

IN THE SUPREME COURT OF OHIO

JULIE PETERMAN,

Plaintiff,

vs.

DEAN STEWART, et al.,

Defendants/Appellee. :

:  
: Case No. 06-2227  
:  
: On Appeal from the  
: Delaware County Court of Appeals,  
: Fifth Appellate District  
: Case No. 05-CAE-12-0082  
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APPELLEE ESTATE OF JOSEPHINE SHIVELY'S  
MEMORANDUM CONTRA MOTION OF APPELLANT TO REMAND

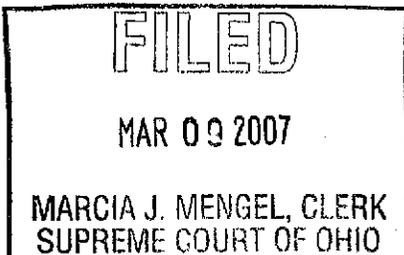
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Before addressing the arguments raised by Appellant Philip L. Proctor (“Proctor”) in his Motion to Remand, Appellee The Estate of Josephine Shively (“Estate”) must point out to this Court an extreme and bold inaccuracy presented by Appellant Proctor. In the Motion to Remand, Appellant Proctor refers to the September 6, 2006 Opinion of the Fifth District Court of Appeals (attached to Proctor’s Motion to Remand as Exhibit A), stating “the Court of Appeals agreed that they did not see any grounds to find a violation of the statute, but did not reverse the trial court because the Appellate Court had changed its previous position and now wanted an additional record.” Motion to Remand, p. 2. This statement is entirely false and Appellee Estate is shocked Appellant Proctor would make such a bold misrepresentation to this Court. As is evidenced by an elementary review of the Opinion, the Fifth District Court of Appeals expressed no such opinion. The Fifth District was unable to opine on the issue of frivolous conduct because Appellant Proctor failed to provide the reviewing court with an appropriate record.

This latest filing of Appellant Proctor provides this Court with yet another example of the course of conduct which leads the trial court to conclude Appellant Proctor and his client, Julie Peterman, had engaged in frivolous conduct. Over the course of several years, Appellant Proctor has bombarded the court system and the Appellees in this action with a plethora of pleadings, all without merit. With each filing, Appellee Estate is forced to incur unnecessary attorney’s fees to defend against Appellant Proctor’s frivolous claims, a course of conduct in which there does not appear to be an end in sight.<sup>1</sup>

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<sup>1</sup>Appellee Estate questions whether this course of conduct is the exact conduct for which S. Ct. Prac. R. XIV, Section 5 is designed to prevent.

In the appeal before the Fifth District Court of Appeals, Appellant Proctor failed to provide the court with transcripts of the hearings held before the trial court which discussed and analyzed the claim of frivolous conduct. In a Joint Motion filed on February 17, 2006 by the Appellees in the appeal before the Fifth District Court of Appeals, the Appellees' sought an order requiring Appellant Proctor to supplement the record with these transcripts, or, in the alternative, asked that the Fifth District dismiss the appeal due to the absence of the transcripts ("Motion to Supplement the Record "). In response to the Motion to Supplement the Record, Appellant Proctor argued that these transcripts were not necessary. These "unnecessary" transcripts represent the portion of the record that Appellant Proctor is now asking this Court to order the Fifth District Court of Appeals to complete and review.

Appellant Proctor advises this Court in his Motion to Remand that he was "obviously willing to provide the additional transcripts." Motion to Remand, p. 4. However, in his Memorandum Contra filed in response to the Motion to Supplement the Record, Appellant Proctor clearly indicated that he had chosen not to submit the transcripts in question, and stated "if Appellees wanted a transcript, they should have ordered it themselves." Appellant Proctor further stated he would not object to allowing the Appellees time to obtain a transcript at their own expense, but the Memorandum Contra was clear that Appellant Proctor did not believe transcripts were necessary and that he would not provide them to the Court. It was not until the Fifth District Court of Appeals affirmed the decision of the trial court that Appellant Proctor exhibited any willingness to supplement the record with

transcripts of the proceedings the Fifth District deemed clearly necessary to examine the alleged assignments of error.

In a March 13, 2006 Judgment Entry (“Judgment Entry”), the Fifth District Court of Appeals denied Appellee’s request for an order requiring Appellant Proctor to supplement the record. Appellant Proctor has severely mischaracterized the nature of the Judgment Entry in his arguments before this Court. Appellant Proctor is trying to argue that the Fifth District Judgment Entry, which stated it would not order Appellant Proctor to supplement the record with additional transcripts, is equivalent to the Fifth District advising Appellant Proctor that the additional transcripts were not necessary to his appeal. This is not the case. The Judgment Entry issued by the Fifth District simply recognized that Appellate Rule 9 places upon the Appellant the responsibility of including in the record transcripts of proceedings which support the claimed assignments of error. It is not the responsibility of the reviewing court to dictate to an Appellant a summary of the transcripts necessary for appellate review. In short, it is the duty and responsibility of the attorney advancing the appeal to assemble the record and to determine which transcripts, if any, are necessary for the proper consideration of the appeal. See *Knapp v. Edwards Laboratories, et al.*, (1980) 61 Ohio St.2d 197, 199 (the “duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record”).

In his Motion to Remand, Appellant Proctor cites to this Court’s opinion in *Knapp* to support his contention that this case should be remanded to allow for the inclusion of

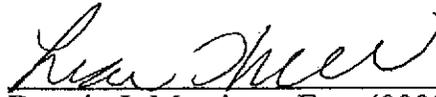
additional transcripts. Appellant Proctor is, however, attempting to apply the *Knapp* decision to a severely different set of circumstances. The facts of this case can be easily distinguished from *Knapp*, as the incompleteness of transcripts in *Knapp* was caused, not by the failure of the Appellant to order the transcripts, but due to illness of the Court Reporter. In the present Appeal, Appellant Proctor made the affirmative decision not to provide the Fifth District Court of Appeals with a complete record of the necessary trial court proceedings. Appellant Proctor had multiple opportunities to provide the Fifth District Court of Appeals with the transcripts necessary to consider the Assignments of Error raised in this Appeal; first at the time the record was certified, and second following Appellees' Motion to Supplement, yet he chose not to do so.<sup>2</sup>

Appellee Estate anxiously awaits a conclusion to the constant stream of filings made by Appellant Proctor. Both the Fifth District Court of Appeals and the Delaware County Court of Common Pleas completed the necessary review to render a decision on the issues presented by Appellant Proctor. Appellee Estate of Josephine Shively respectfully requests that this Court deny Appellant Proctor's Motion to Remand, and that it consider imposing sanctions against Appellant Proctor for his repeated meritless filings in this case.

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<sup>2</sup> The Motion to Supplement requested alternative remedies. The Appellees sought to have Appellant Proctor supplement the record with the necessary transcripts or, in the alternative, asked that the Court dismiss the appeal due to the absence of the transcripts. Appellant Proctor has attempted to rely on Appellate Rule 9(b) to shift to the Appellees the burden of providing the reviewing court with the transcripts necessary to support his claimed assignments of error. Appellate Rule 9(b), however, does not relieve an Appellant from the primary burden of providing the Court with a transcript. See *Knapp v. Edwards Laboratories*, (1980) 61 Ohio St.2d 197, 199.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true copy of the foregoing Appellee Estate of Josephine Shively's Memorandum Contra Motion of Appellant to Remand was served upon the following by mailing the same, postage prepaid, on the 9<sup>th</sup> day of March, 2007:

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