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## State's Memorandum in Support of Admission of Samuel H. Sheppard's Writings in Moretti Book

Marilyn B. Cassidy  
*Cuyahoga County Assistant Prosecutor*

William D. Mason  
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IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

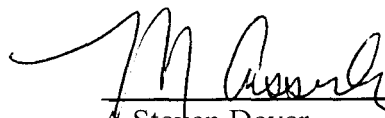
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2000 MAR 27 A 03:17

CHARLES MURRAY, ADMNSTR,	:	CASE NO. 312322
Plaintiff	:	
V	:	JUDGE SUSTER
	:	
STATE OF OHIO,	:	<b>STATE'S</b>
Defendant	:	<b>MEMORANDUM IN</b>
	:	<b>SUPPORT OF ADMISSION OF</b>
	:	<b>SAMUEL H. SHEPPARD'S</b>
	:	<b>WRITINGS IN MORETTI BOOK</b>

The State of Ohio, by and through counsel, William D. Mason, Prosecuting Attorney for Cuyahoga County, and A. Steven Dever, Assistant Prosecutor, submits herewith its Memorandum in Support of admission into evidence of the written statement of Samuel H. Sheppard , inscribed in Phyllis Moretti's copy of the book authored by Sheppard, *Endure and Conquer*. The state submits that the statement is an admission against interest and admissible pursuant to Evid. R. 804 (B)(3), and as evidence attacking the credibility of a hearsay declarant pursuant to Evid. R. 806, all as set forth in the memorandum attached hereto and incorporated herein by reference.

Respectfully Submitted,

WILLIAM D. MASON, CUYAHOGA  
COUNTY PROSECUTOR

  
\_\_\_\_\_  
A. Steven Dever  
Marilyn Cassidy (0014647)  
Assistant Prosecutors  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7785

**MEMORANDUM IN SUPPORT OF SHEPPARD'S WRITTEN ADMISSION  
AS ADMISSIBLE EVIDENCE**

**STATEMENT AGAINST PECUNIARY/ PENAL INTEREST**

*Pecuniary Interest*

In creating the statement against interest exception to the hearsay rule, Evid.R. 804(B)(3) provides:

**Statement against interest.** A statement that was at the time of its making contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculcate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In *Trimble v. Stewart* (1988), WL 14074 (11<sup>th</sup> Dist), unreported, (attached) the reviewing court upheld the admission into evidence, pursuant to Evid. R. 804(B)(3), of two letters from the deceased to her father. Father had forwarded twenty three thousand dollars for the decedent to deposit in her account and to make certain investments on his behalf. Two letters from the decedent acknowledged his ownership of the funds and her intention to do with them as he wished. In affirming the letters' admissibility, the court found the letters to be, at

the time of their making, so far contrary to the declarant's pecuniary or proprietary interest \* \* \* that a reasonable man in his position would not have made the statement unless he believed it to be true.

The statement at issue satisfies criteria set forth by Ohio courts for admission into evidence as an 804 (B)(3) statement against interest. First, Sheppard's statement is clearly against his pecuniary interest. Phyllis Moretti will testify that Sheppard signed the book in April of 1969. At that time, Sheppard had a lawsuit pending against Louis Seltzer, the Cleveland Press and Dr. Samuel Gerber. The complaint, filed in November of 1967, sought damages for alleged injury to his character and for alleged wrongful conviction and ten year imprisonment. The complaint was dismissed from the district court and Sheppard took an appeal to the U.S. Court of Appeals, Sixth Circuit. That court did not render its opinion until January 21, 1970. (See Exhibits A & B, attached). His written admission that he perpetrated the homicide of Mrs. Sheppard would without question invalidate any claim of wrongful conviction or defamation.

### ***Penal Interest***

Evid. R. 804 (B) (3) also provides that statements against one's own penal interest may be admitted as an exception to the hearsay rule . It is significant that despite his ultimate acquittal on the murder charge, and his insulation from further jeopardy resulting from her death, Samuel H. Sheppard's admission to the murder of his wife could subject him to a charge of perjury. Dr. Sheppard testified under oath in his first trial that he did not commit the homicide. Perjury is a felony of the third degree and carries with it the possibility of incarceration and fines.

Dr. Sheppard is indisputably unavailable. Finally, as for indicia of reliability, the State of Ohio will present expert testimony identifying the handwriting as that of Samuel Sheppard. In addition the State will present Susan Fortunato, a forensic chemist for the Secret Service who will identify the ink as ink that was commercially available as of May of 1961.

**THE STATEMENT IS ADMISSIBLE PURSUANT TO EVID. R. 806,  
IMPEACHMENT OF A HEARSAY DECLARANT**

Through various witnesses, including the former testimony of Sam Sheppard, and the examination of Fred Drenkhan, F. Lee Bailey, Sam Reese Sheppard, and others, the hearsay testimony of Samuel H. Sheppard has already been admitted into evidence. As such, the State of Ohio is now permitted to attack the credibility of Samuel H. Sheppard the same as if he had been a testifying witness. Evid R. 806 provides in pertinent part:

(A) When a hearsay statement . . . has been admitted in evidence, the creditability of the declarant may be attacked. . . by any evidence that would be admissible for those purposes if the declarant had testified as a witness.

The credibility of Samuel H. Sheppard is now subject to attack by the State of Ohio by all permissible means, including the presentation of inconsistent statements, bias interest, etc..

When hearsay testimony is admitted in a trial, particularly, when the declarant of hearsay is not presented at trial, Evid. R. 806 operates to alleviate in some degree the disadvantage which arises when the jury is not given an opportunity to view the declarant's demeanor or "to see his credibility and veracity tested under cross examination." *State v. Klein* (1983), 11 Ohio App. 3d 208, 212. Indeed, the refusal to

permit an attack on the credibility of a hearsay declarant is highly prejudicial and has resulted in the reversal of criminal convictions. *State v. Klein, supra* at 212. (Inasmuch as the trial court received in evidence [declarant] Emmons' hearsay statement through [witness] Taylor's testimony, it committed error prejudicial to [criminal defendant] appellant by excluding Emmons' inconsistent written statements offered to impeach him. Reversal [of the conviction] is therefore required.") (*State v. Crossen* October 18 1988), 4<sup>th</sup> Dist. Case No. 902 unreported, (attached) (reversing a conviction and holding that non-testifying "declarant's inconsistent prior or subsequent statements, whether oral or written, may be admitted for purposes of impeaching him.")

