and/or to Dismiss which raised similar and equally misleading arguments as to the nature of proceedings under Ohio Revised Code §2305.02 and Ohio Revised Code §2743.48.

However, in an effort to accommodate the State's concern that this proceeding embody all the niceties of a civil action, the Estate of Dr. Sheppard has agreed to file the instant action in accordance with the Ohio Rules of Civil Procedure in order that the issue of wrongful imprisonment may promptly move toward a hearing. Still, the State is attempting to "put the cart before the horse" by attempting to turn a simple proceeding - designed to determine whether one is indeed innocent of the offense for which he or

she was imprisoned - into some kind of formal litigation where all kinds of procedural and equitable defenses come into play.

The State would have this Court lump the two statutes together in one proceeding. However, the legislature, in 1986, chose to create an approach involving two separate courts of jurisdiction. The proceeding contemplated by Ohio Revised Code §2305.02 is not an **action against the State**, as the Defendant here would argue, but a proceeding to determine whether one fits the definition of a wrongfully imprisoned individual. The Court of Common Pleas has no authority to grant any relief against the State of Ohio - no damage award, no costs, no equitable relief. It merely issues a finding. The Court of Claims, pursuant to legislative enactment, is the only court which can entertain a claim **against** the State pursuant to Ohio Revised Code §2743.48, and grant the statutorily defined relief. Ohio Revised Code §2743.48(D).<sup>1</sup>

The fact that a common pleas court makes a determination of wrongful imprisonment does not automatically mean that the State must pay damages. The petitioner must still meet the requirements of the Court of Claims proceeding, to wit: the filing of an action "no later than two years after" the wrongful imprisonment determination by the court of common pleas. Ohio Revised Code §2743.48(H). Then, and only then, can the Court of Claims order the relief contemplated by the statute, and no other court:

---

<sup>1</sup> See also Ohio Revised Code §2743.02 which sets forth the waiver of the State of Ohio of its immunity from liability and its consent to be sued "and have its liability determined in the Court of Claims created in this chapter in accordance with the same rules of law applicable to suits between private parties . . ."

The court of claims shall have exclusive, original (emphasis added) jurisdiction over such a civil action. The civil action shall proceed, be heard, and be determined as provided in sections 2743.01 to 2743.20 of the Revised Code, except that if a provision of this section conflicts with a provision in any of those sections, the provision in this section controls.

Accordingly, the various arguments advanced by the Defendant such as "laches," statute of limitations, abatement at death, and standing are completely inappropriate as this Court has no jurisdiction to entertain such defenses. As stated above, the proceeding before this Court is not one for relief, but for a special and narrow determination based upon specifically designated factual, not procedural, findings pursuant to Ohio Revised Code §2743.48(A)(1) to (4).

Therefore this Court has a duty, based on the evidence presented, and in accordance with the appropriate burdens of proof, to make a determination as to whether Dr. Samuel H. Sheppard was a wrongfully imprisoned individual, even if the case goes no further than this stage. Whether his estate is entitled to money damages is a question for the Court of Claims, not this Court. The only possible "contest" at this point is a factual one, and the State of Ohio has no right to prevent the Sheppard estate from, at a minimum, having access to a process whereby the Court of Common Pleas can declare Dr. Sheppard's innocence. The legislature could not have envisioned the common pleas court responsibility as anything more than a brief, preliminary step toward correcting an injustice, not presiding over a protracted lawsuit.

In its Brief, the State admits various critical facts which establish a wrongful imprisonment claim. First, it admits that Sheppard was convicted of murder and incarcerated nearly ten years in prison. Second, it admits that his conviction was

reversed because of the "unfairness of the trial and the prejudicial media," an injustice which, in part, can be shown to be the responsibility of the State of Ohio, through the various agents involved in the investigation and prosecution of Dr. Sheppard. Finally, it admits that he was found not guilty after a retrial. For most citizens, that would be more than enough to require reparations from their government.

