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Defendant's Motion for Summary Judgment

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

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

Plaintiff

vs.

STATE OF OHIO

Defendant

1999 SEP 10 P 12: 58

CASE NO. 312322
JUDGE RONALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Defendant, by and through counsel, William D. Mason, Prosecuting Attorney for Cuyahoga County, moves this Court for Summary Judgment under Ohio Civil Rule 56. The grounds for this Motion are that there exists no genuine issue of material fact and Defendant is entitled to judgment as a matter of law, as more fully set forth in the Brief and Exhibits, attached hereto and as may be provided in supplemental amendments.

Respectfully submitted,

WILLIAM D. MASON
Cuyahoga County Prosecutor

9/10/99
S.J. Lane

By:



RANDI MARIE OSTRY (0042306)

Assistant Prosecuting Attorney
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The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
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BRIEF IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiff, Alan Davis, Special Administrator of the Estate of Samuel H. Sheppard, filed this wrongful imprisonment action against the Defendant, State of Ohio, averring the wrongful incarceration of Sheppard. This action comes thirty years after his acquittal at his second trial and twenty-six years after his death. The passage of time and the death of the individual imprisoned are fatal obstacles to the civil action now before the court.

First, the trial court lacks subject matter jurisdiction to hear this cause of action. The tort of wrongful imprisonment abates under R.C. 2305.21 with the death of the one claiming the injury. Therefore, this tort cannot be brought by a decedent's personal representative. A cause of action for wrongful imprisonment, like the torts of slander and false imprisonment, cannot survive the death of the individual claiming the harm because such claims involve a violation of a personal right as distinguished from an actual physical injury. See *Witcher v. Fairlawn* (1996), 113 Ohio App.3d 214, 217-218; *Oakwood v. Makar* (1983), 11 Ohio App.3d 46.

Second, Plaintiff, as Special Administrator of the Estate of Samuel H. Sheppard, lacks standing to bring this action. The statute only authorizes the wrongfully imprisoned individual to commence and maintain the action. And the executor or administrator of an estate does not have standing to assert a violation of a personal right and recover after the death of the one statutorily authorized. See *U.S. v. Kerner* (C.A.7, 1990), 895 F.2d 1159; *Heikkila v. Barber* (C.A.9, 1962), 308 F.2d 558, 561-562. Ergo, this action cannot, and does not, survive the death of Sheppard.

Third, assuming, *arguendo*, the trial court has subject matter jurisdiction and Plaintiff

Alan Davis, as Special Administrator of Sheppard's Estate, indeed has standing, the statute of limitations for bringing this action has long since expired. R.C. 2743.16; *Lewarski v. Columbus Dev. Ctr.* (1987), 40 Ohio App.3d 76; R.C. 2305.11; R.C. 2305.07; R.C. 2305.09. The accrual date for purposes of the statute of limitations is November 16, 1966, the date of Sheppard's acquittal. Sheppard had always maintained his innocence and, therefore, his wrongful incarceration. An alternate accrual date, should this court find otherwise, is November 13, 1967, the date Sheppard filed a federal action seeking compensatory damages for his wrongful incarceration. And, giving Sheppard the benefit of every doubt, the last possible accrual date is September 24, 1986, the effective date of Ohio's Wrongful Imprisonment Statute. Under all three potential accrual dates, the time for commencing this action has expired.

Fourth, regardless of the applicable statute of limitations, the equitable doctrine of laches should be applied to this case. Defendant can successfully establish the requirements of laches, in that there was an unreasonable delay, the absence of an excuse for the delay, Plaintiff's knowledge of the alleged wrong, and prejudice to Defendant, State of Ohio, if this action proceeds.

Finally, as a matter of public policy, to force any defendant to proceed to trial, despite these fatal procedural road blocks, exposes it to an unmanageable, unpredictable, and costly potential of countless similar trials. The mere contention that a new technology may disclose additional information and, hence create a corresponding claim despite the lengthy passage of time and the death of the individual allegedly damaged is not only legally impermissible but is violative of sound public policy. The law mandates finality. Constant relitigation and the arbitrary extension of statutes of limitations deny others access to the judicial system.

II. STATEMENT OF THE CASE

On or about October 19, 1995, Alan Davis, Special Administrator of the Estate of Samuel H. Sheppard, (hereinafter “Plaintiff”), filed a Motion for Declaration of Wrongful Imprisonment in the Cuyahoga County Court of Common Pleas Criminal Division, under case number, CR 64571. Specifically, that case number is the case captioned *State of Ohio v. Samuel Sheppard*, the criminal prosecution of Sheppard, which action was first commenced by way of indictment in August of 1954. Several related pleadings and motions followed. Subsequent to this filing, the State of Ohio successfully argued and thus persuaded counsel for the Sheppard Estate that Ohio law requires the filing of a civil action, *to wit*: a complaint and summons in the Civil Division of the Court of Common Pleas.

As a result, on or about July 24, 1996, Plaintiff filed this action against Defendant, State of Ohio, (hereinafter “Defendant”), alleging wrongful imprisonment and seeking a Declaration of Innocence. The case was assigned by random draw to the Honorable Kathleen Sutula. It was transferred, however, to the docket of the Honorable Ronald Suster based upon a representation by counsel for Plaintiff on the designation sheet that there existed a “related” case, CR 64571, on Judge Sutula’s docket. That case is not a pending matter and not related to this civil action for wrongful imprisonment. As a result of this request, Defendant filed objections to the transfer of the case to the docket of the Honorable Ronald Suster but such objections were overruled and the case was transferred.

