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Memorandum in Opposition to Defendant's Motion to Admit Evidence of Extramarital Affairs

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

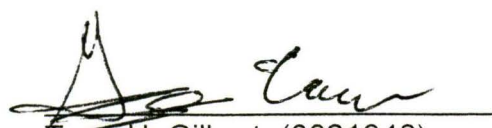
CHARLES MURRAY, Administrator)
of the Estate of)
SAMUEL H. SHEPPARD)
Plaintiff)
vs.)
STATE OF OHIO)
Defendant)

Judge Ronald Suster
Case No. 312322

MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO ADMIT
EVIDENCE OF
EXTRAMARITAL AFFAIRS

Plaintiff, by and through undersigned counsel, hereby submits the attached Memorandum in opposition to the State's Motion requesting that this Court admit testimony regarding extramarital affairs of Dr. Sam Sheppard. The reasons and authorities for denying the State's request are set forth in the attached Memorandum, which is hereby incorporated herein.

Respectfully submitted,



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Attorneys for Plaintiff

Memorandum in Opposition

I. Introduction

On March 5, 2000, this Court issued an omnibus Memorandum Opinion dealing with various evidentiary issues raised by over a dozen written motions filed by both parties to this case. This Court opined that "evidence of prior extramarital affairs (if any) which a reasonable juror could only find had ended prior to July 4, 1954 would most likely not be admissible." Opinion at 7-8. In coming to this conclusion, this Court concluded that such evidence would likely be more prejudicial (by allowing the jury to decide the ultimate question of Dr. Sheppard's innocence based on its reaction to his past infidelity) than probative of a motive for Dr. Sheppard to kill his wife.

In response to this ruling, the State filed a Motion to Admit this evidence, asking this Court to allow the introduction of "evidence of those stress factors which developed over years of betrayal, adultery, humiliation and neglect" in an effort to establish a motive for Dr. Sheppard to kill his wife. This Court should deny the State's motion.

II. Law and Argument

The State first seeks to introduce evidence of Dr. Sheppard's extramarital affairs under the theory that "it is error for a court to deny a party the right to explain or rebut testimony which concerns material that is being introduced for the first time during opponent's case in chief," and that Dr. Sheppard's character has been made an issue in this case through direct testimony by Plaintiff's witnesses. State's Motion at 2. However, this argument should fail for two reasons.

First, the State cites the wrong cases in support of its position. *State v. Grinnell* (1996), 112 Ohio App. 3d 124, 146-47, and its predecessor, *Phung v. Waste*

Management, Inc. (1994), 71 Ohio St. 3d 408, 410-11, both stand for the proposition that a party may not be prevented from bringing in *rebuttal* evidence; nothing in these cases supports the State's proposition that a defendant is permitted to introduce any evidence, regardless of the Rules of Evidence, just because the plaintiff has rested.

Second, and more importantly, the State's position is premised on the wrong rule of evidence - 404(A). *State v. Schmidt* (1979), 65 Ohio App. 2d 239, cited by the State, involves evidence of the character of a victim of crime, which falls under an exception to the general rule prohibiting the introduction of character evidence, Ohio R.Evid. 404(A)(2). This exception is applicable only in criminal cases, and has only been used in situations where the character of the victim has been raised by a criminal defendant. *See State v. Marsh* (1990), 71 Ohio App. 3d 64, 70-71. The State cites no authority for its position that it may allow the introduction of inadmissible evidence by failing to object, and then compound this problem by introducing further inadmissible evidence not falling under one of the exceptions to R.Evid. 404(A). The Court, therefore, correctly noted in its March 5 Opinion that "[t]he State cannot open its own door - and the State's failure to object to inadmissible evidence does not mean that the Plaintiff has similarly failed to object." Opinion at 7. The Plaintiff has not waived any right to object to the State's introduction of character evidence, and this evidence is excluded by R.Evid. 404(A).