The right to impeach a non-testifying declarant pursuant to Evid. R. 806 exists irrespective of whether the party against whom the hearsay was admitted objected and even if the proponent of the hearsay later argues that the statements were not offered to prove the truth of the matter asserted. *State v. Watson* (1991), 61 Ohio St. 3d 1, 6-7.

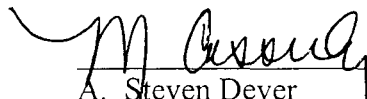
In the instant case, numerous statements of Samuel H. Sheppard have already been admitted into evidence. Accordingly, the State of Ohio is entitled to impeach the credibility of Samuel H. Sheppard as a declarant by use of his writings in the Moreti book.

CONCLUSION

In light of the foregoing, defendant respectfully submits that the testimony of Phyllis Moretti, and the written statement of Samuel H. Sheppard are properly admissible evidence.

Respectfully Submitted,

WILLIAM D. MASON, CUYAHOGA  
COUNTY PROSECUTOR

  
\_\_\_\_\_  
A. Steven Dever  
Marilyn Cassidy (0014647)  
Assistant Prosecutors  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7785

CERTIFICATE OF SERVICE

A copy of the foregoing State's Memorandum in Support of Admission of Samuel H. Sheppard's Writings in Moretti Book, was hand delivered to Terry Gilbert , on March 27, 2000 at Court Room 20 B, 1200 Ontario Street, Cleveland, Ohio 44113.

Respectfully Submitted,

---

Kathleen A. Martin  
Assistant Prosecutor



**\*119921** NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

The **STATE** of Ohio, Plaintiff-Appellee,  
v.  
Terry L. **CROSSEN**, Defendant-Appellant.

No. **902**.

Court of **Appeals** of Ohio, Fifth District,  
Ashland County.

**Oct. 18, 1988.**

Criminal **Appeal** from the Court of Common Pleas  
Case No. 6346.

Robert P. Desanto, Prosecuting Attorney, Ramona  
J. Rogers, Ass't Prosecuting Attorney, Ashland, for  
plaintiff-appellee.

Mark C. Heydinger, Ashland, for defendant-  
appellant.

Before **HOFFMAN**, **WISE** and **TURPIN**, JJ.

*OPINION*

**WISE**, Judge.

**\*\*1** This is an **appeal** from a judgment entered by the Court of Common Pleas of Ashland County sentencing defendant-appellant, Terry L. **Crossen** (appellant), after he had been found guilty by a jury of gross sexual imposition in violation of R.C. 2907.05(A)(3). Appellant argues the following two assignments of error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CONTRAVENTION OF RULE 806 OF THE OHIO RULES OF EVIDENCE, THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY REFUSING TO ALLOW THE DEFENDANT TO ATTACK THE CREDIBILITY OF NON TESTIFYING DECLARANT OF A HEARSAY STATEMENT THROUGH THE USE OF SUBSEQUENT INCONSISTENT STATEMENTS, WHEN THE PRIOR HEARSAY STATEMENTS OF

THE DECLARANT WAS ADMITTED AS AN EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING EVIDENCE OF THE PRIOR SEXUAL ACTIVITY OF THE DEFENDANT.

Appellant was charged in a two-count indictment of having sexual contact with two-year old Rose Dotson (Rose) on two different occasions in January, 1988. A jury found appellant guilty of one count and not guilty of the other count.

At trial, the two-year old Rose did not testify but, over objection of appellant, the State introduced, by way of testimony from the mother, Rose's out-of-court statement made to the mother that appellant "had touched and kissed her cookie." Mother testified that "cookie" was Rose's terminology for "vagina."

Following a prior hearing on the motion to suppress those statements of hearsay, the trial court had ruled:

... that based on case law and the testimony presented, the statements made by the two (2) year old victim [Rose] to her mother constitute excited utterances.

... that the mother, Wendy Dotson, will be entitled to testify to said statements at a trial on this case.

Judgment Entry, March 10, 1988.

Upon cross-examination of the mother, appellant attempted to elicit testimony from the mother concerning other statements of Rose made at the police station. The State objected to the admissibility of the police station statements on the grounds that those statements were not "excited utterances" and were therefore impermissible hearsay. Rose made her initial statement at home at approximately 1:00 a.m. on January 21, 1988; the proffered evidence elicited outside the hearing of the jury establishes that the police station statements were made at approximately "1:00 a.m. to 1:30 a.m." on January 21, 1988; that mother and child were in the police station where a recorded conversation was had between a police clerk, mother, and Rose, the two-year-old. The transcript of the conversation at the police station reveals that Rose, in answering questions of the mother and police clerk, gave answers that were inconsistent within the

statement itself and with her initial statement to her mother. In her transcribed statement, Rose several times denied that the appellant had touched her or did anything to her. Also in the same transcribed statement, Rose indicated that appellant had touched her and at that time she had "told him to stop." See proffered defendant's Exhibit C. The trial court ruled that the police station statements were not "excited utterances" and not an exception to the hearsay rule and therefore could not be inquired into.

## I

**\*\*2** We sustain appellant's first assignment of error on two grounds. One, that the transcribed statement was admissible under Civ.R. 806 and second, that the transcribed statement was admissible under the excited utterance exception to the hearsay rule.

The initial statements of Rose that appellant had touched and kissed her "cookie" were introduced by the mother as an excited utterance exception to the hearsay rule pursuant to Evid.R. 803(2) and therefore they were admitted as substantive evidence to prove the truth of the touching and kissing--the matter asserted. Evid.R. 806 provides for the admissibility of subsequent inconsistent statements of the declarant of the admitted hearsay statement for impeachment purposes. The admission of the inconsistent statement may be offered only to impeach the credibility of declarant and not to prove or disprove the matter asserted. *State v. Kline* (1983), 11 Ohio App.3d 208 (compare *State v. Allender* [Sept. 6, 1988], Stark App. No. CA-7464, unreported):

An extrajudicial statement offered for impeachment purposes is not hearsay since it is not offered for the truth of what it states (Evid.R. 801[C], construed).

Syllabus 1, *State v. Kline*, *supra*.