A series of pleadings and motions was filed in this case, including a Motion to Dismiss, an Answer, an Amended Answer, and a Motion for Judgment on the Pleadings. At all times relevant, Defendant asserted that the court lacks jurisdiction to hear this wrongful imprisonment

claim; the statute of limitations has expired; the plaintiff lacks standing, and; the action does not survive under Ohio's Survival Statute, R.C. 2305.21, or at common law. Defendant's Motions were overruled.

In June of 1997, Defendant filed in the Supreme Court of Ohio, a Petition in Prohibition seeking both an immediate Alternative Writ and a Writ. The Alternative Writ in Prohibition issued, but the court ultimately overruled the Petition in Prohibition in December of 1998, reasoning that "although [Defendant's] arguments may have merit, * * * , the avenue of redress is an appeal, not a writ of prohibition." *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 74, 76, 77.

Accordingly, at this point in the trial court proceedings, the assertions of lack of jurisdiction and standing, the expiration of the statute of limitations, and laches are now brought before this court by virtue of this Motion for Summary Judgment.

III. CIV.R. 56 SUMMARY JUDGMENT

Summary Judgment under Civ.R. 56 is warranted if "the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 322; *Anderson v. Liberty Lobb, Inc.* (1986), 447 U.S. 242. "Once the moving party has presented evidence sufficient to support a motion for summary judgment, the non-moving party is not entitled to trial merely on the basis of allegations; significant probative evidence must be presented to support the complaint." *Goins v. Clorox Co.* (C.A.6, 1991), 926 F.2d 559, 561. When deciding if there are issues of fact

sufficient for trial, “the inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Electric Industries Co. Ltd. v. Zenith Radio Corp.* (1986), 475 U.S. 574, 587.

In this case, even construing all the evidence in the light most favorable to Plaintiff, Alan Davis and the Estate of Sheppard cannot first demonstrate that the court has subject matter jurisdiction; that Plaintiff has standing; and alternatively that this action is not time barred by the statute of limitations, and laches. Plaintiff has provided no significant probative evidence in support of his claim. Repackaging evidence that has been available for decades and “spinning” the meaning of scientific data to fit the interests of Plaintiff does not rise to a level sufficient to overcome a summary judgment request. Therefore, Defendant is entitled to judgment as a matter of law since no genuine issue of material fact exists under Civ.R. 56.

**IV. THE TRIAL COURT LACKS SUBJECT MATTER
JURISDICTION TO HEAR THIS CASE BECAUSE A CLAIM FOR
WRONGFUL IMPRISONMENT ABATED
UPON THE DEATH OF SAMUEL H. SHEPPARD.**

This cause of action for wrongful imprisonment died with Sam Sheppard in 1970. Ohio’s Wrongful Imprisonment Statute, R.C. 2743.48, as well as this state’s common law and statutory authority clearly do not authorize the survival or revival of a claim for wrongful imprisonment. Hence, no one else, including one’s estate, can assume a decedent’s right of recovery for a tort that involves a loss of a personal right.

R.C. 2305.21 governs the survival of causes of action after the death of the one claiming the injury, and reads in pertinent part:

In addition to the causes of action which survive at common law, **causes of action for * * * injuries to the person * * * shall survive**; and such actions may be brought notwithstanding the death of the person entitled or liable thereto. (Emphasis added).

As to the first part of the statute regarding common law survival, “[t]here existed no remedy at common law for a wrongfully imprisoned citizen to pursue an action against the state for damages incurred as a result of his incarceration.” *Wright v. State* (1990), 69 Ohio App.3d 775, 779. “The action was created by R.C. 2305.02 and 2743.48 is a waiver of the state’s common law sovereign immunity, and has no parallel in the ancient dual system of law and equity.” *Walden v. State* (1989), 47 Ohio St.3d 47, 53.

Survival in this case then, under R.C. 2305.21, depends upon whether a cause of action for wrongful imprisonment constitutes an action for “injuries to the person.”

Ohio law is clear that “injuries to the person” means physical injuries. *Witcher v. Fairlawn* (1996), 113 Ohio App.3d 214, 217; *Oakwood v. Makar* (1983), 11 Ohio App.3d 46, 47. In analyzing which claims survive, courts have distinguished between a personal right and a physical injury. And only actions for physical injury survive.

Under law, this court can come to but one conclusion - that the tort of wrongful imprisonment is an action for a violation of a personal right, not a physical injury, and abates at death.

Personal rights encompass injuries to one’s character or reputation. *Flynn v. Relic* (June 26, 1980), Cuyahoga App. No. 41404, unreported. It concerns, for instance, the deprivation of the plaintiff’s freedom of movement; an infringement upon the plaintiff’s liberty to move about at will rather than a physical injury. *Witcher, supra* at 218. Certainly, wrongful imprisonment

involves a person's liberty and freedom of movement rather than an actual physical injury.

Torts such as false imprisonment and malicious prosecution do not survive because they are violations of personal rights not physical injuries. *Id.*; *State ex rel. Crow v. Weygandt* (1959), 170 Ohio St. 81. Likewise, wrongful arrest, a violation of a personal right, does not survive. See *Heikkila v. Barber* (C.A.9, 1962), 308 F.2d 558, 561-562.

The following review of Ohio common law and statutory authority on abatement and survival unequivocally supports a conclusion adverse to Plaintiff.

Noteworthy is the fact that in all of the below analyzed cases, the plaintiff actually commenced the proceedings in his own name but died during the pendency of the action. And in each case, the claim was dismissed at the trial court and upheld on appeal. In this case, there is a posthumous commencement for a violation of a personal right, posing an even stronger set of facts for its abatement and dismissal.

