IN THE SUPREME COURT OF OHIO

JOSEPH A. PINGUE, SR.
Appellant,

v.

JOESPH A. PINGUE, JR.
Appellee.

On Appeal from the Delaware County Court of Appeals, Fifth Appellate District

07-2039

Court of Appeals Case No. 06-CAE-10-0077

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOSEPH A. PINGUE, SR.

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SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF THE CASE AND FACTS.....6

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....9

Proposition of Law No. 1

Sanctions are appropriate for frivolous conduct under Rev. Code 2323.51 and Civil Rule 11 when a case is filed and pursued after the statute of limitations has expired, and for which there is no good faith argument for the extension, modification or reversal of existing law..... 9

Proposition of Law No. 2

An appellate court: a) may not disturb a trial court's findings of fact where there is credible evidence to support the trial court's findings and b) absent an abuse of discretion, may not disturb a trial court's finding of frivolous conduct and imposition of sanctions.....12

CONCLUSION.....15

CERTIFICATE OF SERVICE.....16

APPENDIX **Appx. Page**

Opinion of the Delaware County Court of Appeals (September 18, 2007).....1

Judgment Entry of the Delaware County Court of Appeals (September 18, 2007).....17

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents two crucial issues for the conduct of litigants and their counsel in Ohio: 1) Whether sanctions are appropriate for frivolous conduct under Rev. Code 2323.51 and Civil Rule 11 when a case is filed and pursued after the statute of limitations has expired, and for which there is no good faith argument for the extension, modification or reversal of existing law, and 2) Whether an appellate court: a) may disturb a trial court's findings of fact where there is credible evidence to support the trial court's findings, and b) absent an abuse of discretion, upon the finding of frivolous conduct and imposition of sanctions.

The Fifth District Court of Appeals 2-1 Decision is of great public and general interest because frivolous lawsuits which are time-barred and contain a blatant misapplication of the discovery rule should not be tolerated in Ohio without sanctions imposed to the filing party. Unfortunately, the most recent decision of the Fifth District Court of Appeals encourages and allows a party, who brought a claim with no legal foundation, to be absolved of accountability for such conduct. Further, the Decision of the Fifth District fails to defer to the trial court's findings of fact and application of well-settled Ohio law.

Ohio law, including the holdings of this Court, holds that the discovery rule is inapplicable to assault cases. *Grooms v. Grooms,* 1985 Ohio App. LEXIS 5754; *O'Stricker v. Jim Walter Corp.* (1983) 4 Ohio St. 3d 84. According to the law of this Court:

> An injured person need not be aware of the full extent of the injury before there is a "cognizable event" triggering the statute of limitations. Instead, it is enough that some noteworthy event, the cognizable event, has occurred

which does or should alert a reasonable person that a wrong has taken place. *Zimme v. Calfree, Halter & Griswold* (1989), 43 Ohio St. 3d 54.

In spite of the established Ohio law which shows the inapplicability of the discovery rule to the pled facts of this lawsuit, the Appellee nonetheless pursued his claim knowing under the discovery rule theory there was no case. The trial Court held and confirmed that Appellee's claims and the entire action was frivolous. The rationale for the trial Court's decision was that the claim was time barred by the applicable one year assault statute of limitations and that the discovery rule was inapplicable for a case of assault under Ohio law.

The trial court specifically stated as follows:

> ***This court therefore finds as a matter of law that this entire action was frivolous.***
>
> ***The court finds that this conduct was frivolous, and for the Defendant, expensive, and that Defendant is entitled to reasonable attorneys fees as a result.*** **(Id. at pg 7,) [Emphasis added.]**

The trial court further stated:

> *The court finds that Defendant has proven all of the relevant criteria such as the time, required, the fee customarily charges, and so forth. The court finds that Defendant has proven by clear and convincing evidence that he has incurred attorneys' fees in the sum of $58,820.76. The court further finds that Defendant has proven attorneys' fees for some services that may not be recompensable.* (Record 87, pg 8.)