While the transcribed police station statements can be said to contain inconsistencies as well as consistencies with her initial statement to her mother, we also agree with syllabus 2, 3, and 4 of *Kline*, *supra*, and so hold that:

2. When a witness testifies in court to admissible hearsay statements of a third-party declarant, that declarant's inconsistent prior or subsequent statements, whether oral or written, may be admitted for the purpose of impeaching him. (Evid.R. 806, construed.)

3. In Ohio, the rule is a liberal one with respect to

establishing inconsistency. The threshold inconsistency requirement is met if a statement offered for impeachment can be interpreted in either of two ways, though only one interpretation is actually inconsistent with the testimony of the witness sought to be impeached. Ohio evidence law recognizes contradiction by reference to a material fact omitted in a witness' prior statement or, in the case of a third-party hearsay declarant, an omission in a statement made subsequent in time to one admitted in evidence at trial. By omitting a material fact under circumstances in which it was natural and reasonable for him to assert it, the declarant's subsequent statement thereby contradicts his prior statement admitted in evidence.

4. Whether an inconsistent statement actually impeaches or otherwise discredits its maker is a question of weight for the jury. If the subsequent, extrajudicial statement is susceptible of different meanings, one of which would be inconsistent with the truth of in-court testimony, it is admissible in evidence for the jury to determine which is the true meaning, and to exclude such evidence is prejudicial error. (*Dilcher v. State*, 39 Ohio St. 130, paragraph four of the syllabus, applied and followed.)

**\*\*3** We further hold that the statements made by Rose at the police station at a time "between 1:00 a.m. and 1:30 a.m." are as much an excited utterance as per the statements made to the mother at "approximately 1:00 a.m." and should have been admitted. *State v. Duncan* (1978), 53 Ohio St.2d 215.

We sustain appellant's first assignment of error.

## II

Appellant argues that the trial court committed prejudicial error in admitting evidence of prior sexual activity on the part of the defendant. The record discloses that defendant did not take the stand nor was any evidence by way of any witness or exhibits introduced into evidence by the appellant (the attempted introduction of the inconsistent statement by Rose was excluded by the trial court). The State offered the testimony of one Officer Lattanzi and also introduced, through witness Officer Lattanzi, State's Exhibit 4, which was a statement taken by Lattanzi from the appellant at 12:40 on January 21, 1988. The statement consists of eighteen pages, and on each page the officer admonishes appellant to be truthful, "tell me the truth ... tell me truthfully ... I don't believe that ... tell me the truth ..." etc. Counsel for appellant cross-examined officer Lattanzi extensively

as to the officer's intent behind those statements. On re-direct, Officer Lattanzi was asked by the prosecutor at T.II-216:

Q. In this case, why were you so persistent with your questioning that night, January 20th--that morning when you were questioning Terry Crossen, why were you persistent with your questioning?

A. Terry doesn't like to talk about things like this.

At T.II-217:

Q. Have you had previous experience, talking to Terry Crossen?

A. Yes, sir.

Q. And how many occasions, approximately?

A. Two other occasions that I'm familiar with.

Following that, the prosecutor approached the bench and informed the court that he was going into other acts for the reason to show that this particular act was not an accident. At T.II-219, the prosecutor asked the question:

Q. Officer Lattanzi, you had **stated** to Mr. Fridline [counsel for appellant] that you did not, as he was--Mr. Crossen was telling you that these were accidents, you did not believe him. Do you recall that?

A. Yes, sir.

Q. I would like you to tell the jury exactly *and in detail* each and every reason that you had for not believing him. (Emphasis added).

There was an objection which was overruled and the officer was permitted to testify in detail to previous acts committed by the appellant. The officer was permitted to testify not only that appellant had initially denied the prior acts, and that he had later said that they were accidents, but the officer was permitted to testify further that during the prior acts questioning, appellant had "stated that the four-year-old unzipped his pants and took his penis out and began rubbing on it." That appellant "had placed his finger in this four-year-old's vagina." Without belaboring the matter nor fattening this opinion, we simply sustain appellant's second assignment of error on the authority of *State v. Burson* (1974), 38 Ohio St.2d 157; *State v. Curry* (1975), 43 Ohio St.2d 66; *State v. Lytle* (1976), 48 Ohio St.2d 391; *State v. Thompson* (1981), 66 Ohio St.2d 496.

**\*\*4.** Having sustained both appellant's assignments of error, the judgment of the Court of Common Pleas, Ashland County, is reversed.

HOFFMAN, P.J., and TURPIN, J., concur.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Ashland County, is reversed and this matter is remanded to that court for further proceedings according to law and not inconsistent with the opinion filed herein.

**\*14074 NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.**

Ralph S. TRIMBLE, Plaintiff-Appellee,  
v.  
John M. STEWART, Jr., Administrator of the  
Estate of Janet Ann Stewart, Defendant-  
Appellant.

No. 1327.

Court of Appeals of Ohio, Eleventh District,  
Geauga County.

Feb. 12, 1988.

Civil Appeal from the Court of Common Pleas  
Probate Division, Case No. 85 P.C. 520.

Thomas R. Reinstatler, Cincinnati, for plaintiff-  
appellee.

Barbara J. Gustafarro, Painesville, for defendant-  
appellant.

Before FORD, P.J., and COOK, and CHRISTLEY,  
JJ.

**OPINION**

COOK, Judge.

**\*\*1** On March 6, 1985, Janet Ann Stewart died from injuries sustained in an automobile accident. Her husband, John M. Stewart, Jr., appellant, was appointed administrator of her estate. As administrator, he compiled an inventory of the decedent's estate. Included in the inventory was a money market account in Janet Stewart's name with a balance of \$27,000.

The decedent's father, Ralph S. Trimble, appellee, claimed that \$23,000 of the account was his and that he had given that amount to his daughter to hold and to invest for his benefit. He claimed appellant was aware of this transfer of money and had assured him it would be returned to him once the estate was settled. However, appellant distributed the money to himself as the decedent's heir.

On November 18, 1985, appellee filed a declaratory judgment action in the Geauga County Probate Court

seeking a declaration as to ownership of the \$23,000. He alleged he had given the decedent \$24,000 to hold and to invest for him and that, in June 1984, he asked her to withdraw \$1,000 of his money so he could buy furniture for an apartment. He further alleged that the remaining \$23,000 should be returned to him.

