

IN THE SUPREME COURT OF OHIO

Julie Peterman	:	Case No. 06-1894
	:	
Plaintiff,	:	
	:	
vs	:	On Appeal from the
	:	Delaware County Court
Dean Stewart	:	of Appeals, Fifth
And	:	Appellate District
Estate of	:	
Josephine Shively,	:	
	:	
Defendants-Appellees.	:	

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**MOTION OF APPELLANT, PHILIP L. PROCTOR,  
FOR RECONSIDERATION**

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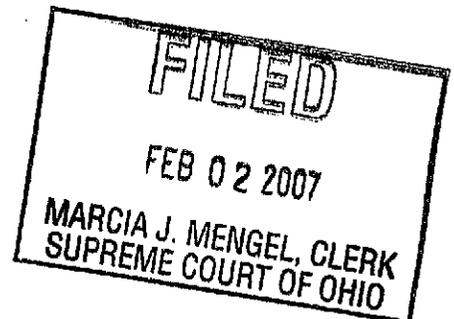
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## MOTION FOR RECONSIDERATION

Appellant Proctor moves, pursuant to Supreme Court Rule XI, § 2, for Reconsideration in this matter. Reconsideration should be granted for the following reasons:

**1. The matter presented regarding the constitutional right to privacy is one of the most precious constitutional rights and this right needs to be protected;**

**2. Recent information has been obtained that there is indication of reservations at the trial court level and a potential willingness to reconsider the issue in question;**

**3. There is a great deal of interest by several attorney organizations, law schools, and other groups who believe that important constitutional rights are at stake in this matter;**

**4. The issue presented as to whether an attorney can file, on behalf of his client, a privacy claim for the taking from the client's home and using of the client's private papers is a very simple and straightforward matter;**

**5. Neither the trial court nor the Court of Appeals set forth any specific violation of the statute by Appellant, and the transcripts provided clearly showed that the trial court was confused on the law;**

**6. Not only will the nearly \$32,000.00 judgment against Appellant clearly be a substantial injustice to him personally, but it will have a chilling effect on advocacy because attorneys's will avoid privacy cases for fear of being sued;**

**7. This case is a companion case to another Supreme Court Appeal in case no. 2006-1983 which remains pending and is apparently getting a closer look by this court; and**

**8. The trial court's ruling that the client did not have a right to bring her action was also a denial of the First Amendment Right to Petition the Government to Redress Grievances.**

## **CONSTITUTIONAL PROVISIONS IN THIS APPEAL**

The constitutional provisions set forth in this appeal are as follows: Article I § 14 of the Ohio Constitution and the Fourth Amendment to the U.S. Constitution regarding Protection Against Seizure of Private Papers and Property; the Fifth and Fourteenth Amendments to the U.S. Constitution regarding the Right to Privacy; Article IV § 3(B)(2) of the Ohio Constitution regarding Final Orders; and the First Amendment to the U.S. Constitution regarding the Right to Petition the Government to Redress Grievances.

## **BRIEF RESTATEMENT OF RELEVANT FACTS**

This appeal stems from a judgment in the amount of \$31,995.90 in the Delaware County Common Pleas Court for joint and several liability against both the client and attorney for allegedly filing a “frivolous” lawsuit pursuant to ORC 2323.51 because the suit was allegedly not warranted by law, or a good faith argument for extension, modification, or reversal of existing law. The trial court made no ruling regarding why it felt the action was not warranted by law and the Court of Appeals refused to review the law. Although it is undisputed that the causes of action are recognized in Ohio, Appellee has argued that the facts alleged are not grounds for an invasion of privacy claim. The alleged facts in the Complaint were that Appellee took private papers from the client’s home, secreted the papers from her, filed them on the public record, and otherwise disseminated the documents. The private papers included medical records, social security documents containing her social security number, her children’s psychological reports during a divorce, bank account statements, and attorney-client work product notes. Thus, clearly and unquestionably a valid cause of action would apply in this matter.

## PROPOSITIONS OF LAW SET FORTH IN THIS APPEAL

Appellant set forth the following Propositions of Law in his appeal:

PROPOSITION OF LAW NO. 1: Where constitutionally protected personal and private papers were taken from the home of the complaining party, secreted from her, and then filed on a public court record without any relevance to the court matter, an action for invasion of privacy, intentional infliction of emotional distress, and abuse of process is cognizable as warranted by law, or an argument for extension, modification, or reversal of existing law. Therefore, such an action cannot be grounds for a finding of "frivolous conduct" pursuant to ORC 2323.51.