In *Witcher*, the plaintiff sued police officers of the city of Fairlawn for false imprisonment alleging he was wrongfully detained at a mall store. During the pendency of the proceedings, the plaintiff died and his wife filed a suggestion of death and substituted herself as the administratrix of his estate. *Id.* at 215. The defendant-city of Fairlawn moved to dismiss the complaint asserting that the tort of false imprisonment did not survive the plaintiff's death. The trial court agreed, as did the appellate court, and held that because the claim of "false imprisonment involves an injury to the personal rights of the plaintiff and not injuries to the plaintiff's body," it did not survive his death. *Id.* at 218. In so holding, the court rejected the plaintiff's argument that false imprisonment, by its very nature, requires some sort of physical restraint tantamount to a physical injury. *Id.* at 219. The court agreed that false imprisonment

will always include an element of force or threat of force to compel a person “to remain where he does not wish to remain * * *.” *Id.* But this does not change the nature of a violation of this very personal right. *Id.*

Similarly, the Honorable August Pryatel in the *Oakwood* case reversed a judgment for an award of damages relating to slander when, during the pendency of the proceedings, one of the defendants died. *Id.* at 48. The trial court substituted the deceased’s husband and executor as a successor party and the case proceeded to judgment. *Id.* at 47. Judge Pryatel held that the trial court lacked subject matter jurisdiction to hear the case because the deceased’s executor could not be substituted as a party. The action of slander, a violation of a personal right, abates at the death of either of the parties to the suit, making any substitution of a party a legal impossibility. *Id.*

This court likewise lacks subject matter jurisdiction because Plaintiff cannot be substituted as a party. The tort of wrongful imprisonment abated with the death of Sheppard and, therefore, this cause of action should be dismissed.

V. THE ESTATE OF SAMUEL H. SHEPPARD LACKS STANDING TO BRING A CLAIM FOR WRONGFUL IMPRISONMENT

Plaintiff, Alan Davis, as Special Administrator of the Estate of Samuel H. Sheppard, lacks standing to commence this cause of action. The plain and unambiguous language of the subject statute does not authorize an estate to bring this claim. Accordingly, the Estate, by and through its Special Administrator, cannot be Sheppard’s successor plaintiff.

Lack of standing challenges the capacity of a party to bring an action. *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77. Therefore, standing is a “threshold question” which this court must decide in order for this action to proceed. *Id.* “The lack of standing may be cured by substituting the proper party so that *a court otherwise having subject matter jurisdiction* may proceed to adjudicate the matter. Civ.R. 17.” *Id.* (Emphasis added).

In this case, the issue of standing cannot be cured first, because the court lacks subject matter jurisdiction. *Id.* And, second, even if it did have jurisdiction, the only party having standing - Sheppard himself - is deceased. And an estate cannot assert a violation of a personal right under the statute and common law.

The undisputed facts compel this tribunal to conclude that Plaintiff therefore lacks standing. Sheppard’s Estate cannot be compensated for a loss of income and associated expenses incurred by Sheppard during his lifetime had he not been convicted, even if actual damages to the Estate are proved. See *U.S. v. Kerner* (C.A.7, 1990), 895 F.2d 1159.

**A. The Plain and Unambiguous Language of Ohio’s
Wrongful Imprisonment Statute does not authorize anyone other
than Samuel H. Sheppard from commencing this action.**

R.C. 2743.48, by its plain language, affords redress only to those individuals claiming this right and does not allow redress to their heirs, representatives, and assigns.

The court in *Wright v. State* (1990), 69 Ohio App.3d 775, when confronted with an interpretation of the language of the subject statute, duly noted the judiciary’s role in reviewing legislation and restrained itself as follows:

It is not the judiciary's function to rewrite laws according to what the court perceives as just but to enforce the literal writing of the statute whenever possible. *Bd. of Edn. v. Fulton Cty. Budget Comm.*(1975), 41 Ohio St.2d 147, [citation omitted]. Regardless of the method of interpretation used, absent ambiguity, a court will not delve into legislative intent but will give effect to the plain meaning of the statute, R.C. 1.49, even when a court believes that a statute results in an unfavorable outcome. **It is the province of the legislature to gauge public sentiment and to determine what is just.**" *Wright, supra*, at 781. (Emphasis added).

"In our tripartite system of government, the power to make law is vested within the legislature and not the judicial branch. No legislature, regardless of foresight, can anticipate every situation that is likely to arise. Therefore, courts are called upon to interpret laws when unique fact patterns are presented. However, the court can only interpret and not legislate. [citation omitted]." *Id.*

Accordingly, courts do not have authority to ignore plain and unambiguous language of a statute under the guise of statutory interpretation, but must give effect to the precise words used, being mindful not to add to, or subtract from, the statute. *In re Collier* (1993), 85 Ohio App.3d 232. Further, words must be taken in their usual, normal or customary meaning. *Love v. Motorists Mut. Ins. Co.* (1993), 86 Ohio App. 3d 394.

In Ohio, the specific inclusion by the General Assembly of items in a statute implies the exclusion of others. *Kirsheman v. Paulin* (1951), 155 Ohio St. 137, 146; *Investors Reit One v. Jacobs* (1989), 46 Ohio St.3d 176. *Inclusio unius est exclusio alterius*, i.e., "The certain designation of one person is an absolute exclusion of all others. [citation omitted]." Black's Law Dictionary (6 Ed.Rev.1990) 763. As such, the inclusion of the word "individual" in the Wrongful Imprisonment Statute implies the absolute exclusion of the words "representative,

heirs, and assigns.” Thus, the action may only be brought by the individual claiming a violation of the right.

Evidence of the General Assembly's intent to limit eligibility for compensation under the Wrongful Imprisonment Statute is found in R.C. 2743.48(B)(1):

When a court of common pleas determines, * * *, ***that a person is a wrongfully imprisoned individual***, the court ***shall provide the person*** with a copy of this section and ***orally inform him*** and his attorney of ***his rights*** under this section to commence a civil action against the state * * * because of ***his wrongful imprisonment*** and to be represented in that civil action by ***counsel of his own choice***. (Emphasis added).