After a bench trial, the court found that appellee had transferred \$24,000 to the decedent, that the transaction failed to be an express trust but was a resulting trust, and that appellant had developed a "coolly calculated scheme to deprive his father-in-law of his life savings." The court found that appellant held the \$23,000 in a constructive trust for appellee.

Appellant has appealed the judgment of the trial court and has filed the following five assignments of error:

"1. The trial court erred in failing to dismiss appellee's complaint where the evidence showed a failure to file a claim against the estate of the deceased within the four month statutory limitation.

"2. The court erred in admitting into evidence letters allegedly written by the deceased as they constituted hearsay and did not come within any exception to the hearsay rule.

"3. The court erred in not finding that the transfer of funds by appellee to his daughter constituted a gift.

"4. The court erred in finding that the transfer of funds from the appellee to his daughter constituted a constructive and/or resulting trust.

"5. The court erred in failing to indemnify the appellant, John M. Stewart, Jr., administrator of the Estate of Janet Ann Stewart, from liability for administration of the estate pursuant to § 2113.56 O.R.C."

The assigned errors are without merit.

Appellant first contends that the court erred in not finding that appellee failed to file a claim against the estate within the four month statutory limitation.

R.C. 2117.07 requires that claims against an estate of a deceased be filed within four months after the appointment of an executor or administrator. If not timely filed, said claims are forever barred.

**\*\*2** However, money held by a deceased in a resulting trust, as in the instant cause, is not a debt

and may be recovered from the personal representative of a deceased trustee without complying with the provisions of R.C. 2117.07. *Staley v. Kreinbuhl* (1949), 152 Ohio St. 315. Generally speaking, traceable trust property may be recovered by the settlor-beneficiary although no claim has been filed against the estate. *Cook v. Crider* (1939), 63 Ohio App. 12.

Appellant's second contention is that the court erred in admitting into evidence, during appellee's case, two letters allegedly written by the deceased tending to prove appellee's claim. He argues that Evid.R. 804(B)(5) allows statements made by a decedent to be offered only by the administrator or executor of a decedent to rebut testimony by an adverse party, this limited use of said statements of a deceased being an exception to the hearsay rule.

The adoption of Evid.R. 601 abrogated the "dead man's" statute, R.C. 2317.03. *Johnson v. Porter* (1984), 14 Ohio St.3d 58. In *Johnson*, the court referred to the Staff Note to Evid.R. 601 to the effect that concomitant to the adoption of said rule was the adoption of Evid.R. 804(B)(5). The note indicated Evid.R. 601 preserves one's competency to testify while Evid.R. 804(B)(5) permits the adverse party to introduce evidence, which would otherwise be hearsay, to rebut such testimony.

However, in the instant cause, the otherwise hearsay evidence was offered by appellee in support of his claim against appellant as administrator of the decedent's estate. The two letters from the decedent were admissible pursuant to Evid.R. 804(B)(3), "Statement against interest." The two letters included statements by the deceased which were at the time of their making "so far contrary to the declarant's pecuniary or proprietary interest \* \* \* that a reasonable man in his position would not have made the statement unless he believed it to be true."

We conclude the court did not err in admitting the two letters from the deceased to appellee in appellee's case.

Appellant's third contention is that the court erred in not finding that the transfer of funds by appellee to his daughter constituted a gift. He argues that transfers made by a father to a daughter, without consideration, are presumed to be gifts. He further argues that this is true in the instant cause because the evidence indicated that the money was put into a money market account in the decedent's name and social security number only, the decedent regularly withdrew the

interest accrued on the principal, and the decedent reported the interest as income on her tax return.

However, the elements of a valid gift *inter vivos* are (1) an intention on the part of the donor to transfer title and right of possession of the property to the donee; and (2) delivery of the subject matter of the gift to the donee with the relinquishment of ownership, dominion, and control over it. *Bolles v. Toledo Trust Co.* (1936), 132 Ohio St. 21.

In the instant cause, the evidence indicated that appellee did not intend to transfer title and right of possession of the \$24,000 to his daughter and did not intend to relinquish ownership of the money to her. On March 21, 1984, after a phone call with appellee, decedent sent him a letter in which she thanked her father for a wedding gift and also assured him that she would do as he wished with a second check. She wrote " \* \* \* and of course you can send me a check that I'll put it in the bank for you--I think you want it in my name and I understand your reason. That's fine." Subsequently, appellee sent the decedent a check for \$1,000 as a wedding gift and a check for \$24,000 to be deposited in a bank for his benefit. On April 9, 1984, decedent sent appellee another letter acknowledging receipt of the checks and reporting that she put the \$24,000 along with her own money into a money market account. The account never fell below \$23,000 after appellee had requested \$1,000 of his money to buy furniture for his apartment.

**\*\*3** We conclude that the court did not err by failing to find that the transfer of funds by appellee to his daughter was a gift.

Appellant's fourth contention is that the court erred in finding that the transfer of funds from appellee to his daughter constituted a constructive and/or a resulting trust.

However, appellant is unable to demonstrate his alleged error. A review of the trial court's decision indicates the court did not find that the subject transfer of funds constituted a constructive and/or a resulting trust. On the contrary, the court found that the decedent held appellee's money in a resulting trust and appellant, as a result of his action in including appellant's trust money in the estate inventory and distributing the money to himself as heir and beneficiary, held appellee's money for him in a constructive trust.

Appellant's last contention is that the court erred in failing to "indemnify" him from liability in the

administration of his wife's estate pursuant to R.C. 2113.56.

R.C. 2113.56, in pertinent part, provides:

"An executor or administrator is not liable for any distribution made in compliance with sections 2113.53, 2113.54, and 2113.55 of the Revised Code, \* \* \*."

R.C. 2113.53 provides:

"At any time after the appointment of an executor or administrator, the executor or administrator may distribute to the beneficiaries entitled thereto under the will, if there is no action pending to set aside the will, or to the heirs entitled thereto by law, in cash or in kind, any part or all of the assets of the estate. \* \* \* If any executor or administrator distributes any part of the assets of the estate before the expiration of the time \* \* \* for the filing of claims, he is personally liable \* \* \* to any claimant who subsequently establishes his claim against the estate. The executor or administrator shall be liable only to the extent that the sum of the remaining assets of the estate \* \* \* are insufficient to satisfy the share of the \* \* \* claims against the estate. The executor or administrator shall not be liable in any case for an amount greater than the value of the estate that existed at the time that the distribution of assets was made and that was subject to \* \* \* the claims."