Fifth District stated in its Opinion that:

> *. . . Courts should apply R.C. 2323.51 "carefully so that legitimate claims are not chilled. A party is not frivolous merely because a claim is not well grounded in fact. Furthermore, that statute was not intended to punish mere misjudgment or tactical error. Instead the status was designed to chill egregious, overzealous, unjustifiable and frivolous action.' . . . We cannot conclude that no reasonable lawyer would have brought [a]ppellant's action in light of the existing law, even though we*

upheld the trial court's grant of judgment on the pleadings in the previous appeal.

However, the Dissent to the Fifth District Opinion correctly applied existing Ohio law to the fact by stating as provided:

> *The present case involves, not a plaintiff who failed to discover any injury, but a plaintiff who failed to discover the full extent of his injuries before the statute of limitations expired. There is no requirement that a plaintiff must discover the full extent of his or her injuries before the statute of limitations begins to fun.*
>
> . . .
>
> *In determining whether the claim itself is frivolous, the test is whether no reasonable lawyer would have brought the action in light of the existing law. Riston v. Butler, (2002) 149 Ohio App. 3d 390, citing Hickman v. Murray (Mar. 22, 1996), Montgomery App. No. CA 15030. In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim." Id. at par. 30, quoting Hickman v. Murray.*
>
> *The Ohio Supreme Court has stated:*
>
> *When a trial court has determined that reasonable inquiry by a party's counsel of record should reveal the inadequacy of a claim, a finding that the counsel of record has engaged in frivolous conduct is justified, as is an award, made within the statutory guidelines, to any party adversely affected by the frivolous conduct. Ron Scheiderer & Assoc. v. City of London (1988), 81 Ohio St. 3d 94, 97-98, 689 N.E. 2d 552. Considering the course of this litigation and the trial court's findings, it is apparent that a reasonable inquiry would have revealed the legal impossibility of the claim. The cognizable event in the case at bar occurred, according to appellant's complaint between 1962 and 1990. Although a discovery rule has been adopted for accrual of actions for bodily injury by O'Stricker v. Jim Walter Corp. (1983), 4 Ohio St. 3d 84, a discovery rule has not been adopted with respect to actions for assault and battery. Grooms v. Grooms (Feb. 26, 1985), 10th Dist. No. 84AP-773..*
>
> . . .

> *Under a de novo review of the facts and the law, I would conclude that the trial court properly granted appellee's motion for sanctions. (Opinion, pg. 14-16).*

The dissent correctly recognized and followed Ohio Supreme Court precedent and that Appellee was aware of his harm as late as 1991. As such, regardless of what Appellee's physician told him of the possibility of future harm, it is irrelevant as to the tolling of the statute of limitations under the discovery rule.

In the case at bar, it is undisputed that the "cognizable event" occurred between the years 1962 and 1990. The plaintiff was aware of the alleged assault on numerous occasions and was not under any incapacity which would have prevented timely bringing an action. For this reason, the case was dismissed upon a motion for judgment on the pleadings. As such, any reasonable inquiry, which counsel for Appellee affirmatively states that he conducted, would clearly have shown that the claim is and was severely time barred, and "cannot be supported by a good faith argument for an extension, modification or reversal of existing law."

In spite of the existing law and without pleading for an extension, modification or reversal of existing law, Appellee filed the initial claim, knowingly forcing the defense of that action and this caused Appellant to incur thousands upon thousands of dollars in attorney's fees. As such, pursuant to the Fifth District's holding, a litigant who has conducted frivolous conduct does not have to be accountable for such behavior. The foregoing issue is one of great and general public interest because leaving in tact this erroneous decision eradicates the Supreme Court and Ohio Legislatures pronouncements of frivolous conduct and further evicerates redress by the victims of frivolous conduct.

The second issue, "whether an appellate court: a) may disturb a trial court's findings of fact where there is credible evidence to support the trial court's findings, and b) absent an abuse of discretion, upon the finding of frivolous conduct and imposition of sanctions" is of great general and public interest because, under existing Ohio law, a reviewing court must defer to the trial court's findings of fact where the record contains competent, credible evidence. Further, the law mandates that the trial court unequivocally has the discretion to assess a penalty for frivolous conduct. In the instant facts, during the commencement of the underlying litigation, the case was before the trial court for several years. The Fifth District appears to have ignored well settled law in making its decision.