PROPOSITION OF LAW NO. 2: The ruling set by the Ohio Supreme Court in *Kala v Aluminum Smelting & Refining Co* and *Russell v Mercy Hospital* is to be clarified such that where the trial court orders an attorney to be withdrawn, that is a constitutional final order and sets the jurisdictional limit of filing for attorney's fees pursuant to ORC 2323.51. This would especially be true where the motion for fees was not filed until over five months after the attorney was ordered withdrawn and over four months after the case was concluded.

## ARGUMENT IN SUPPORT OF MOTION FOR RECONSIDERATION

### **I. The Constitutional Right to Privacy must Be Protected.**

Even as this matter is being reviewed, there are courageous men and women fighting and dying to protect our constitutional freedoms. Yet one of the most basic freedoms under the constitution is being abolished by the lower courts. Moreover, this appeal does not seek any in depth analysis of the right to privacy. Rather, it simply asks that the highest court in the state recognize that a person has a place to go when their constitutionally protected right to privacy has been violated. This has nothing to do with money damages or personal animosities that can exist between litigating parties. Further, the dollar value of the paper is not the issue, but rather the personal importance of the private information in the papers.

The privacy rights of the citizens of Ohio are in serious jeopardy. Not only because of the

implications of this case, but also because attorneys will not want to take a privacy case for fear of being sued. Indeed this case involves a substantial constitutional matter because it asks that this court recognize that a cause of action can be brought to prevent the use of, and obtain the return of, private papers taken from one's home.

## **II. There Is a Potential Willingness to Reconsider by the Trial Court.**

Just before this court entered its dismissal entry on January 24, 2006, Appellant spoke to a local Delaware County attorney, Anthony M. Heald, who stated that the trial judge had indicated that he had some reservations about his ruling and was thinking about reconsidering and reversing his decision. This fact was made known to counsel for Appellees before this court entered its January 24, 2007 Entry, and Appellant was seeking further information regarding this development at the time the dismissal was filed.

Therefore, should this court decide not to accept jurisdiction for briefing and argument, then Appellant would request that this court, at the least, remand this matter to the trial court for reconsideration. (This court may wish to first remand this matter to the Court of Appeals to provide instructions to the trial court as to what to review. That may be helpful especially since a reading of the transcripts provided to the Court of Appeals clearly showed that the trial court readily admitted that it was unsure as to the law regarding the matter before the court.)

## **III. There Is a Great Deal of Interest by Public Groups in this Appeal.**

In Appellant Proctor's Notice Regarding Amicus Curiae, he set forth several organizations who indicated an interest in filing an Amicus brief upon jurisdiction being granted (e. g., the Ohio State Bar Association, the Ohio Academy of Trial Lawyers, and the University of Dayton College of Law). In fact, there were many more organizations that expressed interest in the matter being

presented to this court regardless of whether they may have actually come forward with an Amicus or not.

Thus, for example, nearly every law school in Ohio expressed at least some degree of interest due to the concern for the ability of future lawyers to advocate for clients without fear of reprisal. These lawyers are sworn in by this very court every year. Appellant asks that this court accept this appeal so that the next time attorneys are being admitted to the bar, this court can tell them that the highest court in Ohio was protecting them even before they became members of the bar. But, just as importantly, Appellant asks that this court speak to all the interested groups and citizens of Ohio by accepting this appeal and thereby acknowledging the importance of the constitutional rights involved.

#### **IV. The Issues Presented in this Appeal Are Very Simple and Straightforward.**

Proposition of Law I merely asks this court to determine whether a cause of action for invasion of privacy can be brought or is, at least, a potentially cognizable action where private papers have been taken and made public. To do so sends a message to people like Appellees to not take someone's private papers; and, if you have possession of them for some reason, return them. Proposition of Law II only asks this court to determine the subject matter and personal jurisdiction of an attorney where the attorney has been ordered to be withdrawn. In this action, Attorney Proctor was held liable for all fees before and after his disqualification even though the action was brought against him five months after his withdrawal and four months after the case was concluded.

Thus, the issues presented in this case are simple and straightforward. Further, if this court would not accept jurisdiction for briefing and argument, Appellant requests, at the least, that this court summarily remand the matter to the trial court or Court of Appeals with instructions to make

a proper review.