Appellant argues that since he distributed the estate proceeds in compliance with the statutes, he should be "indemnified" from liability.

**\*\*4** While appellant cites good law, it is not applicable in the instant cause. Here, the trial court found that the transfer of the funds from appellee to his daughter constituted a resulting trust, appellee holding equitable title while the deceased held legal title. Thus, the funds were removed from the funds of the estate and out of the control of appellant as administrator of the estate. Appellant held the funds as trustee for appellee. He thus distributed the funds to himself not as administrator of the estate but as trustee of the constructive trust of the \$23,000.

Thus, the court did not err in failing to "indemnify" appellant from liability under R.C. 2113.56.

Judgment affirmed.

FORD, P.J., concurs with concurring opinion.

CHRISTLEY, J., joins in concurring opinion.

FORD, Presiding Judge, concurring.

While I concur with the majority in this case, I am inclined to be more restrictive. The record in this case, and more specifically the conclusionary entry by the trial court, indicate that the trial court determined that the factual posture here provided the basis to conclude that the moneys in question were the subject of a constructive trust in which the appellant was the trustee for the benefit of the appellee. This determination is evidenced by the following language in the trial court's judgment entry:

"5. Defendant holds the trust fund as trustee of a 'constructive trust' for the benefit of plaintiff."

In its Memorandum of Ruling, the trial court discusses both the concept of constructive trust as well as that of a resulting one. On the subject of constructive trust in this Memorandum, the trial court included the following quotations with attendant citations:

"A constructive trust generally involves the existence of fraud in view of which an equitable title or interest is recognized in some person other than the taker or holder of legal title. Relief in constructive trust cases is granted on the ground of fraud, actual or constructive, or merely upon the breach of the general legal obligation of honesty and fair dealing.

53 Ohio Juris.2d 579, *Fehrman vs. Ellison*, 290 N.E.2d 190

And furthermore:

A 'constructive trust' arises when one having title to property is subject to an equitable duty to convey it to another because he would be unjustly enriched if he were allowed to retain it.

*Croston vs. Croston*, 18 O.A.2d 159, 247 N.E.2 765"

Further, this Memorandum included this additional language:

"The situation existing between the Plaintiff and Defendant surely falls within the purview of the definition of a 'constructive trust' in the last quote. Defendant has legal title to the Plaintiff's money by converting it to his own use. He also is subject to an equitable duty to convey it to another (the Plaintiff)

because he would be unjustly enriched if he were allowed to retain it."

See, also, 53 Ohio Jurisprudence 2d (1962) 391, 392, Trusts, Section 4.

**\*\*5.** Consequently, in affirming the decision of the trial court, I would do so only on the basis that the trial court had properly concluded on the facts in this case that a constructive trust be imposed in favor of the appellee.

United States District Court  
FOR THE  
Northern District of Ohio, Eastern Division

Marshal's Office No.  
54931

MD-Ohio - Cleveland

CIVIL ACTION FILE NO. ....

Samuel H. Sheppard

Plaintiff

v.

The E. W. Scripps Company,

Louis B. Seltzer,

Samuel R. Gerber

Defendants

SUMMONS

Nov 13 12 23 PM '67

U.S. DISTRICT COURT  
CLEVELAND, OHIO

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

IN 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

Wesley 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 67-338

CIVIL NO. \_\_\_\_\_

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

FILED  
Indefk

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 license 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.

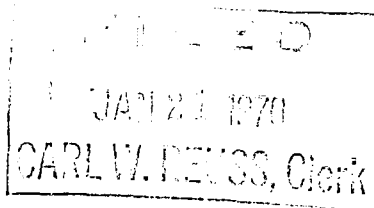
A trial by jury is hereby requested.

  
Russell A. Sherman,  
Attorney for Plaintiff  
205 Elyria Savings & Trust Bldg.  
Elyria, Ohio  
323-3332

F. Lee Bailey  
Forty Court St.  
Boston, Massachusetts

Benjamin L. Clark  
50 West Broad St.  
Columbus, Ohio,  
Of Counsel

No. 18977



# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL H. SHEPPARD,  
*Plaintiff-Appellant,*  
v.  
THE E. W. SCRIPPS COMPANY, LOUIS  
B. SELTZER, SAMUEL R. GERBER,  
*Defendants-Appellees.*

APPEAL from the  
United States District  
Court, Northern Dis-  
trict of Ohio, Eastern  
Division.

Decided January 21, 1970.

Before: PECK, MCCREE and COMBS, Circuit Judges.

PECK, Circuit Judge. The complaint filed in the District Court in this action alleges a deprivation of constitutional rights and seeks recovery of damages under the provisions of 42 U.S.C. § 1983. The complaint alleges the murder of plaintiff's wife July 4, 1954, and his arrest, indictment, trial and conviction therefor. Recovery is sought from the publisher of a newspaper, its editor and the local county coroner, hereinafter referred to as Gerber. It is alleged that as a result of conspiratorial conduct of the defendants during the investigatory and trial proceedings culminating in his conviction plaintiff was deprived of a fair trial, due process of law and the rights, privileges and immunities secured to him by the United States Constitution. The judgment of conviction was subsequently vacated by the Supreme Court and the cause remanded for a new trial in the state court, which resulted in a verdict of acquittal. In the present action, the District Court sustained the defendants' motion to dismiss the complaint,

and this appeal was perfected from the order granting that motion.

Early in its opinion, the District Court offers this observation:

"At the outset, this court determines that the complaint must fail in its entirety if, for any reason, it is insufficient to state a claim as to Gerber, for, since defendants Scripps and Seltzer are chargeable only as private citizens and cannot be said to act 'under color of any State Law,' it is clear from nearly a hundred years of case law that the Civil Rights Act, affording protection against deprivation of civil rights by state action, is not applicable to them, absent a conspiracy with one so acting."