The hypocrisy of the Defendant in its attempt to turn this proceeding into a full blown civil action against the State, with the attendant requirements of the Civil Rules of Procedure, is demonstrated by its previous willingness to skirt those rules in the recent matter of Brian Piszczek.<sup>2</sup> In that case, Mr. Piszczek simply moved the Court for the wrongful imprisonment determination, and the State consented without objections concerning case numbers, service of summons, etc. The Attorney General of Ohio acknowledged that the determination was correct and went on to stipulate to a settlement which was approved by the Court of Claims. It is therefore baffling that the Defendant would pick and choose whatever procedural posture suits their purposes - depending on the circumstances. It is also interesting to note that nowhere in their Motion does the State suggest that there exists evidence to refute the allegations in the Petition.

The State argues that Walden v. State, 47 Ohio St.3d 47 (1989), a case that discusses some aspects of the wrongful imprisonment claim, stands for the proposition that the Rules of Civil Procedure apply to proceedings under Ohio Revised Code

---

<sup>2</sup> The Piszczek wrongful imprisonment determination complaint filed in the Court of Claims and Stipulation of Settlement were previously presented to this Court in Petitioner's Response to the State's Motion to Strike and/or Dismiss, and would incorporate said attachments hereto.

§2305.02. To the contrary, all Walden concluded was that the burden of proof with respect to establishing innocence is the preponderance of the evidence. Walden cannot be interpreted to require the formal application of the Civil Rules. If so, the proceedings in Piszczek would be a nullity.

There are many examples in our jurisprudence where criminal trial courts are not entirely strangers to the application of various aspects of civil procedure. For example, in post conviction proceedings, pursuant to Ohio Revised Code §2953.21, the court may allow discovery and other historically civil methods to develop the factual record. Likewise, in cases with a finding of not guilty by reason of insanity, the court conducts civil review of the issue of the defendant's mental state. Ohio Revised Code §2935.40. Additionally, in drunk driving cases, there are administrative license suspension hearings, pursuant to Ohio Revised Code §4511.191, and in forfeiture proceedings which employ a civil burden of proof under Ohio Revised Code §2933.43. All of these proceedings are conducted by criminal trial courts under the same case number as the criminal case, and do not require the application of the Civil Rules of Procedure.

The State of Ohio in no way can be prejudiced by going forward with the hearing on the merits. It is certainly free to challenge the evidence and inferences said evidence may lead as far as establishing Dr. Sheppard's innocence. And, if it is unhappy with the determination, they can still raise all the "bars to recovery" raised in the Motion in the context of the action against the State in the Court of Claims pursuant to Ohio Revised Code §2748.73.

all these years to penetrate the resistance of the various agencies involved in order to piece together the truth of what went wrong 42 years ago.

Over the years, it can be shown how information came to the authorities which would have pointed to a viable suspect, but was largely ignored. Moreover, since 1990, thousands of hours have been expended in exploring every aspect of this case. Litigation under the Ohio Public Records Act had to be mounted just to obtain the police reports from Bay Village. Witnesses, never before interviewed, were found in various states who had critical information regarding the innocence of Dr. Sheppard. Remarkably, it wasn't until 1993 that a police report was obtained which showed evidence of a forcible break in at the Sheppard house the night of the murder. And it was only in recent months that over 100 pieces of forensic evidence, never tested before, were uncovered at the Coroner's Office, which have been sent out for new forensic examination. Even this Court, in an effort to obtain all remaining records and evidence in this case, issued a broad production order (with the consent of the State) to once and for all get to the truth surrounding the Sheppard case. All this information has been shared with the Cuyahoga County Prosecutor's Office. Every piece of evidence, every witness statement, and all the documentation that Plaintiff has, has been turned over to the Prosecutor's Office. In other words, no side, if there are sides in the context of jointly seeking the truth, is in an unequal position. That is why it seems so ludicrous for the State to attempt to turn this into some kind of adversarial proceeding.

How can the State seriously suggest that Plaintiff is guilty of "laches" or that it has been materially prejudiced?<sup>3</sup> If anyone is prejudiced, it is the Sheppard family who for 42 years had to endure a cruel system which never budged an inch in maintaining that Sheppard was guilty despite overwhelming evidence to the contrary.