Such language demonstrates a clear contemplation that the litigant himself be present. Hence, had the General Assembly intended that someone in Plaintiff's stead could bring this action, it would have so expressly provided. It is not within the authority of the court to extend clear and unambiguous language to areas where that very language was designed to exclude.

As stated, the *Wright* court was confronted with an interpretation of the precise language of the subject statute. Specifically, that court addressed the issue of whether Ohio's Wrongful Imprisonment Statute applies to juveniles who were wrongfully incarcerated even though the statute does not expressly apply to juveniles. *Wright, supra* at 778. The court engaged in an analysis of the exact nature of the statute, finding it to be remedial not penal and intending it to correct past injustices. *Id.* at 779-780. The court then concluded that the “remedial intent should be honored if there is ambiguity by adopting a liberal construction of the statute.” *Id.* at 780. However, in so concluding, the *Wright* court refused to extend the remedy to juveniles, finding that the language is “written strictly in adult criminal language [and further] that [i]t

must be presumed that the legislature knew of the separate and independent procedures used in the juvenile justice system when it chose the words that it did.” *Id.* at 781. (Emphasis added).

Similarly, in *Dragon v. State* (1988), 48 Ohio App.3d 72, 73, the court failed to expand the subject statutory language to include compensation for time spent incarcerated on an incorrect revocation of probation. The *Dragon* court held that the express language in R.C. 2743.48 does not include an award for an incorrect probation revocation. *Id.* The court reasoned that, had the General Assembly intended the statute to so provide, “it would have expressly done so.” *Id.*

In *Mueller v. State* (Dec. 12, 1988), Warren App. No. 88-05-037, unreported, the court was confronted with whether the General Assembly intended that there be a collateral estoppel effect given in the civil action for wrongful imprisonment based upon the not guilty verdict in the underlying criminal case. The *Mueller* court held that “[n]o such intent is stated specifically in the statutes * * *.” *Id.* at 2. And therefore, the court refrained from adding to the express words of the subject statute.

The decision and reasoning of the *Wright*, *Dragon*, and *Mueller* courts compel the same result in this case. It must be presumed that the General Assembly knew of the separate and independent procedures used in those seeking this remedy while still alive and those posthumously seeking a remedy by a personal representative. This court should therefore find that the express words of the statute do not apply to anyone other than the one claiming the right.

Hence, the scope of remediation is clearly limited to the “individual” by the very language of the statute.

B. Sheppard's Estate cannot maintain this action because the law does not provide for compensation to anyone other than Sheppard himself.

The statutory provision upon which this claim rests does not allow persons in Plaintiff's position a right to relief. See *Warth v. Seldin* (1975), 422 U.S. 490, 500. Because a plaintiff must generally assert his own legal rights and interests and cannot bring his claim for relief on the legal rights or interests of a third party, Sheppard's Estate, by and through its Special Administrator, cannot assert Sheppard's legal rights. *Kerner, supra*. Further, there is no allegation in Plaintiff's complaint as to any injury by virtue of wrongful imprisonment to anyone other than the deceased, Samuel H. Sheppard.

In *Kerner*, the plaintiff as executor and son of the decedent, sought a writ of error coram nobis, by and through his father's estate, brought thirteen years after his father's death. In it, plaintiff sought compensation to the estate based upon a recent change in the law which posthumously invalidated his father's criminal conviction for mail fraud. The action further requested that his other criminal convictions based upon the mail fraud conviction also be vacated. The *Kerner* court agreed that the estate indeed suffered actual damages from his father's convictions but, significantly, plaintiff, as executor of his father's estate, lacked standing and the action was dismissed. *Id.* at 1161, 1162. The court reasoned that a convicted defendant who died no longer personally suffered any lingering civil disabilities and reputational and financial injuries alone are insufficient. *Id.* at 1161. While this federal case involves the extraordinary remedy of a specific writ, the import of its reasoning is applicable in this case and compels the same result. Plaintiff lacks standing under the subject statute's clear and unambiguous language.

There is no issue before this court which can be asserted by the Estate and its Special Administrator as a representative or successor plaintiff. Accordingly, the court must grant judgment to Defendant as a matter of law.

**VI. ASSUMING THIS COURT HAS SUBJECT MATTER
JURISDICTION AND PLAINTIFF HAS STANDING,
THIS ACTION IS TIME BARRED UNDER
ALL POTENTIALLY APPLICABLE LIMITATIONS STATUTES.**

Assuming, *arguendo*, that the subject action is indeed a legally viable cause of action properly brought before a court with subject matter jurisdiction, then this action is barred by the statute of limitations.

Statutes of limitations are statutes of repose. They are designed to secure the peace of society and are enacted to prevent delay in asserting claims. The object and purpose of these statutory time limitations are to encourage diligence in the enforcement of demands and the speedy adjudication of the rights of parties. See generally, 66 Ohio Jurisprudence 3d (1986), Limitations and Laches, Section 2.

Regardless of which statutory section and accrual date is applied, the action is time barred.

**A. THE ACCRUAL DATE FOR THIS CAUSE OF ACTION IS
EITHER NOVEMBER 16, 1966, NOVEMBER 13, 1967, OR SEPTEMBER 24, 1986.**

The starting point in this discussion is the accrual date, or the date upon which the cause of action “arose” for purposes of the statute of limitations. “In general, a cause of action exists from the time the wrongful act was committed.” *O’Stricker v. Jim Walter Corp.* (1983), 4 Ohio

St.3d 84, 86. But in situations where this general rule would lead to an unconscionable result such that the injured party's right to recovery is time barred before he is made aware of the injury's existence, the accrual date is when actual damage or injury occurs. *Id.* citing *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79; *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, paragraph two of the syllabus; *Wylar v. Tripi* (1971), 25 Ohio St.2d 164, 168.

