



5-28-1997

Plaintiff's Motion to Strike or Alternatively to Deny Defendant's Motion for Judgment on the Pleadings

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IN THE COURT OF COMMON PLEAS

GERALD F. SUSTER
CLERK OF COURT
CUYAHOGA COUNTY, OHIO
CUYAHOGA COUNTY

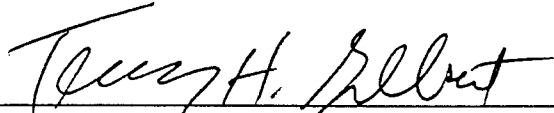
ALAN J. DAVIS, Special Administrator)
of the Estate of SAMUEL H.)
SHEPPARD)
Plaintiff)
-vs-)
STATE OF OHIO)
Defendant)

CASE NO. 96-312322-CV
JUDGE RONALD SUSTER

**PLAINTIFF'S MOTION TO STRIKE
OR ALTERNATIVELY TO DENY
DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Now comes the Plaintiff, through counsel, and hereby moves this Court, pursuant to Rule 12(F) of the Ohio Rules of Civil Procedure, to strike Defendant's Motion for Judgment on the Pleadings, or in the alternative, to deny said Motion for the reason that the arguments contained in said Motion have been previously briefed and presented to this Court and rejected, are clearly redundant and have no merit. The State of Ohio, while unhappy with this Court's prior rulings on the very same arguments, is simply not content to avail itself of an appropriate appellate remedy to challenge this Court's rulings, but arrogantly feels it has the privilege to continue to repeatedly raise the same exact arguments, albeit with different headings, and thereby abuse the administration of justice and the Rules of Civil Procedure by causing more unnecessary delays and costs with respect to this case, as more fully briefed in the attached Brief hereto.

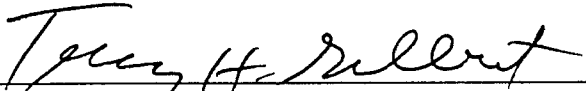
Respectfully submitted,



TERRY H. GILBERT (0021948)
Attorney for Plaintiff
1700 Standard Building
1370 Ontario Street
Cleveland, OH 44113
(216) 241-1430

CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff's Motion to Strike or Alternatively to Deny Defendant's Motion for Judgment on the Pleadings has been ~~hand delivered~~^{mailed}, this 27 day of May, 1997, to Patrick Murphy, Esq. and Marilyn Cassidy, Esq., Assistant Cuyahoga County Prosecutors, at their office, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.



TERRY H. GILBERT
Attorney for Plaintiff

BRIEF

Defendant's Motion for Judgment on the Pleadings is the latest installation of the State's effort to prevent the matter of Dr. Sam Sheppard's wrongful imprisonment claim from being heard on the merits. Two previous Motions to Dismiss, raising the same arguments, were rejected on January 13, 1997. These previous Motions, and responses thereto, were extensively researched, briefed, and considered, and the case clearly was headed for a trial. Indeed, the Court met with undersigned counsel and First Assistant Prosecutor Carmen Marino (thought to represent the State of Ohio) on March 10, 1997. A timetable for resolving evidentiary issues was agreed upon and the Court scheduled a hearing for May 9, 1997 in order to focus on outstanding evidence questions. By agreement of the parties, the trial on the merits was scheduled for July 14, 1997. Nothing was mentioned about any further attempts to block a trial in this case, as that question had been moot for some time.

Then, without regard to any of the ground rules mutually previously agreed to by the Court and counsel, the State, represented by other members of the Prosecutor's Office (without Mr. Marino on the pleadings) filed its Motion for Judgment on the Pleadings one day before the May 9th hearing. They also conveniently failed to notify or serve a copy of their eleventh hour Motion on counsel for the Plaintiff. The Court was gracious in allowing its copy to be reviewed as Plaintiff's counsel walked into the courtroom for the hearing. As a result of this desperate attempt to re-assert previously rejected arguments, the original purpose of the scheduled hearing was sabotaged and

then indefinitely delayed because the Court was placed in a position of having to consider the Motion, and afford an opportunity to Plaintiff to respond.