**THE STATUTE OF LIMITATIONS IN AN ACTION FOR WRONGFUL IMPRISONMENT IS TWO YEARS FROM THE DATE OF THE DETERMINATION BY THE COURT OF COMMON PLEAS.**

The action against the State specified in Ohio Revised Code §2973.48 does not accrue until the court of common pleas issues a determination that an individual has been wrongfully imprisoned. Then, according to section (H) the claimant "shall commence a civil action no later than two years after the date of entry of the determination . . ." Therefore, the statute of limitations involved in this proceeding is built into the statutory scheme itself. No other general statute of limitations would obviously apply.

The State attempts to argue once again that the proceeding under Ohio Revised Code §2305.02 is an action against the State for which a statute of limitations applies. But the actual remedial statute is Ohio Revised Code §2743.48, pursuant to the Court of Claims Act, giving rise to a waiver of sovereign immunity in the context of wrongful imprisonment.

---

<sup>3</sup> Even if "laches" were recognized as a valid defense, Defendant has totally failed to present any specific evidence that the State is materially prejudiced by the delay. Neither the question of liability or damages (which is strictly defined by Ohio Revised Code §2743.48) changes with the passage of time.



The contention that the six year statute of limitations under 2305.07 would apply is erroneous since the common pleas proceeding does not create a liability. Likewise, the same reasoning would apply to 2305.09(D). The liability for wrongful imprisonment is not recognized in 2305.02, where the factual finding of the common pleas court is entered, but in 2743.48, which provides the ability to sue the State for certain statutory damages.

Finally, the cause of action accrues not at the acquittal, and not even when evidence of innocence emerges (which is still emerging in this case) but only when the common pleas court issues the wrongful death determination. Otherwise it would be impossible to pinpoint in many cases the date upon which someone becomes innocent. Is it when a new suspect confesses or when he is convicted? Is it when a newspaper article or TV newsmagazine solves a crime? Or could it be when the petitioner discovers such fact? As argued by Defendant itself, acquittal is not enough. So, the only uniform and orderly way these actions can be fairly managed is by requiring a legal determination whereby the elements of what constitutes a wrongfully imprisoned individual are determined in a proceeding such as the one established in 2305.02. Only then does the cause of action accrue.

**AN ACTION PURSUANT TO OHIO REVISED CODE §2743.48 DOES NOT ABATE AT DEATH, BUT SURVIVES THE DEATH OF THE CLAIMANT.**

Plaintiff would reiterate that the proceeding before the Common Pleas Court is not an action against the State which would involve the principles of survivorship or

abatement. The Estate stands in the shoes of Dr. Sheppard and has every right to seek the determination.

Nonetheless, the question of whether an action survives is governed by two closely related statutes: Ohio Revised Code §2305.21 and Ohio Revised Code §2311.21.

The survivor statute states:

**§2305.21** [i]n addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person (emphasis added) or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

It should be evident that a wrongful imprisonment claim is analogous to the tort of false imprisonment. In the recent Supreme Court decision, Bennett v. Ohio Dept. of Rehab. & Corr., 60 Ohio St.3d 107 (1991), the Court held that "R.C.2743.48 does not replace the false imprisonment tort but, rather, supplements it to allow a recovery in some cases when recovery was not available before." But more significant, the Court explained that "each day's continuance of the **body of the person** in custody, is a distinct trespass . . ."<sup>4</sup>

Clearly, the survivor statute on its face includes the tort of false imprisonment because causes of actions for "injury to the **person or property** . . . shall survive." Ohio Revised Code §2305.21. The Plaintiff is seeking damages for the injury to the person of Dr. Sheppard for the ten years wrongfully confined in prison. Moreover, the remedial statute, Ohio Revised Code §2743.48 does not provide for damages against reputation

---

<sup>4</sup> "Broadly speaking, false imprisonment is an injury to personal liberty, while malicious prosecution is an infringement of an individual's right to reputation." 45 O.Jur.3d 165.