In *Wiltberger v. Davis,* the court stated that "we will not disturb a trial court's findings of fact where the record contains competent, credible evidence " in addressing the issue of sanctions. *Wiltberger v. Davis* (1996), 110 Ohio App. 3d 46; *C.E. Morris Co. v. Foley Construction Co.* (1978) 54 Ohio St. 2d 79. It is further well settled under Ohio law that "the decision to assess or not to assess a penalty lies within the sound discretion of the trial court. The language of R.C. 2323.51 unequiovocally bests the trial court with such discretion." The *Wiltberger* court further held that "we will not disturb a trial court's findings of fact where the record contains competent, credible evidence." Here, the holding of the Fifth District is further contrary to existing Ohio law in that the Fifth District has set a precedent that reviewing courts may disturb the findings of fact of trial courts when awarding sanctions for frivolous conduct.

In this case, the Fifth District made no specific finding that record failed to contain competent, credible evidence and nonetheless failed to defer to the trial court's factual findings. Further, there is no language in the Fifth District Opinion that the trial

court abused its discretion. The Fifth District simply failed to follow existing Ohio law by failing to defer to the trial court in the trial court's decision to award sanctions and by failing to defer to the trial court's factual findings.

Hearings were conducted and the trial judge personally made observations of the witnesses at the trial court level. However, if the Fifth District's holding continues to be precedent, then reviewing courts in the future will not be required to give deference to the trial court's factual findings or decision to penalize parties for frivolous conduct after an award of sanctions has been made. Such a decision would undermine the entire function of trial courts. As such, the Fifth District's holding is contrary to existing Ohio law, and this issue should be reviewed by this Court.

STATEMENT OF THE CASE AND FACTS

On or about March 6, 2003, Appellee Joseph A. Pingue, Jr. ("Appellee") filed a frivolous Complaint, by and through counsel against Appellant Joseph A. Pingue, Sr. ("Appellant"), in the Delaware County Court of Common Pleas. In the Complaint, Appellee asserted claims that were outside the statute of limitations for assault, intentional infliction of emotional distress and unintentional infliction of emotional distress for conduct that allegedly occurred seventeen to thirty years prior to the filing of the Complaint.

After the statute of limitations argument was raised by Appellant, Appellee then concocted a "revived memory" theory, and eventually a discovery rule theory, although the facts in the case are contrary to any "revived memory" theory or discovery rule theory.

On or about November 12, 2003, the Delaware County Court of Common Pleas granted Appellant's Motion for Judgment on the Pleadings and held that the discovery rule did not apply to assault cases and the statute of limitations for Appellee's Complaint expired. On August 9, 2004, Fifth District Court of Appeals affirmed the trial court's decision.

On or about April 26, 2005, Appellant filed a Motion for Sanctions and Request for a Hearing, which requested attorney's fees from Appellee and his counsel. On September 22, 2006, the trial court awarded attorneys fees to Appellant in the amount of $33,605.58 for reasonable attorney's fees.

Appellant and Appellee both appealed the September 22, 2006 Decision to the Fifth District Court of Appeals. On September 18, 2007, the Fifth District Court of Appeals reversed the decision of the trial court and that Appellee nor his counsel had engaged in sanctionable frivolous conduct. On September 28, 2007, Appellant filed a Motion for Reconsideration of the September 18, 2007 Decision and a Motion to Certify Conflict. Both Motions are pending and currently unopposed by Appellee.

Appellee alleged in the Complaint that on or about March 12, 2002, his neurologist informed him that as a result of years of alleged abuse, he suffered irreversible brain damaged which may cause Appellee to be suspectible to Parkinson's disease or Alzheimer's disease in the future.

Appellee's Complaint falsely alleged that "between 1962 and 1990, Defendant physically abused Plaintiff and struck him in the head, ears, jaw, mouth, nose, neck, shoulders, arms, hands, chest, abdomen, buttocks, knees and legs.". (Rec. 9, par. 1). In his Complaint, Appellee further states that Appellee "first discovered and viewed home

movies and home videotapes that show him being hit by Defendant *** which showed incidents he had not previously remembered and which revived memories of other physical assaults and mental abuse." (Rec. 9, par. 4).