The State next seeks to admit evidence of extramarital affairs under the guise of "other acts" to prove motive, which is permitted under R.Evid. 404(B). The State now alleges, adopting the philosophy of Dr. Emanuel Tanay, Plaintiff's expert witness in forensic psychiatry, that Dr. Sheppard engaged in a long-term pattern of humiliation,

neglect, and infidelity, which came to a head on the weekend of July 4, 1954 due to the sudden announcement of Marilyn's pregnancy and the unwelcome attentions of Dr. Lester Hoversten. Putting aside the factual weakness of the State's premise, the State is arguing an inappropriate theory to justify admission of this evidence.

In order to be considered an "other act," the alleged prior acts must be "inextricably related to the crime charged," State's Motion at 10. The State's new definition of "inextricable relation," where every act of Dr. Sheppard is "inextricably related" to a crime of domestic homicide, is unsupportable. "Inextricable relation" is reserved for those acts closely related in time, kind, and purpose to the act at issue, as this Court pointed out in the portion of its Opinion regarding the "other acts" of Richard Eberling, at 9-11. In order to demonstrate that Dr. Sheppard's alleged acts of infidelity, assuming that they occurred, are probative of his motive, the State must first demonstrate that the extramarital affairs were related to his motive for the crime. So far, the State has produced only inadmissible hearsay statements, as well as inadmissible opinions by outsiders to the marriage, in support of its assertion that these affairs somehow served as a motive for the brutal murder. Until the State presents competent, admissible evidence explaining how these prior extramarital affairs could serve as a motive, none of Dr. Sheppard's alleged extramarital affairs should be admitted into evidence. This follows this Court's existing ruling, that "until the Court can make a determination that a reasonable juror could find that Samuel H. Sheppard had a motive to kill Marilyn Sheppard arising from his extramarital activity," evidence of extramarital affairs should be prohibited.

Even assuming that this evidence exists, the State must still explain how the

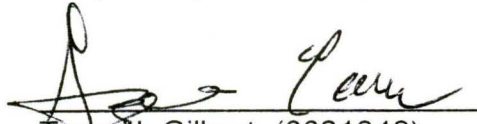
evidence of Dr. Sheppard's extramarital affairs is more probative of motive than it is prejudicial to the jury. The danger of this prejudice is significant; the State seems to argue that because evidence of extramarital affairs is the only evidence they possess regarding motive, its probative value is great. This argument - that because no other evidence exists, the existing evidence must be important and extremely probative - should be recognized as an end run around the R.Evid. 403 balancing test. This Court should apply the proper balancing test, and find, as it already has in the case of the hearsay testimony of Robert Bailey, that prejudice arising from evidence of past extramarital affairs substantially outweighs the probative value of this evidence.

Finally, the evidence the State now seeks to introduce is exactly the kind of evidence it argued should be excluded from the testimony of Dr. Tanay. If the State prevails on its motion, Plaintiff would be forced to introduce plentiful and voluminous evidence of marital harmony and happiness, and recall Dr. Tanay to the stand to explain the significance of the marital history as affecting Dr. Sheppard's alleged motive. The State should not be permitted to take such inconsistent positions.

III. Conclusion

The State's motion to admit evidence of Dr. Sheppard's extramarital affairs should be denied, and this evidence should be excluded, as irrelevant under R.Evid. 402, improper character evidence under R.Evid. 404(A), and as unfairly prejudicial under R.Evid. 403, for the reasons set forth above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terry H. Gilbert", written over a horizontal line.

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George H. Carr (0069372)

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Attorneys for Plaintiff

Certificate of Service

The undersigned certifies that the foregoing Memorandum in Opposition to Defendant's Motion to Admit Other Acts Evidence and Character Evidence has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 14th day of March, 2000.

A handwritten signature in black ink, appearing to read "George H. Carr", written over a horizontal line.

George H. Carr (0069372)

Attorney for Plaintiff