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Motion for Injunction and or Protective Order to Enjoin Exhumation of the Body of Marilyn Sheppard

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Counsel for the Sheppard Estate

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ALAN J. DAVIS,
SPECIAL ADMINISTRATOR
OF THE ESTATE OF SAMUEL
H. SHEPPARD

Plaintiff

-VS-

STATE OF OHIO

Defendant

CASE NO. CV 312322

JUDGE RONALD SUSTER

MOTION FOR INJUNCTION AND OR
PROTECTIVE ORDER TO ENJOIN
EXHUMATION OF THE BODY OF
MARILYN SHEPPARD

(ORAL HEARING REQUESTED)

Now comes Plaintiff, by and through counsel, and respectfully requests that this Court order an injunction and/or protective order pursuant to its power under Civ. Pro. Rule 65, enjoining Defendant from exhuming of the body of Marilyn Sheppard. On August 19, 1999, said exhumation was ordered by the Cuyahoga County Coroner's office on its own initiative and without requesting an order of this Court. Although Plaintiff supports any attempt to uncover the truth in regards to the murder of Marilyn Sheppard, Plaintiff opposes the prosecutor's exhumation order on the following procedural grounds: 1) this unilaterally ordered exhumation is an abuse of the civil discovery process; 2) allowing such a unilateral act creates an unequal playing field and evidences an attempt by the State to harness its prosecutorial powers simply to gain an unfair advantage in this civil law suit 3) the State of Ohio, like all other parties to a civil law suit should be required to request an order from

this Court allowing such exhumation, only after it makes a showing that there is an evidentiary need for such action and reveals any expected findings that may result therefrom. For these reasons and others more fully elaborated in the attached memorandum, Plaintiff requests an injunction to prevent the exhumation of the body of Marilyn Sheppard and an oral hearing on this matter during the pretrial planned for August 30, 1999.

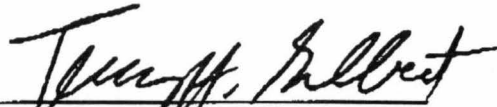
Respectfully submitted,


TERRY H. GILBERT (0021948)
1700 Standard Building
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(216) 241-1430

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Injunction and or Protective Order to Enjoin Exhumation of the Body of Marilyn Sheppard, has been hand delivered this ____ day of August, 1999 to William D. Mason, Cuyahoga County Prosecutor, at his office: Ninth Floor, Court Tower, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.



TERRY H. GILBERT (0021948)
Attorney for Plaintiff

MEMORANDUM IN SUPPORT**FACTS**

This wrongful imprisonment lawsuit was originally filed in October of 1995. In the four years that have expired since the filing of this suit, extensive discovery has been conducted by both parties, including the exhumation of the body of Dr. Samuel H. Sheppard in September of 1997.¹ Finally, trial was set for October 18, 1999, with a pretrial scheduled for August 30, 1999. On August 19, 1999, the Prosecuting Attorney ordered that the remains of Marilyn Sheppard be exhumed and the State of Ohio filed a Motion for Continuance of the trial date so that it would have time to preform said exhumation, followed by forensic tests. Plaintiff now seeks an injunction or protective order preventing the State of Ohio from conducting this exhumation and tests, unless and until it can present evidence showing the need for such action and obtain an order from this Court allowing such exhumation.

ARGUMENT

I. **THE STATE OF OHIO'S UNILATERAL ORDER ALLOWING FOR THE EXHUMATION OF THE BODY OF MARILYN SHEPPARD IS AN ABUSE OF THE DISCOVERY PROCESS**

Discovery in civil case is governed by Title V of the Ohio Rules of Civil Procedure. In the case at bar, the State of Ohio is attempting to subvert these rules by unilaterally ordering the exhumation of the body of Marilyn Sheppard, under the guise of the prosecutorial power provided to it by Ohio Rev. Code §313.18. The statute provides that:

¹. This exhumation was conducted pursuant to a Court order finding that such action was necessary and likely to lead to the discovery of admissible evidence. The disinterment was fully paid for by Plaintiff, upon the State's refusal to contribute monetarily.

The prosecuting attorney or coroner may order the disinterment of any dead body, under the direction and supervision of the coroner, and may authorize the removal of such body by the coroner to the quarters established for the use of such coroner, for the purpose of examination and autopsy.