**V. Neither of the Lower Courts Set Forth Any Specific Violation of the Statute by Appellant.**

The trial court was admittedly confused on the law (as was shown in the transcripts provided to the Court of Appeals) and made no finding of any particular conduct regarding Appellant. The trial court merely set forth a vague statement that the action was not warranted by law. Further, the Court of Appeals did not affirm the trial court's decision based upon any rule of law. Rather, the Court of Appeals passed on ruling altogether finding that the record provided was not adequate to determine the assignments of error presented.

Moreover, the Court of Appeals found that if the trial court's finding of "frivolous conduct" was legally unsupported, it would be an abuse of discretion (see Exhibit A, paragraph 48, pg. 9). However, the Court of Appeals also found that while the action filed may not have been "frivolous," the Appellate Court did not feel that it had an adequate record to make that determination (see Exhibit A, paragraph 63, pg. 12).

Moreover, neither the trial court nor the Court of Appeals set forth any specific violation of the statute by Appellant Proctor. Thus, the Supreme Court should accept jurisdiction, or remand this matter to the trial court or Court of Appeals, if for no other reason than to demand fairness and merit precision from the lower courts. In sum, Appellant Proctor should not be left paying a nearly \$32,000.00 judgment with no idea of what he was accused of, much less why the trial court ruled as it did.

**VI. Refusal to Accept this Case Would Have a Chilling Effect on Zealous Advocacy.**

Accepting jurisdiction in this matter will prevent a chilling effect on attorney's need to be a zealous advocate for his client. The filing of the invasion of privacy case was clearly and obviously

within the bounds of advocacy. Attorneys should not have to worry that they are going to be sued, much less saddled with a huge judgment, if they take a privacy case. Without an attorney, many clients will not know how to bring a case to protect themselves from invasion of privacy. Moreover, attorneys, as much as clients, need to know that filing for invasion of privacy is safe from personal attack by the opponent in the litigation.

#### **VII. This Case Is a Companion Case to Another Supreme Court Appeal.**

Regarding Proposition of Law I, this case is a companion case to Supreme Court Appeal No. 2006-1983. This was the separate appeal by the client and could be consolidated for briefing and argument if jurisdiction were granted. The companion appeal remains pending and is apparently getting a closer look by this court. Both appeals have merit and should be reviewed, and therefore, this court should reconsider its dismissal as to this case.

#### **VIII. The First Amendment Right to Petition.**

The right of the client to bring action to obtain redress of her grievance is a right guaranteed by the First Amendment to the U.S. Constitution. Although this argument was not specifically addressed in Appellant's Jurisdictional Memorandum, it is worth the consideration of this court in determining jurisdiction.

In *United Mine Workers of America v. Illinois State Bar Assoc.*, (1967), 389 US 217, 19 L Ed 2d 426, pg. 430, the Supreme Court described the right to petition as follows:

“... [The right] to petition for redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights. [This right, moreover, is] intimately connected, both in origin and in purpose with the other First Amendment rights of free speech and free press. ‘All these, though not identical, are inseparable.’ The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees. . . .”

*Edwards v. South Carolina*, (1963), 372 US 229, 9 L Ed 2d 697, pg. 703-704, described the right to petition as:

“ . . .an opportunity essential to the security of the Republic, [and it] is a fundamental principle of our constitutional system.”

Furthermore, in *LeBlanc-Sternberg v. Fletcher*, (1991), 781 F Supp 261, pg. 265, the court said that,

“The right to petition is fundamental to the very idea of a republican form of government.” And, in

*Graham v. Henderson*, (1996), 89 F Supp 75, pg. 80, the court said:

“Because of its central importance, the right is ‘substantive rather than procedural, regardless of the procedural means applied.’”

In *California Motor Transport Co. v. Trucking Unlimited*, (1972), 404 US 508, 30 L Ed 2d 642, pg. 646, the U.S. Supreme Court said that no court can impute a Congressional intent in any statute to invade this freedom. In conclusion, the client had a legitimate grievance and she had a constitutionally protected right to have that matter addressed by the court. Therefore, the trial court’s ruling that she had no right to bring the action was in violation of the First Amendment to the U.S. Constitution, and this is another reason which this court should accept jurisdiction and review this matter.