We are in accord with this expression. See *Shelley v. Kraemer*, 334 U.S. 1 (1947); *The Civil Rights Cases*, 109 U.S. 3, 17 (1883); *Mulligan v. Schlachter*, 389 F.2d 231 (6th Cir. 1968); *Cooper v. Wilson*, 309 F.2d 153 (6th Cir. 1962); *Jones v. Alfred H. Mayer Company*, 255 F. Supp. 115 (E.D. Mo. 1966).

In his brief appellant states that the decision of the District Court appealed from was predicated upon two conclusions of law, namely that the complaint did not allege conduct by Gerber "under color of law," and that Gerber's position as coroner was quasi-judicial in character, affording him immunity. While it is true that the opinion of the District Court deals with these two issues at length, that opinion further resolves a third issue adversely to appellant in this language: "[N]othing Gerber is alleged to have done under color of law could properly be said to be the cause of any deprivation of rights the plaintiff allegedly suffered." If this is true, whether or not the acts were done under color of law obviously becomes immaterial.

The issue as to whether Gerber's acts were the cause of the alleged constitutional deprivation has been passed upon by the Supreme Court in the opinion resulting in the vacation

of appellant's conviction and the remand for retrial (*Sheppard v. Maxwell*, 384 U.S. 333 (1966)). That this issue was squarely before the Supreme Court becomes apparent in the first paragraph of Mr. Justice Clark's opinion (384 U.S. 335):

"This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution . . . . We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment."

The opinion proceeds with a detailed review of the facts of the offense and of the trial, which is perhaps best summed up in the often quoted language of Judge Bell of the Supreme Court of Ohio and which is set forth in Justice Clark's opinion (384 U.S. 356):

"Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre . . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St., at 294, 135 N.E.2d 342."

Justice Clark follows that quotation with this observation: "Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public." The very fact that the trial was conducted under such deplorable conditions, however, points up the fact that the deprivation

of appellant's constitutional rights resulted from the unfortunate circumstances accompanying the trial itself rather than from any conduct Gerber may have engaged in. That the Supreme Court found this to be true clearly appears from its opinion, which squarely places the blame where it really belongs under our system of administration of justice, on the trial judge.

After observing that the trial began two weeks "before a highly contested election at which both Chief Prosecutor Mahon and Trial Judge Blythin were candidates for judge-ships," Justice Clark continues (384 U.S. 354-55):

"While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of the 'judicial serenity and calm to which [he] was entitled.' *Estes v. State of Texas* . . . 381 U.S., at 536, 85 S. Ct., at 1629. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."

After a further review of the facts and the publicity attendant upon the trial, the opinion commented upon the absence of rules governing the use of the courtroom by newsmen and insulating the proceedings from prejudicial publicity and disruptive influences, and then concluded "that these procedures would have been sufficient to guarantee Sheppard a fair trial." (384 U.S. 358). Finally, in concluding the opinion Justice Clark stated (384 U.S. 363):

"Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control dis-

ruptive influences in the courtroom, we must reverse the denial of the habeas petition."

The essence of the complaint in the present case is contained in its allegations charging a deprivation of constitutional rights by Gerber, but as is demonstrated in the foregoing quotations the Supreme Court has already determined that the trial judge, not Gerber, is responsible for that deprivation. In view of that determination, it must be here concluded that the District Judge properly found that no cause of action was stated.

Since we find the controlling issue to have been determined by the Supreme Court it is unnecessary to here examine the other grounds relied upon by the District Judge, and we expressly refrain from expressing an opinion on the claimed deficiency of the complaint in not specifically stating that the various acts alleged were committed "under color of law," and as to whether Coroner Gerber was entitled to judicial immunity. We observe, however, that even in the absence of the opinion in *Sheppard v. Maxwell*, *supra*, the greater weight of authority and better reasoned decisions would require us to find the lack of a cause of action. *Striker v. Pincher*, 317 F.2d 780 (6th Cir. 1963); *Cuiksa v. City of Mansfield*, 250 F.2d 700 (6th Cir. 1957); *Dunn v. Gazola*, 216 F.2d 709 (1st Cir. 1954); *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1954); *Reinke v. Walworth, County Sheriff*, 282 F. Supp. 377 (E.D. Wis. 1968); *Sinchak v. Parente*, 262 F. Supp. 79 (W.D. Pa. 1966). In *Striker v. Pincher*, *supra*, this court considered a situation in which plaintiff claimed to have been deprived of constitutional rights by County Sheriff Pincher. We therein observed that "Pincher did not directly deprive Striker of any right of any sort. He had no authority or shadow of authority in respect to the trial. It is not claimed that statute, custom or usage gave Pincher any authority in respect to the trial . . ." (317 F.2d 783). This pronouncement has precise application to the circumstances with which



we are concerned, in which Gerber "had no authority or shadow of authority in respect to the trial." In *Cuiksa, supra*, we considered a situation in which the alleged deprivation, as here, consisted of actions on the part of a defendant in initiating the prosecution and in testifying at the trial. We held that these actions did not deprive the appellant therein of any constitutional right, and with reference to the constable defendant-appellee observed, "Nor is he responsible for the subsequent actions and rulings of the judge." (250 F.2d 704). Similarly, in the present case it could scarcely be contended that Gerber was in any way responsible for Judge Blythin's conduct of the trial. In *Whittington, supra*, another situation existed in which the plaintiff alleged a deprivation of rights, but wherein the court pointed out that "[i]f there was any denial of due process, the efficient cause thereof was the omission of the state probate judge to give notice of the proceeding. That failure is not attributable to these defendants." (201 F.2d 811). The analogy to the case here reviewed is too obvious to require comment.

In accordance with the foregoing, the order of the District Court from which this appeal was perfected is affirmed.