Such tactics cannot be tolerated by the Court. A litigant must not be permitted to continue to file the same Motions and raise the same arguments after unequivocal adverse rulings. This Court has the discretion, pursuant to Rule 12(F) to strike "from any pleading any insufficient claim or defense or any **redundant** (emphasis added), immaterial, impertinent, or scandalous matter." The State's Motion for Judgment on the Pleadings is clearly redundant.

In the August, 1996 Motion to Dismiss (overruled on January 13, 1997), the State raised **laches, statute of limitations, standing, abatement, and only live individuals can sue**. In the May, 1997, Motion for Judgment on the Pleadings, the State raised **laches, statute of limitations, standing, abatement, and only live individuals can sue**. No new law, facts or grounds were stated, other than the concept of jurisdiction was thrown in. However, the jurisdiction argument was based upon the recycling of the original standing argument - in other words, that an estate has no authority to bring an action in wrongful imprisonment. The two Motions are identical almost to the word, and the State makes no serious attempt to camouflage the use of a wordprocessor to spit out the same brief.

The appropriate response of this Court is to strike the pleading. The State's attitude is essentially - "we don't like your ruling, so we'll file again and again until you get the point." This mentality is dangerous and disrespectful to the Court, and must not be tolerated. And then when one considers that the Motion was filed to thwart the Court's

agenda for May 9, 1997, one begins to wonder if the State Ohio is dealing with a full deck.

To the extent that a response is necessary, Plaintiff would incorporate all arguments previously raised in its earlier responses. However, since the issues were previously briefed, Plaintiff has discovered a case where both the Common Pleas Court and the Court of Claims recognized that a wrongful imprisonment claim survives the death of the individual and can be brought by the estate. In Eva Celestino, Administrator of the Estate of Juan A. Celestino v. State of Ohio, (Court of Common Pleas, Sandusky County No. 94CV13; Court of Claims No. 95-12770), the issue of abatement was raised in a Motion to Dismiss and rejected. The State failed to perfect an appeal and an action pursuant to Ohio Revised Code §2743.48 was filed **on behalf of the estate** in the Court of Claims. The Ohio Attorney General eventually stipulated to a judgment. See attached records from this case.

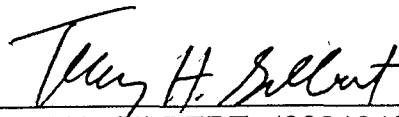
The central argument of the State is that the wrongful imprisonment remedy is only available to live people, and is extinguished once the victim of a wrongful imprisonment dies. Apparently, even the Attorney General's Office has given up on that argument and had no problem consenting to the payment of damages to the Estate of Juan A. Celestino. It is paramount under Ohio jurisprudence that, except for very narrowly defined actions specified in the survivor statute, Ohio Revised Code §2305.21, actions, whether by statutory remedy, or common law, survive. The State is hung up on the word "individual" and therefore assumes, simplistically and without any legal authority, that it means the action does not survive. But the analysis does not end with the dictionary

definition of "person" or "individual"; it must be viewed in the context of the long tradition in Ohio in favor of remedies surviving the death of the victim, unless the legislature specifically identifies an action that does not survive. And to be sure, the legislature has not removed the wrongful imprisonment remedy from those actions that survive, and it is presumptuous for the State to attempt to second guess the legislative intent in this area.

The remaining arguments advanced by the State such as laches and statute of limitations are completely devoid of merit, as the statutory scheme for the wrongful imprisonment remedy specifically sets forth the applicable time limits - two years to file in the Court of Claims after a Common Pleas Court's determination of wrongful imprisonment. There is no time limitation as to when a party may seek such determination. These issues were briefed in Plaintiff's previous Brief in Response to Defendant's Motion to Dismiss, attached hereto.

For all the above reasons, Defendant's Motion for Judgment on the Pleadings should be stricken and/or denied.

Respectfully submitted,



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