and character, and Plaintiff is not seeking such damages.<sup>5</sup> It would be inconceivable that a trespass to property would survive, but not a trespass on a person, particularly when the person's freedom is taken away. According to Bowman v. Parma Board of Education, 44 Ohio App.3d 169, a claim for psychic injury or emotional distress survived the death of a person, because "implicit in the recognition of tort claims for psychic injury of a severe nature is that such claims are claims for injury to the person which would survive death under R.C. 2305.21." Also, an injured party's right to punitive damages may survive his death and be pursued by a representative of his estate. Schaeffer v. D & J Produce, 62 Ohio App.2d 53 (1978). Furthermore, remedial statutes such as the survivorship statute are meant to be liberally construed. See, Rules of Construction R.C.1.1, Wright v. State, 69 Ohio App.3d 775 (Franklin, 1990); Johnson v. State, 520 N.E.2d (Ohio, 1987). Moreover, the federal courts have analogized civil rights actions pursuant to 42 U.S.C. §1983 as personal injury actions. Wilson v. Garcia, 471 U.S. 261 (1985). To be sure, the loss of physical liberty at the hands of the state must constitute an injury "to the person" as contemplated by the survivor statute.

Thus, because the wrongful imprisonment claim survives the death of the injured party, the only question remaining is whether the action abates pursuant to the abatement statute, which states:

---

<sup>5</sup> Ohio Revised Code §2743.48 only allows damages of \$25,000 per year of imprisonment, loss of income, costs, and attorney's fees. There is no provision for loss of reputation.

**§2311.21** Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance or against a judge of a county court for misconduct in office, which shall abate by the death of either party.

An abatement statute must be strictly construed because by nature it curtails or limits a remedy. The Ohio abatement statute clearly admonishes that actions will not abate unless certain specifically named causes of actions are involved. None of the enumerated actions include a wrongful imprisonment claim. Therefore, not only does Plaintiff's action survive, but it does not abate either.

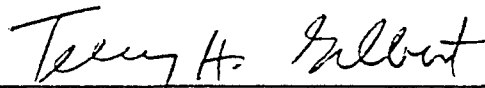
The State raises other contentions which will be briefly addressed. First, it is argued the standing doctrine precludes the Sheppard Estate from pursuing a claim for wrongful imprisonment. It has long been held that the estate is the proper party to bring actions on behalf of a deceased party who has a claim at law. Johnson v. Koppers Co., Inc., 524 F.Supp. 1182 (N.D. Ohio, 1981); accord, Bazdas v. Koppers Co., Inc., 524 F.Supp. 1194 (N.D. Ohio, 1981). Consequently, such argument is meritless. Second, it is argued that the action for wrongful imprisonment can only be brought by an individual because the statute uses the word "individual" and is silent on the right of personal representatives, heirs or assigns to bring claims thereunder. Yet, virtually all common law and statutory remedial actions are silent with respect to language other than a claimant. The body of a remedial statute is not determinative as to who may bring a claim on behalf of a decedent. The relevant inquiry would be through Ohio Revised Code §2305.21 which unequivocally provides that causes of actions for a decedent's personal injury shall survive.

## CONCLUSION

The proceeding under Ohio Revised Code §2305.02 is designed to make a specific determination as to whether an individual was wrongfully imprisoned. It is not an action against the State whereby the various defenses, equitable or legal, might be interposed. The action against the State is governed by 2743.48 under the jurisdiction of the Court of Claims. Nevertheless, laches does not apply; there is no statute of limitations applicable to Ohio Revised Code §2305.02 (only with respect to Ohio Revised Code §2743.48); the action survives, does not abate, and is properly brought by the estate.

The Motion to Dismiss must be overruled.

Respectfully submitted,



---

TERRY H. GILBERT (0021948)  
Attorney for Plaintiff, Special Administrator  
of the Estate of Samuel H. Sheppard  
1700 Standard Building  
1370 Ontario Street  
Cleveland, OH 44113  
(216) 241-1430

CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff's Brief in Response to Defendant's Motion to Dismiss has been hand-delivered, this 22 day of NOV, 1996, to Patrick J. Murphy, Esq., Assistant Cuyahoga County Prosecutor, at his office, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.

*Terry H. Gilbert*

---

TERRY H. GILBERT

Attorney for Plaintiff, Special Administrator  
of the Estate of Samuel H. Sheppard