Ohio Rev. Code §313.18. While this statute appears to give the prosecutor and coroner unlimited discretion to exhume a body, clearly the purpose of this statute was to allow the State of Ohio, via the prosecuting attorney or the coroner, to investigate homicides and gather evidence for use in prosecuting wrongdoers. There is no indication that this statutory power was meant to be used by the State in defending against civil actions. In fact, to allow such use would provide the State an unfair advantage over its opponents, creating an unequal playing field in all civil cases by or against the State. When Sam Reese Sheppard, wanted to exhume the body of his own father, he had to obtain an order from this Court upon a showing that such exhumation was likely to lead to the discovery of admissible evidence not already in Plaintiff's possession and control.² It is only fair that his opponent, who just so happens to be the State of Ohio, be held to this same standard. To allow the State to make an end run around these discovery rules, by reference to this archaic statute granting the State of Ohio (via the prosecuting attorney and coroner) this criminal, investigatory power, is an abuse of power that cannot go unchallenged.

Even if the statutory power set forth in Ohio Rev. Code. §313.18, were meant to apply outside of the criminal, investigatory setting, case law places limits on this exercise of prosecutorial power. In State ex rel. v Perry, 113 Ohio St. 641, the Supreme Court of Ohio held that the coroner's/prosecutor's power to exhume is

² The exhumation of Dr. Sam Sheppard was found by this Court to be necessary because an alternative source of Sheppard's DNA could not be obtained.

limited and can be abused. As the Court stated, the remedy for such abuse of discretion is the granting of an injunction. The Court continued:

While the discretion of a public official honestly and judiciously exercised will not be controlled by courts, an injunction may be issued in the case of a gross abuse of discretion, when it appears that his discretion is being exercised arbitrarily, on grounds, or for reasons, clearly untenable, or to an extent clearly unreasonable.

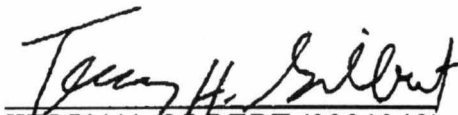
Id. at 649.

In Perry, the Plaintiff was attempting to restrain the coroner from exhuming a body and holding an inquest to determine the cause of death when it was clear that the decedent died of natural causes. Perry denied the Plaintiff's remedy as they had requested a writ of prohibition rather than an injunction. As such, the court never reached the issue of whether or not the proposed exhumation was an abuse of discretion. However, the Court made it crystal clear that the coroner's discretion is limited and further, that the appropriate remedy for such abuse of power is an injunction. In the case at bar, the coroner's decision to order the exhumation of the body of Marilyn Sheppard is clearly an abuse of discretion. RC 313.18 was intended to promote the interests of the criminal justice system in uncovering the circumstances surrounding a suspicious death. That discretion and purpose has been clearly recognized in criminal investigations but it does not fit the purposes of this civil matter.

The standard for exhumation of a body in civil cases is set forth in case law. See, 21 ALR 538 (1952). In Cabe v Parker-Graham-Sexton, 202 NC 176, 162 SE 223 (1982), it was held that the State or a private party should have the right an autopsy for evidentiary purposes but that the court would not order a body to be disinterred unless there was a strong showing that it was necessary and the interests of justice required it. As clarified

by Ohio Courts, "It is within the discretion of the court to order the exhumation . . . but it will not be ordered where an examination has been made before burial, and a second examination is not shown to be necessary to subserve justice." State v. Strome, 26 Ohio Nisi Prius 406 (1926). In the case at bar, the State of Ohio conducted an inquest prior to the burial of Marilyn Sheppard and has failed to show how an exhumation would produce any new evidence that the State does not already possess as a result of the original inquest. The original injuries to Marilyn Sheppard were well documented, described, and photographed at the original autopsy. Moreover, there is no necessity to obtain tissue samples for DNA testing since reliable samples were already available to the State. If the State expects to uncover some new evidence, the discovery rules require the State to inform Plaintiff and this Court of the nature of that evidence, prior to any exhumation. Accordingly, Plaintiff requests that this Honorable Court exercise its power pursuant to Civ. Proc. R. 65 and enjoin the State from acting upon its unilateral order to exhume the body of Marilyn Sheppard.

Respectfully submitted,



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