McCREE, Circuit Judge, concurring. I concur in the result reached by my brethren. However, I do not agree with their conclusion that the Supreme Court's determination in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), that appellant's rights were violated by "the [trial] judge's failure to insulate the proceedings from prejudicial publicity and disruptive influences", 384 U.S. at 358 n. 11, necessarily precludes the possibility that his rights might also have been violated by a conspiracy to prosecute him without cause and to prevent a fair trial. Appellant has alleged that certain private persons engaged in publishing newspapers and a public official conspired to corrupt the judicial process in order to obtain his conviction for murder, and, on a motion to dismiss, we must accept these allegations as true. The deprivation of

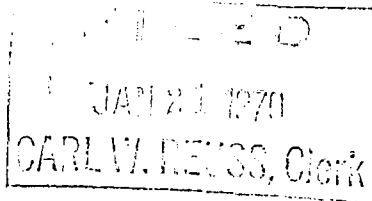
constitutional rights which the Supreme Court found in *Sheppard v. Maxwell* and the deprivation alleged here are not mutually exclusive, and the fact that appellant chose one as the basis for his habeas corpus petition in 1963 should not prevent him from basing a damage suit on the other.<sup>1</sup>

Nevertheless, I agree with the District Judge who held that the allegedly actionable conduct of Coroner Gerber is insulated from liability under the Civil Rights Act by a doctrine analogous to that of judicial immunity. As the District Judge observed in his opinion, the Supreme Court has held that the Civil Rights Act did not abrogate the common law immunity of certain public officials for actions within their jurisdiction.<sup>2</sup> This doctrine applies not only to judges, but also to other officials whose duties are quasi-judicial. *Kenney v. Fox*, 232 F.2d 288 (6th Cir. 1956), *cert. denied sub nom. Kenney v. Killian*, 352 U.S. 855 (1956). And the same immunity has been extended to coroners. *Hebert v. Morley*, 273 F. Supp. 800, 802-03 (C.D. Cal. 1967). I agree with the District Court that the only conduct in which defendant Gerber is alleged to have engaged under color of law must be characterized, under the laws of Ohio and under the Civil Rights Act, as quasi-judicial. See *State ex rel. Harrison v. Perry*, 113 Ohio St. 641, 644-45, 150 N.E. 78 (1925). Since this action cannot be maintained against Gerber, the only defendant who acted under color of law, it must fail as to the others. *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965).

<sup>1</sup> 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. Diversity is not alleged here, and therefore I do not consider whether appellant has a good cause of action for malicious prosecution under the Ohio tort law. See *Sheppard v. The E. W. Scripps Co.*, No. 18,978 (6th Cir. 1969).

<sup>2</sup> *Pierson v. Ray*, 386 U.S. 547 (1967); see *Bradley v. Fisher*, 13 Wall. 335 (1872) (common law immunity). The immunity applies even to acts which are alleged, as are those here, to have been maliciously or corruptly motivated. *Pierson v. Ray*, 386 U.S. at 554. The policy behind this rule is not difficult to discern. As the Supreme Court expressed it, a judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice and corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Id.*

No. 18977



# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

---

SAMUEL H. SHEPPARD,  
*Plaintiff-Appellant,*  
v.  
THE E. W. SCRIPPS COMPANY, LOUIS  
B. SELTZER, SAMUEL R. GERBER,  
*Defendants-Appellees.*

APPEAL from the  
United States District  
Court, Northern Dis-  
trict of Ohio, Eastern  
Division.

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Decided January 21, 1970.

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Before: PECK, MCCREE and COMBS, Circuit Judges.

PECK, Circuit Judge. The complaint filed in the District Court in this action alleges a deprivation of constitutional rights and seeks recovery of damages under the provisions of 42 U.S.C. § 1983. The complaint alleges the murder of plaintiff's wife July 4, 1954, and his arrest, indictment, trial and conviction therefor. Recovery is sought from the publisher of a newspaper, its editor and the local county coroner, hereinafter referred to as Gerber. It is alleged that as a result of conspiratorial conduct of the defendants during the investigatory and trial proceedings culminating in his conviction plaintiff was deprived of a fair trial, due process of law and the rights, privileges and immunities secured to him by the United States Constitution. The judgment of conviction was subsequently vacated by the Supreme Court and the cause remanded for a new trial in the state court, which resulted in a verdict of acquittal. In the present action, the District Court sustained the defendants' motion to dismiss the complaint,

and this appeal was perfected from the order granting that motion.

Early in its opinion, the District Court offers this observation:

"At the outset, this court determines that the complaint must fail in its entirety if, for any reason, it is insufficient to state a claim as to Gerber, for, since defendants Scripps and Seltzer are chargeable only as private citizens and cannot be said to act 'under color of any State Law,' it is clear from nearly a hundred years of case law that the Civil Rights Act, affording protection against deprivation of civil rights by state action, is not applicable to them, absent a conspiracy with one so acting."

We are in accord with this expression. See *Shelley v. Kraemer*, 334 U.S. 1 (1947); *The Civil Rights Cases*, 109 U.S. 3, 17 (1883); *Mulligan v. Schlachter*, 389 F.2d 231 (6th Cir. 1968); *Cooper v. Wilson*, 309 F.2d 153 (6th Cir. 1962); *Jones v. Alfred H. Mayer Company*, 255 F. Supp. 115 (E.D. Mo. 1966).

In his brief appellant states that the decision of the District Court appealed from was predicated upon two conclusions of law, namely that the complaint did not allege conduct by Gerber "under color of law," and that Gerber's position as coroner was quasi-judicial in character, affording him immunity. While it is true that the opinion of the District Court deals with these two issues at length, that opinion further resolves a third issue adversely to appellant in this language: "[N]othing Gerber is alleged to have done under color of law could properly be said to be the cause of any deprivation of rights the plaintiff allegedly suffered." If this is true, whether or not the acts were done under color of law obviously becomes immaterial.

The issue as to whether Gerber's acts were the cause of the alleged constitutional deprivation has been passed upon by the Supreme Court in the opinion resulting in the vacation

of appellant's conviction and the remand for retrial (*Sheppard v. Maxwell*, 384 U.S. 333 (1966)). That this issue was squarely before the Supreme Court becomes apparent in the first paragraph of Mr. Justice Clark's opinion (384 U.S. 335):

"This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution . . . . We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment."

The opinion proceeds with a detailed review of the facts of the offense and of the trial, which is perhaps best summed up in the often quoted language of Judge Bell of the Supreme Court of Ohio and which is set forth in Justice Clark's opinion (384 U.S. 356):

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Justice Clark follows that quotation with this observation: "Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public." The very fact that the trial was conducted under such deplorable conditions, however, points up the fact that the deprivation

of appellant's constitutional rights resulted from the unfortunate circumstances accompanying the trial itself rather than from any conduct Gerber may have engaged in. That the Supreme Court found this to be true clearly appears from its opinion, which squarely places the blame where it really belongs under our system of administration of justice, on the trial judge.