The Wrongful Imprisonment Statute is silent on this issue. And [a]bsent legislative definition, it is left to the judiciary to determine when a cause 'arose.' [citation omitted]."
O'Stricker, supra at 87.

In this case, and applying the general rule, this cause arose when the alleged wrongful act, arguably Sheppard's indictment, was committed, as he had always maintained his innocence. However, should this court decide that the application of the general rule would produce an unconscionable result, then the court should find that the date of Sheppard's acquittal, **November 6, 1966**, is the accrual date. It was then that Sheppard knew, for purposes of the statute of limitations, of his alleged injury. See *Rogers v. Barbera* (1960), 170 Ohio St. 241 (malicious prosecution accrues when proceedings are terminated in plaintiff's favor); *Maxey v. Gather* (1952), 94 Ohio App. 115, 118 (action for false imprisonment accrues when disability of imprisonment is removed on plaintiff's release date); *Twine v. Probate Court, Franklin Cty.* (June 28, 1990), Franklin App. No. 89AP-1170, unreported, at 2 (discharge date of plaintiff's invalid detention at a hospital is the accrual date).

Hence, this cause of action accrued when the proceedings were terminated in Sheppard's favor, November 16, 1966. See, *Rogers, supra*.

A second possible accrual date, however, resulted from Sheppard's own action and inaction during his lifetime. Sheppard filed a federal claim for wrongful incarceration and failed to file a related state claim when he had the opportunity; hence providing evidence of his awareness of his alleged injury and accompanying request for compensation for such injury.

Just under one year from his acquittal date, on November 13, 1967, Sheppard commenced a civil action in the United States District Court for the Northern District of Ohio seeking compensatory damages for his wrongful imprisonment, rendering *November 13, 1967* an alternate accrual date. (A copy of the complaint is attached hereto as Exhibit A). Sheppard sued E.W. Scripps Company, publisher of *The Cleveland Press*, Louis B. Seltzer, its Editor, and Samuel Gerber, Cuyahoga County Coroner.

Sheppard's federal lawsuit essentially averred a cause of action for wrongful imprisonment. It was dismissed by the district court and its dismissal was affirmed on appeal. *Sheppard v. The E.W. Scripps Company* (C.A.,6, 1970), 421 F.2d 555. (the court held that the newspaper's publisher and editor, as private citizens, had not acted "under color of any state law" and Gerber, the Coroner, a quasi-judicial officer, was protected by sovereign immunity). *Id.*

Sheppard's complaint sought compensatory damages for:

- (1) his imprisonment for approximately ten years in various jails and prisons in the State of Ohio;
- (2) a loss of income for thirteen years as a physician licensed in the State of Ohio;
- (3) fees, costs, and expenses of defending himself against the indictments and judgments wrongfully procured, and;
- (4) the loss of reputation and community respect suffered as a result of these proceedings.

The remedies sought are specifically provided for under R.C. 2743.48, Ohio's Wrongful Imprisonment Statute. Number one above avers imprisonment in Ohio jails and prisons. R.C. 2743.48(A)(3). Number two avers a loss of income, a compensation provided for under R.C. 2743.8(E)(2)(c). And number three requests reimbursement for all costs associated with his defense, as provided for under R.C. 2743.48(E)(2)(a).

The filing of the federal lawsuit unequivocally establishes Sheppard's knowledge of the alleged wrong and his intent to recover for such wrong. As such, and alternatively, the accrual date would have been the date upon which he filed a federal claim for wrongful imprisonment.

In sum, Sheppard could have joined the State of Ohio as a defendant in his 1967 federal claim. But he did not. He could also have filed a state claim for malicious prosecution under Ohio tort law after his federal claim was dismissed on procedural grounds, as the circuit court instructed. ("An action for malicious prosecution might have been filed in state court, but that does not render unavailable the remedies of the Civil Rights Act."). *Sheppard v. E.W. Scripps*, *supra*, at 559, fn. 1 (McCree, J., concurring). But he did not so file, even after being put on notice of other possible remedies. Sheppard could also have filed a claim for wrongful imprisonment under Ohio's moral claims legislation. See *Walden v. State* (1989), 47 Ohio St.3d 47, 49. But he did not.

Hence, his failures to so file and seek redress for his alleged injuries in state and federal courts not only invoke the statute of limitations based upon either of the above discussed accrual dates, but demonstrate Sheppard's abandonment of any such future claims.

Whichever interpretation of accrual is applied, the result is still the same. This action cannot be maintained under the statute of limitations.

The most generous interpretation of accrual, however, yields the effective date of the subject statute, *September 24, 1986*. Ohio's Wrongful Imprisonment Statutes, R.C. 2305.02 and 2743.48 were added to the Revised Code in 1986 to authorize civil actions against the state for specified monetary amounts brought by certain wrongfully imprisoned persons. *Walden, supra*, citing 141 Ohio Laws, Part III, 5351. This replaced "the former practice of compensating wrongfully imprisoned persons by *ad hoc* moral claims legislation. See, generally, Comment, Wrongful Incarceration in Ohio: Should There Be More Than A Moral Obligation? (1982), 12 Cap.U.L.Rev. 255." *Id.*

Because Sheppard's acquittal pre-dated this legislation, the effective date of this statute operates as an alternate accrual date.

But applying all three accrual dates, the action is still time barred.