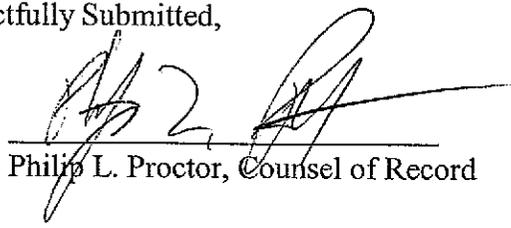
### **CONCLUSION AND REQUEST FOR RELIEF**

For the reasons discussed above, Appellant Proctor requests that this Motion For Reconsideration be granted. Appellant alternatively requests that, if this court decides not to accept this appeal for briefing and argument, that this court remand this matter to the trial court for reconsideration (as the trial judge has indicated reservations regarding his ruling and a potential willingness to reconsider this case). Appellant also alternatively requests a remand to the Court of Appeals for a proper review because the Court of Appeals did not review the merits in this matter.

Appellant further requests that a stay be issued regarding the ongoing wage garnishment issued against Appellant.

Respectfully Submitted,

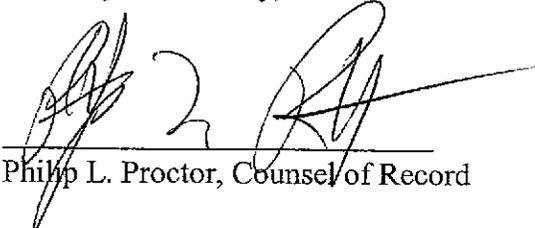
By:

  
Philip L. Proctor, Counsel of Record

COUNSEL OF RECORD  
AND APPELLANT

**PROOF OF SERVICE**

I hereby certify that a copy of this Motion For Reconsideration was sent by regular U.S. mail to Fred J. Beery, Attorney for Appellee, Dean Stewart, at 125 N. High St., Hillsboro, Ohio 45133, to Dennis Morrison, Attorney for Appellee, Estate of Josephine Shively, at Means, Bichimer, Burkholder, and Baker, 2006 Kenny Rd., Columbus, OH 43221-3502, and to Julie Peterman, Plaintiff, at P. O. Box 510, Delaware, OH 43015 this 2nd day of February, 2007.

  
Philip L. Proctor, Counsel of Record

COUNSEL OF RECORD  
AND APPELLANT

**Exhibit A**

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

JULIE PETERMAN	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellant	:	Hon. W. Scott Gwin, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 05-CAE-12-0082
DEAN STEWART, ESTATE OF	:	
JOSEPHINE SHIVELY	:	
	:	
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Case No. 02-CV-C-08549

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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APPELLEE, DEAN STEWART

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FILED  
SEP - 6 AM 10:25  
JAN ANTONOPLOS  
CLERK

Court of Appeals  
Delaware Co., Ohio  
I hereby certify the within be a true  
copy of the original on file in this office.  
Jan Antonoplos, Clerk of Courts  
By [Signature] Deputy

*Boggins, J.*

{¶1} This appeal, and that of related Case No. 05-CAE-12-0084, concern the rulings of the Common Pleas Court of Delaware County that the filing of an action by Appellant Peterman who was represented until withdrawal by Appellant-Attorney Philip L. Proctor constituted frivolous conduct entitling Appellees Dean Stewart and the Estate of Josephine Shively to attorney fees of \$30,215.90 from Appellant Proctor and \$1,780.00 from Appellant Peterman.

**STATEMENT OF THE FACTS AND CASE**

{¶2} The Complaint in this cause essentially asserted invasion of privacy by the filing of documents in Probate Court and the publishing of same, which matters related to personal information of Appellant Peterman unrelated to the Estate of Josephine Shively, her aunt. Appellee Stewart served as Executor of such Estate.

{¶3} Intentional infliction of emotional distress was also included in the Complaint.

{¶4} While injunctive relief was referenced in Count Five of the Complaint, the prayer was for monetary damages only.

{¶5} The three Assignments of Error of Appellant Philip L. Proctor are:

**ASSIGNMENTS OF ERROR OF APPELLANT PHILIP L. PROCTOR**

{¶6} "1. IN THE JUDGMENT ENTRY FILED ON NOVEMBER 22, 2005, THE TRIAL COURT FAILED TO ANALYZE THE ATTORNEY AND CLIENT SEPARATELY AND THEREFORE FAILED TO RECOGNIZE PROCEDURAL AND LEGAL ISSUES THAT WOULD APPLY TO THE ATTORNEY WHICH INCLUDED THE FACT THAT APPELLEES WERE OUT OF RULE, APPELLEES DID NOT PROVIDE PROPER

NOTICE, AND THAT THE ATTORNEY DID NOT ACT WILFULLY [SIC] CONTRARY TO THE STATUTE OR CIVIL RULE.