After observing that the trial began two weeks "before a highly contested election at which both Chief Prosecutor Mahon and Trial Judge Blythin were candidates for judge-ships," Justice Clark continues (384 U.S. 354-55):

"While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of the 'judicial serenity and calm to which [he] was entitled.' *Estes v. State of Texas* . . . 381 U.S., at 536, 85 S. Ct., at 1629. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."

After a further review of the facts and the publicity attendant upon the trial, the opinion commented upon the absence of rules governing the use of the courtroom by newsmen and insulating the proceedings from prejudicial publicity and disruptive influences, and then concluded "that these procedures would have been sufficient to guarantee Sheppard a fair trial." (384 U.S. 358). Finally, in concluding the opinion Justice Clark stated (384 U.S. 363):

"Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control dis-

ruptive influences in the courtroom, we must reverse the denial of the habeas petition."

The essence of the complaint in the present case is contained in its allegations charging a deprivation of constitutional rights by Gerber, but as is demonstrated in the foregoing quotations the Supreme Court has already determined that the trial judge, not Gerber, is responsible for that deprivation. In view of that determination, it must be here concluded that the District Judge properly found that no cause of action was stated.

Since we find the controlling issue to have been determined by the Supreme Court it is unnecessary to here examine the other grounds relied upon by the District Judge, and we expressly refrain from expressing an opinion on the claimed deficiency of the complaint in not specifically stating that the various acts alleged were committed "under color of law," and as to whether Coroner Gerber was entitled to judicial immunity. We observe, however, that even in the absence of the opinion in *Sheppard v. Maxwell*, *supra*, the greater weight of authority and better reasoned decisions would require us to find the lack of a cause of action. *Striker v. Pincher*, 317 F.2d 780 (6th Cir. 1963); *Cuiksa v. City of Mansfield*, 250 F.2d 700 (6th Cir. 1957); *Dunn v. Gazola*, 216 F.2d 709 (1st Cir. 1954); *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1954); *Reinke v. Walworth, County Sheriff*, 282 F. Supp. 377 (E.D. Wis. 1968); *Sinchak v. Parente*, 262 F. Supp. 79 (W.D. Pa. 1966). In *Striker v. Pincher*, *supra*, this court considered a situation in which plaintiff claimed to have been deprived of constitutional rights by County Sheriff Pincher. We therein observed that "Pincher did not directly deprive Striker of any right of any sort. He had no authority or shadow of authority in respect to the trial. It is not claimed that statute, custom or usage gave Pincher any authority in respect to the trial . . ." (317 F.2d 783). This pronouncement has precise application to the circumstances with which

we are concerned, in which Gerber "had no authority or shadow of authority in respect to the trial." In *Cuiksa, supra*, we considered a situation in which the alleged deprivation, as here, consisted of actions on the part of a defendant in initiating the prosecution and in testifying at the trial. We held that these actions did not deprive the appellant therein of any constitutional right, and with reference to the constable defendant-appellee observed, "Nor is he responsible for the subsequent actions and rulings of the judge." (250 F.2d 704). Similarly, in the present case it could scarcely be contended that Gerber was in any way responsible for Judge Blythin's conduct of the trial. In *Whittington, supra*, another situation existed in which the plaintiff alleged a deprivation of rights, but wherein the court pointed out that "[i]f there was any denial of due process, the efficient cause thereof was the omission of the state probate judge to give notice of the proceeding. That failure is not attributable to these defendants." (201 F.2d 811). The analogy to the case here reviewed is too obvious to require comment.

In accordance with the foregoing, the order of the District Court from which this appeal was perfected is affirmed.

McCREE, Circuit Judge, concurring. I concur in the result reached by my brethren. However, I do not agree with their conclusion that the Supreme Court's determination in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), that appellant's rights were violated by "the [trial] judge's failure to insulate the proceedings from prejudicial publicity and disruptive influences", 384 U.S. at 358 n. 11, necessarily precludes the possibility that his rights might also have been violated by a conspiracy to prosecute him without cause and to prevent a fair trial. Appellant has alleged that certain private persons engaged in publishing newspapers and a public official conspired to corrupt the judicial process in order to obtain his conviction for murder, and, on a motion to dismiss, we must accept these allegations as true. The deprivation of

constitutional rights which the Supreme Court found in *Sheppard v. Maxwell* and the deprivation alleged here are not mutually exclusive, and the fact that appellant chose one as the basis for his habeas corpus petition in 1963 should not prevent him from basing a damage suit on the other.<sup>1</sup>

Nevertheless, I agree with the District Judge who held that the allegedly actionable conduct of Coroner Gerber is insulated from liability under the Civil Rights Act by a doctrine analogous to that of judicial immunity. As the District Judge observed in his opinion, the Supreme Court has held that the Civil Rights Act did not abrogate the common law immunity of certain public officials for actions within their jurisdiction.<sup>2</sup> This doctrine applies not only to judges, but also to other officials whose duties are quasi-judicial. *Kenney v. Fox*, 232 F.2d 288 (6th Cir. 1956), *cert. denied sub nom. Kenney v. Killian*, 352 U.S. 855 (1956). And the same immunity has been extended to coroners. *Hebert v. Morley*, 273 F. Supp. 800, 802-03 (C.D. Cal. 1967). I agree with the District Court that the only conduct in which defendant Gerber is alleged to have engaged under color of law must be characterized, under the laws of Ohio and under the Civil Rights Act, as quasi-judicial. *See State ex rel. Harrison v. Perry*, 113 Ohio St. 641, 644-45, 150 N.E. 78 (1925). Since this action cannot be maintained against Gerber, the only defendant who acted under color of law, it must fail as to the others. *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965).

<sup>1</sup> 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. Diversity is not alleged here, and therefore I do not consider whether appellant has a good cause of action for malicious prosecution under the Ohio tort law. *See Sheppard v. The E. W. Scripps Co.*, No. 18,978 (6th Cir. 1969).

<sup>2</sup> *Pierson v. Ray*, 386 U.S. 547 (1967); *see Bradley v. Fisher*, 13 Wall. 335 (1872) (common law immunity). The immunity applies even to acts which are alleged, as are those here, to have been maliciously or corruptly motivated. *Pierson v. Ray*, 386 U.S. at 554. The policy behind this rule is not difficult to discern. As the Supreme Court expressed it, a judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice and corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Id.*