1. THE APPLICATION OF R.C. 2305.07 TIME BARS THIS ACTION.

The most generous statute in terms of time permitted to bring this cause of action is R.C. 2305.07 and reads:

Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, **or upon a liability created by statute** other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued. (Emphasis added).

The potential liability of the state was arguably created by statute, specifically, R.C. 2305.02 and 2743.48. As noted by the Supreme Court of Ohio, "[t]he enactment of R.C. 2743.48 was necessary to authorize compensation because the state, even after the waiver of sovereign immunity in R.C. 2743.02, remained generally immune from lawsuits by persons who were

wrongfully convicted and incarcerated.” *Bennett v. Ohio Dept. of Rehab. & Corr.* (1991), 60 Ohio St.3d 107, 110. Hence, while wrongfully incarcerated individuals could bring an action against the state, the subject statute authorized compensation and allowed “recovery in some cases when recovery was not available before.” *Id.* at 111.

Thus, the state’s liability, albeit through the authorization of compensation, was indeed created by statute. But this action, under the six year limit in R.C. 2305.07, is still time barred using the dates November 16, 1966, November 13, 1967 or September 24, 1986.

2. THE APPLICATION OF R.C. 2347.16 TIME BARS THIS ACTION

R.C. 2743.16 reads in relevant part:

* * * civil actions against the state * * * permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than **two years** after the date of accrual of the cause of action * * *. (Emphasis added).

Defendant, the State of Ohio, statutorily waived its immunity from liability and consented to be sued under R.C. 2743.02 (A)(1), which provides in relevant part:

The state hereby waives its immunity from liability and consents 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, subject to the limitations set forth in this chapter.

Because this is a civil action against the state which is expressly permitted by R.C. 2743.02, clearly within the category of statutory sections contemplated in R.C. 2743.16(A), the applicable statute of limitations is two years from the date of accrual.

In *Lewarski v. Columbus Dev. Ctr.* (1987), 40 Ohio App.3d 76, 78, the court, in a wrongful incarceration action filed against state agencies, applied the two year limit in R.C. 2743.16 and held that the action was barred for failing to timely file. The *Lewarski* plaintiff filed his action in 1984, two years prior to the effective date of the Wrongful Imprisonment Statute. Hence, wrongful imprisonment prior to the enactment of the subject statute - which statute merely authorized specific compensation - had a two year limit. And this court should likewise apply this two year limit for the same cause of action.

Hence, using all three accrual dates, this action is out of rule by decades.

3. THE APPLICATION OF R.C. 2305.11 TIME BARS THIS ACTION.

Assuming this court finds R.C. 2743.16(A) inapplicable, then the statutory section governing limitations on false imprisonment applies as the subject tort has its origin in false imprisonment.

The General Assembly enacted the Wrongful Imprisonment Statute in order to address a “narrow legal problem” as explicated above. *Bennett, supra*, at 110. In review, that problem was, despite the state’s waiver of sovereign immunity in R.C. 2743.02, it still remained largely immune from lawsuits brought by innocent persons for compensation who were wrongfully convicted and incarcerated. *Id.* So this separate statute provided for specific compensation in an already existing claim for wrongful imprisonment. *Id.*; R.C. 2743.48(E) & (F). The immunity in question, however, was derived from the law governing the tort of false imprisonment. *Id.* (Emphasis added). As such, “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.” *Id.* at 111. (Emphasis added).

Because the tort of wrongful imprisonment is a derivative of the tort of false imprisonment, the statute of limitations for false imprisonment alternatively applies to this action.

R.C. 2305.11 reads in relevant part:

(A) An action for libel, slander, malicious prosecution, or **false imprisonment**, * * * shall be commenced **within one year** after the cause of action accrued. (Emphasis added).

Again, using any of the three possible accrual dates, 1966, 1967, or 1986, this action is time barred.

4. THE APPLICATION OF R.C. 2305.09 TIME BARS THIS ACTION.

Should this court find that none of the above applies, then the catch-all statute, R.C. 2305.09, would apply and Sheppard would have had four years from the accrual date within which to have brought this action.

That section reads in pertinent part:

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

- (A) For trespassing upon real property;
- (B) For the recovery of personal property, or for taking or detaining it;
- (C) For relief on the ground of fraud;
- (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1304.34 of the Revised Code.

The relevant section is (D) and that section can best be analyzed by way of a process of elimination of the above listed statutes.

First, the injury does not arise on contract. And, second, assuming for the sake of this argument that the false imprisonment limitation statute, R.C. 2305.11, is inapplicable, this action does not fall within any of the enumerated sections. Hence, the wrongful imprisonment cause of action could possibly fall within this statutory section and is still time barred.

Ergo, this court, if it finds that it has subject matter jurisdiction and proceeds then to grant Plaintiff standing and further rules that this action for a violation of a personal right survives Sheppard's death - all against existing case and statutory authority - then this action is barred by the statute of limitations and must be dismissed as a matter of law.

IV. THE EQUITABLE DEFENSE OF LACHES BARS THIS ACTION.

If this court disregards all of the above procedural bars, then it must find that the equitable defense of laches bars this action.

Laches is an omission to assert a right for an unreasonable and unexplained period of time. *State ex rel. Scioto County Child Support Enforcement Agency v. Gardner* (1996), 113 Ohio App.3d 4. The defense of laches is available where there is:

- (1) an unreasonable delay or lapse of time in asserting a right;
- (2) the absence of an excuse for delay;
- (3) actual or constructive knowledge of the injury or claimed wrong; and;
- (4) prejudice to the party for whose benefit the defense is invoked.

State ex rel. Polo v. Cuyahoga County Bd. of Elections (1995), 74 Ohio St.3d 143. In this case, all four elements are met.