{¶7} "A. APPELLEE-ESTATE FILED OUT OF RULE AS TO ATTORNEY PROCTOR.

{¶8} "B. BOTH APPELLEES WERE OUT OF RULE AS TO ATTORNEY PROCTOR BECAUSE HE WITHDREW UNOPPOSED FROM THE CASE.

{¶9} "C. ATTORNEY PROCTOR WAS NOT SERVED WITH THE MOTION.

{¶10} "D. NO NOTICE WAS PROVIDED AS TO ATTORNEY PROCTOR.

{¶11} "E. AN ATTORNEY CANNOT BE LIABLE UNLESS THERE WAS MISCONDUCT THAT WAS DONE WILFULLY [SIC].

{¶12} "F. AN ATTORNEY CANNOT BE LIABLE FOR ADVOCATING THE POSITION OF HIS OWN CLIENT.

{¶13} "II. REGARDING THE JUDGMENT ENTRY FILED ON NOVEMBER 22, 2005, THE ATTORNEY CANNOT BE LIABLE WHERE THE CLIENT WAS GRANTED THE VERY RELIEF SHE SOUGHT.

{¶14} "III. IN THE JUDGMENT ENTRY FILED ON NOVEMBER 22, 2005, THE TRIAL COURT ERRED WHEN IT FOUND THAT MATTERS SET FORTH IN THE COMPLAINT WERE NOT WARRANTED BY LAW.

## II .

{¶15} We shall first address the Second Assignment of Error of Appellant Proctor.

{¶16} Appellant Proctor asserts no liability claiming that the order to return Appellant Peterman's papers was the relief Appellant Julie Peterman requested. The

Complaint causes of action and relief requested are set forth on page 2 of this Opinion. Monetary damages only appeared in the prayer, not the return of papers. These Assignments of Error are therefore unfounded.

I., III.

{¶17} Before we address the remaining Assignments, we must consider Civ.R. 11 and R.C. §2323.51.

{¶18} Civil Rule 11 states in part:

{¶19} "The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted."

{¶20} Clearly, the filing of a frivolous pleading is not affected by subsequent withdrawal by the attorney.

{¶21} Revised Code §2323.51 (A) and (B)(1)(2), (C) and (D) provide in part:

{¶22} "Definitions; award of attorney's fees as sanction for frivolous conduct

{¶23} "(A) As used in this section:

{¶24} "(1) "Conduct" means any of the following:

{¶25} "(a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action;

{¶26} " \* \* "

{¶27} "(B)(1) Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in division (E)(2)(b) of section 101.15 or division (I)(2)(b) of section 121.22 of the Revised Code, at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section.

{¶28} "(2) An award may be made pursuant to division (B)(1) of this section upon the motion of a party to a civil action or an appeal of the type described in that division or on the court's own initiative, but only after the court does all of the following:

{¶29} "(a) Sets a date for a hearing to be conducted in accordance with division (B)(2)(c) of this section, to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;

{¶30} "(b) Gives notice of the date of the hearing described in division (B)(2)(a) of this section to each party or counsel of record who allegedly engaged in frivolous conduct and to each party who allegedly was adversely affected by frivolous conduct;

{¶31} "(c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division, allows the parties and counsel of record involved to present any relevant evidence at the hearing, including evidence of the type described in division (B)(5) of this section, determines that the conduct involved was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made. If any party or counsel of record who allegedly engaged in or allegedly was adversely affected by frivolous conduct is confined in a state correctional institution or in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, the court, if practicable, may hold the hearing by telephone or, in the alternative, at the institution, jail, or workhouse in which the party or counsel is confined.

{¶32} "(3) The amount of an award made pursuant to division (B)(1) of this section that represents reasonable attorney's fees shall not exceed, and may be equal to or less than, whichever of the following is applicable:

{¶33} "(a) If the party is being represented on a contingent fee basis, an amount that corresponds to reasonable fees that would have been charged for legal services had the party been represented on an hourly fee basis or another basis other than a contingent fee basis;

{¶34} "(b) In all situations other than that described in division (B)(3)(a) of this section, the attorney's fees that were reasonably incurred by a party.