This case does not present a situation where a plaintiff, through some form of disability, was unable to proceed with litigation. Rather, in this case, so much time has passed and the only legally cognizable plaintiff is deceased. Certainly, the equitable principles of jurisprudence bar this action.

First, the delay in bringing this action is indeed unreasonable. Sheppard was acquitted at his second trial on November 16, 1966. Less than one year later, on November 13, 1967, he filed a civil action against, *inter alia*, the then Cuyahoga County Coroner, seeking damages for his wrongful imprisonment in Ohio jails and prisons, loss of reputation and further seeking compensation for his loss of income and bills accrued from his defense. As discussed above, Sheppard could have joined the State of Ohio in that action but did not. Moreover, he could have filed state claims at that time. *Sheppard v. E.W. Scripps, supra* at 559, fn. 1. But he did not.

Further, in 1986, the General Assembly enacted the Wrongful Imprisonment Statute. Plaintiff filed nothing until 1995, when a complaint (albeit improperly filed in the closed criminal case) was commenced in this court. The proper complaint was filed in 1996, forty-two (42) years after Marilyn Sheppard's murder, thirty (30) years after Sheppard's acquittal at his

second trial, twenty-nine (29) years after his federal claim was filed, twenty-six (26) years after its dismissal, and ten (10) years after the enactment of the subject statute. Certainly this delay is unreasonable.

Second, there exists no viable excuse for the unreasonable delay in asserting this claim. Sheppard always maintained his innocence and corresponding wrongful imprisonment. Evidence of this is his previously filed federal claim, just one year after his acquittal.

Plaintiff may assert that Sheppard's innocence is now provable by new scientific advances, specifically DNA technology, which was not heretofore available. However, DNA evidence has been used in criminal cases as early as 1987. *Andrews v. Florida* (1988), 533 So.2d 841. And its use was affirmed on appeal in 1988. *Id.* Hence, the delay in bringing this action over seven years after its initial debut in a criminal case is indeed unreasonable.

Third, Sheppard obviously had knowledge of his alleged wrongful incarceration. Further, and conceding nothing herein, if the Estate can be a successor plaintiff, then knowledge is imputed to it just as if it were Sheppard himself, thereby satisfying the third element of laches.

Fourth, Defendant has been significantly and unfairly prejudiced by the delay in Plaintiff asserting this claim. Evidence has grown old and has been exposed to contamination. Witnesses have likewise grown old, some have died, and memories have faded. Further, no chain of evidence has been preserved since, as a matter of policy, law enforcement agencies and other related offices rightfully rely on benchmarks, such as the statutes of limitations on actions, in developing policies for records retention and disposition of evidence from trial. In fact, much of the evidence in the underlying criminal case was returned to Sheppard or his family upon his acquittal leaving open at the very least the legitimate concern of evidence contamination, let

alone availability.

Defendant therefore can satisfy all four requirements of the equitable defense of laches and this court should apply it to bar further litigation in this case.

VI. CONCLUSION

The legal arguments presented above - jurisdiction, standing, abatement and survival, and time bar are rooted in equity jurisprudence and public policy interests.

If the legal concepts advanced herein do not procedurally bar this action, then no citizen can be confident of the finality of any court proceeding and all statutes of limitations would be rendered meaningless.

Justice does not require, and should not permit, the substitution of an estate of an individual who may have had a colorable claim when he was alive, particularly in light of the fact that Sheppard himself pursued legal recompense after his acquittal in federal court, but failed to assert, and therefore abandoned, any corresponding state claim. The General Assembly did not intend, and could not have intended, that survivors of formerly incarcerated individuals be vested with the right to pursue such a claim into perpetuity.

Procedurally, this court first lacks subject matter jurisdiction to maintain this action. Second, Plaintiff, by and through Alan Davis as Special Administrator of the Estate of Samuel H. Sheppard, lacks standing to pursue this claim. Not only did this action die with Sheppard, but the General Assembly did not contemplate a plaintiff to recover in a representative capacity under the wrongful imprisonment statute.

SERVICE

A copy of the foregoing Motion for Summary Judgment was mailed this 10 day of September, 1999, to Terry H. Gilbert and George H. Carr, 1700 Standard Building, 1370 Ontario Street, Cleveland, Ohio.

By:

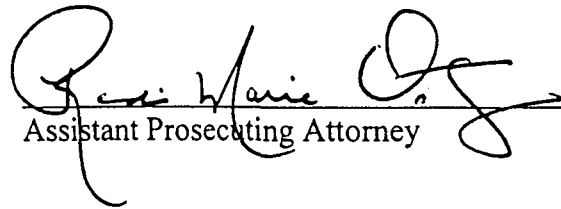

Assistant Prosecuting Attorney

EXHIBIT A

**Copy of Complaint
Filed in Federal Court**

November 13, 1967

United States District Court

FOR THE
Northern District of Ohio, Eastern DivisionMarshal's Slip No.
5 4931

ND-Ohio - Cleveland

CIVIL ACTION FILE NO.

Samuel H. Sheppard

Plaintiff

v.

The E. W. Scripps Company,

Louis B. Seltzer,

Samuel R. Gerber

Defendants

11-87-8338

NOV 13 12 23 PM '67

SUMMONS

to the above named Defendants:

You are hereby summoned and required to serve upon Russell A. Sherman

plaintiff's attorney, whose address is 205 Elyria Savings & Trust Bldg.,
Elyria, Ohio

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

C. B. WATKINS

Clerk of Court.

A. I. Nixon

Deputy Clerk.

Date: 11/13/67

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

C 67-838

THE UNITED STATES DISTRICT
COURT, NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL H. SHEPPARD,

Plaintiff

vs

THE E. W. SCRIPPS COMPANY, et al,

Defendants

PLAINTIFF'S COMPLAINT

FILED

Nov 13 10 53 AM '67

CLERK U. S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Russell A. Sherman
Attorney for Plaintiff
205 E.S.T. Bldg.
Elyria, Ohio

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL H. SHEPPARD
33 Mosel Str.
Duisburg, West Germany,

Plaintiff

vs

THE E. W. SCRIPPS COMPANY
901 Lakeside Ave.
Cleveland, Ohio

LOUIS B. SELTZER
17825 Lake
Cleveland, Ohio

SAMUEL R. GERBER
11424 Cedar Rd.
Cleveland, Ohio,

Defendants

C 67-838

CIVIL NO. _____

NOV 13 10 53 AM '67
FILED
CLERK U. S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Indfk

PLAINTIFF'S COMPLAINT

1. The Plaintiff, Samuel H. Sheppard presently resides at and is domiciled in Duisburg, West Germany. The Defendants, Louis B. Seltzer and Samuel R. Gerber are citizens of the State of Ohio. The Defendant, The E. W. Scripps Company is a corporation incorporated under the laws of the State of Ohio.

2. This action arises under the Fourteenth Amendment to the Constitution of the United States under title 42 §1983 of the United States Code. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand and 00/100 Dollars (\$10,000.00).

3. The Defendant, Louis B. Seltzer was, at the time of the wrongs herein complained of, the editor of a newspaper called "The Cleveland Press"; said newspaper was published by the Defendant, The E. W. Scripps Company.

4. The Defendant, Samuel R. Gerber, was at the time of the wrongs complained of, and still is, the coroner of Cuyahoga County, State of Ohio. As such coroner, he had the duty and the authority to investigate and report causes of deaths occurring within said County.

5. The Plaintiff, Samuel H. Sheppard was in 1954, a physician residing and practicing in Cuyahoga County, State of Ohio, and specializing in neurosurgery. The Plaintiff in 1954 had an active and successful medical practice.

6. On or about the 4th day of July, 1954, Marilyn Sheppard, then the Plaintiff's wife, was murdered in her home on Lake Road in Bay Village, Ohio by a person or persons to the Plaintiff unknown.

7. Following such murder, the Defendant, Samuel R. Gerber, commenced an investigation into its causes and into the identity of the person or persons responsible for it.

8. Following the murder, the Defendants, Louis B. Seltzer and The E. W. Scripps Company commenced an editorial attack upon the Plaintiff in the Cleveland Press, which was designed and calculated to, and did in fact, cause elective prosecuting officials to accuse him of complicity aforesaid.

9. Between July 14, 1954 and July 30, 1954, the Defendants, Louis B. Seltzer and The E. W. Scripps Company conspired with the Defendant, Samuel R. Gerber, to implicate, accuse, arrest and indict the Plaintiff for the said murder, even though each of said Defendants well knew that the Plaintiff had nothing to do with the murder of Marilyn Sheppard. It was part of said conspiracy that the Defendant, Samuel R. Gerber, would use his official position as coroner to act under color of state law and wrongfully implicate, and cause to be tried, the Plaintiff.

10. It was further a part of the conspiracy aforesaid that the Defendants, Louis B. Seltzer and The E. W. Scripps Company would mount and launch an attack upon the Plaintiff calculated to prevent him from obtaining a fair trial before an impartial jury or a fair judge. It was further a part of the said conspiracy for the Defendants, Louis B. Seltzer and The E. W. Scripps Company to so influence, intimidate and control the trial judge who presided at Plaintiff's criminal trial for the murder of his wife, Marilyn Sheppard, as to cause said judge to make wrongful

and adverse rulings to the Plaintiff. It was further a part of said conspiracy for the Defendant, Samuel R. Gerber, to issue statements suggestive of Plaintiff's guilt before an impartial jury could be selected; and to give false and prejudicial testimony against the Defendant at his trial. It was further a part of the conspiracy for the Defendants, Louis B. Seltzer, and The E. W. Scripps Company to publish, during the trial, and to thus call to the attention of the Plaintiff's petit jury, hearing the case against him, prejudicial and inadmissible material which the Defendants well knew could not reach said jury in the courtroom and which the Defendants knew would cause the Plaintiff's wrongful conviction.

11. The Defendants effectuated each of the above-described illegal and wrongful acts, and thus caused, as planned, the wrongful conviction of the Defendant.

12. In so conspiring and acting, the Defendants deprived the Plaintiff of his Federal constitutional right to a fair trial under the Fourteenth Amendment to the United States Constitution.

13. By so conspiring and acting, the Defendants deprived the Plaintiff of Due Process of Law under the Fourteenth Amendment to the Constitution of the United States.

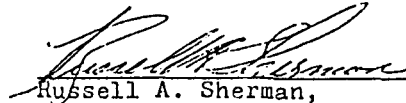
14. By so conspiring and acting, the Defendants deprived the Plaintiff of the rights, privileges, and immunities secured to him by the United States Constitution. As a result of such conspiracy and action by the Defendants, the Plaintiff has been damaged, (1) by his imprisonment for approximately ten years in various jails and prisons in the State of Ohio, (2) by a loss of income for thirteen years as a physician licensed in the State of Ohio, (3) by the fees, costs, and expenses of defending himself against the indictments and judgments wrongfully procured as set forth above, and (4) by the loss of reputation and community respect suffered as a result of these proceedings.

WHEREFORE, Plaintiff demands:

1. That the Defendants be required to pay to the Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' unlawful acts as aforesaid.

2. That Plaintiff have such other and further relief as the law and justice may require.

A trial by jury is hereby requested.


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Attorney for Plaintiff
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323-3332

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Of Counsel