{¶35} "(4) An award made pursuant to division (B)(1) of this section may be made against a party, the party's counsel of record, or both.

{¶36} "(5)(a) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded reasonable attorney's fees and the party's counsel of record may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of the reasonable attorney's fees, an itemized list or other evidence of the legal services rendered, the time expended in rendering the services, and whichever of the following is applicable:

{¶37} "(i) If the party is being represented by that counsel on a contingent fee basis, the reasonable attorney's fees that would have been associated with those services had the party been represented by that counsel on an hourly fee basis or another basis other than a contingent fee basis;

{¶38} "(ii) In all situations other than those described in division (B)(5)(a)(i) of this section, the attorney's fees associated with those services.

{¶39} "(b) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded court costs and other reasonable expenses incurred in connection with the civil action or appeal may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of the costs and expenses, an itemized list or other evidence of the costs and expenses that were incurred in connection with that action or appeal and that were necessitated by the frivolous conduct, including, but not limited to, expert witness fees and expenses associated with discovery.

{¶40} "(C) An award of reasonable attorney's fees under this section does not affect or determine the amount of or the manner of computation of attorney's fees as between an attorney and the attorney's client.

{¶41} "(D) This section does not affect or limit the application of any provision of the Rules of Civil Procedure, the Rules of Appellate Procedure, or another court rule or section of the Revised Code to the extent that the provision prohibits an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal or authorizes an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal in a specified manner, generally, or subject to limitations."

{¶42} The assertion that the respective motions of Appellees, Estate of Josephine Shively and Dean Stewart were untimely is without merit.

{¶43} The case was voluntarily dismissed by Appellant Peterman on November 24, 2003. The Estate and Appellee Stewart filed motions on December 4, 2003, with an amendment by the Estate on March 11, 2004.

{¶44} These motions were filed within the statutory 30-day period.

{¶45} " 'A frivolous claim is a claim that is not supported by facts in which the complainant has a good-faith belief, and which is not grounded in any legitimate theory of law or argument for future modification of the law.' " *Burrell*, supra, 128 Ohio App.3d at 230, 714 N.E.2d 442, quoting *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 12, 663 N.E.2d 657. Whether a party has made a good faith argument under the law is a legal question subject to de novo review on appeal. *Curtis v. Hard Knox Energy, Inc.*, 11th Dist. No. 2005-L-023, 2005-Ohio-6421, 2005 WL 3274990, at ¶ 15, citing *State Farm*

*Ins. Cos. v. Peda*, 11th Dist. No. 2004-L-082, 2005-Ohio-3405, 2005 WL 1538623, at ¶ 28. *Bowersmith v. United Parcel Serv., Inc.*, March 27, 2006, 166, Ohio App.3d 22, 2006-Ohio-1417.”

{¶46} Also, the voluntary dismissal of the case has no bearing on the question of an award for frivolous conduct.

{¶47} “\* \* \* sanctions are a collateral issue over which the trial court retains jurisdiction. *Burrell v. Kasscieh* (1998), 128 Ohio App.3d 226, 229-230, 714 N.E.2d 442.

{¶48} If the award for frivolous conduct was legally unsupported, this would constitute an abuse of discretion.

{¶49} In order to find an abuse of discretion, we must determine that the trial court’s decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. We must look at the totality of the circumstances in the case sub judice and determine whether the trial court acted unreasonably, arbitrarily or unconscionably.

{¶50} We now direct our attention to the asserted causes of action of invasion of privacy and intentional infliction of emotional distress and abuse of process.

{¶51} In *Henson v. Henson* (2005), 9<sup>th</sup> Dist. App. No. 22772, 2005-Ohio-6321, the court stated:

{¶52} “The tort of invasion of privacy includes four separate torts: (1) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in

a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness."

{¶53} The Sixth District Court of Appeals in *Villa v. Village of Elmore* (2005), 6<sup>th</sup> Dist. App. No. L-05-1058, 2005-Ohio-6649 held:

{¶54} "Ohio courts have recognized that the following five elements must be proved to establish a claim for invasion of privacy by publication of private facts: (1) the disclosure was public in nature; (2) the facts disclosed concerned an individual's private life, not his public life; (3) the matter publicized would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; (4) the publication was made intentionally, not negligently and (5) the matter publicized was not of legitimate concern to the public. *Early v. The Toledo Blade* (1998), 130 Ohio App.3d 302, 342, 720 N.E.2d 107, citing *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163, 166-167, 499 N.E.2d 1291."

{¶55} The requirements of proof to establish intentional infliction of emotional distress were set forth in *Cobb v. Mantua Township Board of Trustees*, 11<sup>th</sup> Dist. App. No. 2003-P-0112, 2004-Ohio-5325:

{¶56} "An individual can recover for intentional infliction of severe emotional distress when a defendant, ' "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress in [the plaintiff] \* \* \*.' " *Yeager v. Local Union 20, Teamsters, Chauffers, Warehousemen & Helpers of America* (1983), 6 Ohio St.3d 369, 374, 453 N.E.2d 666, quoting Restatement of the Law 2d, Torts (1969) 71, Section 46(1)."

{¶57} Also, in *Pritchard, M.D., v. Algis Sirvaitis & Associates*, 8<sup>th</sup> Dist. App. No. 86965, 2006-Ohio-3153, as to abuse of process, the court set forth the requirement of abuse of process:

{¶58} "In order to establish a claim for abuse of process, appellant was required to satisfy the following elements: 1) a legal proceeding was set in motion against him in proper form and with probable cause; 2) the proceeding was perverted by the plaintiff to attempt to accomplish an ulterior purpose against the defendant for which it was not designed; and 3) direct damage resulted to appellant from the wrongful use of process. *Robb, supra*, at 270, citing *Yaklevich v. Kemp, Schaeffer and Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 298."

{¶59} The arguments of Appellant Peterman's papers being stolen from the abandoned residence or received from the police is inconsequential, as the unwarranted filing of personal papers, is the issue, if such occurred.

{¶60} In order to determine if the allegations of the Amended Complaint are frivolous, we must determine the alleged basis thereof. While proof of such would not be required at the hearing as to frivolous conduct, the court must be provided information claimed to support such causes of action.

{¶61} When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. Because Appellant has failed to provide this Court with those portions of the transcript necessary for resolution of the assigned errors, we must presume the

regularity of the proceedings below and affirm, pursuant to the directive set forth above in *Knapp, supra*.

{¶62} We note that a court stenographer's services were, by several entries, taxed as costs for the initial hearing on the fee motions and for subsequent continuation dates, but we are unaware of what occurred without providing transcripts.

{¶63} While there may or may not have been a non-frivolous basis at least for the claims of invasion of privacy for the filing of personal papers of Appellant Peterman in the Estate, or for abuse of process, we are unable to make that determination without an appropriate record and must presume the correctness of the trial court's determination.

{¶64} The procedural assertions of Appellant Proctor are without merit as the hearing was set and continued several times without known raising of this objection.

{¶65} Appellant Proctor's Assignments of Error Nos. I and III are denied.

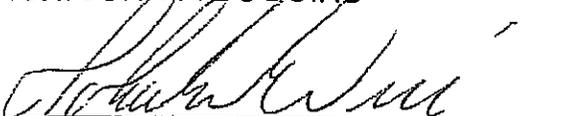
{¶66} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Boggins, J.

Wise, P.J. and

Gwin, J. concur.

  
HON. JOHN F. BOGGINS

  
HON. JOHN W. WISE

  
HON. W. SCOTT GWIN

**Exhibit B**

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JULIE PETERMAN

Plaintiff-Appellant

-vs-

DEAN STEWART, ESTATE OF  
JOSEPHINE SHIVELY

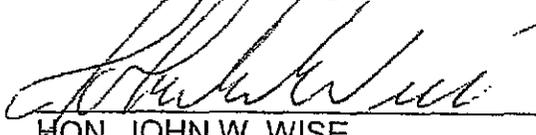
Defendants-Appellees

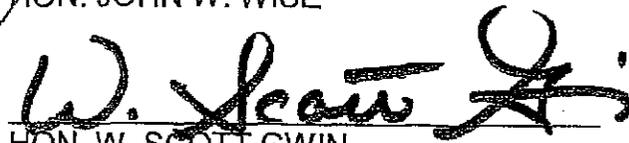
JUDGMENT ENTRY

CASE NO. 05-CAE-12-0082

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellant.

  
HON. JOHN F. BOGGINS

  
HON. JOHN W. WISE

  
HON. W. SCOTT GWIN

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FILED  
06 SEP -6 AM 10:26  
JAN ANTONIOPLOS  
CLERK