Appellee was previously employed by Appellant's real estate development company on several occasions. Appellant had to terminate Appellee's employment because Appellee failed to pay subcontractors as instructed, failed to follow company rules and regulations, failed to collect rent money and allowed tenants to move into premises without making payments. Prior to Appellee's termination, Appellee always praised Appellant for being a good father. Once Appellee was fired by Appellant for the second time, Appellee suddently starting stating that Appellant physically abused Appellee. As such, Appellant's position is that Appellee fabricated these stories as revenge for Appellee's firing.

Notably, although Appellee stated in his Complaint that he had a 'revived memory', there is evidence that shows that Appellee was aware of any alleged assault as early as 1991. In the September 9, 1991 deposition of Appellee, he stated that he witnessed himself getting hit in a home movie, several years prior to the 1991 deposition. As such, the evidence speaks for itself that Appellee's 2003 Complaint was severely time-barred. At this time, Appellee began to use his 'discovery rule' theory, although the applicable law bars a claim under the discovery rule. Simply stated, if the discovery rule was Appellee's rationale for the filing of the claim in 2003, it is interesting that the discovery rule was not mentioned in the initial Complaint and was brought up later in the course of the litigation.[1] Based upon the foregoing, Appellant is entitled to sanctions as

[1] In spite of the aforementioned, counsel for Appellee, Jeffrey D. Boyd, in his affidavit, admits to have reviewed numerous documents, conducted legal research and interviewed family members prior to the

granted by the trial court and respectfully requests that the Supreme Court of Ohio accept jurisdiction over this case.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Sanctions are appropriate for frivolous conduct under Rev. Code 2323.51 and Civil Rule 11 when a case is filed and pursued after the statute of limitations has expired, and for which there is no good faith argument for the extension, modification or reversal of existing law.

In its Decision, the Fifth District Court of Appeals held that "we cannot conclude that no reasonable lawyer would have brought Appellant's action in light of the existing law." Despite this, the Fifth District held in the previous appeal, the Fifth District held that Appellee had no viable claim pursuant to the discovery rule and such a claim was time-barred. *Pingue v. Pingue,* Delaware Co. Case No. 03-CA-E-12070.

Also, as properly pointed out in the dissent of the September 18, 2007 Decision, existing Ohio law does not recognize a discovery rule theory in assault cases. *Grooms v. Grooms,* 1985 Ohio App. LEXIS 5754. In *Grooms,* the plaintiff filed a claim for assault and battery, and contended that the cause of action did not accrue until the full extent of her injuries were discovered after she visited a physician. The Tenth District Court of Appeals held:

> Although a discovery rule has been adopted for accrual of actions for bodily injury by *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, a discovery rule has not been adopted with respect to actions for assault and battery. However, even assuming that a discovery rule is applicable, the cause accrues when the plaintiff discovers her legal injury, that is discovers that she has been injured as a result of wrongful conduct by the defendant.***
>
> **No new cause of action for assault and battery accrued when plaintiff later discovered that the extent of her bodily injuries was greater than she originally realized.** A claim for assault and the extent of physical

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filing of the Complaint. For these reasons, Mr. Boyd was well versed in the facts of the instant matter; Mr. Boyd would not have had a reasonable belief in fact or in law for filing the Complaint.

> injuries is greater than originally realized does not create a new accrual date for the cause of action for assault and battery. (emphasis added).

Further, the Ohio Supreme Court decided a similar holding in *Zimme v. Calfree, Halter & Griswold* (1989), 43 Ohio St. 3d 54, as it held as provided:

> An injured person need not be aware of the full extent of the injury before there is a "cognizable event" triggering the statute of limitations. Instead, it is enough that some noteworthy event, the cognizable event, has occurred which does or should alert a reasonable person that a wrong has taken place.

In determining whether the claim itself is frivolous, the test is whether no reasonable lawyer would have brought the action in light of the existing law. *Riston v. Butler,*(2002), 149 Ohio App. 3d 390. Further, the test includes whether the claim is warranted under existing law, or whether a good faith-argument for extension, modification or reversal of existing law. *Id. at 402.* A claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim. *Hickman v. Murray* (Mar. 22, 1996) Montgomery App. No. CA 15030.

As stated above, Ohio law is well-settled that the discovery rule tolls the statute of limitations only when a plaintiff does not know of the injury or the perpetrator. Once a plaintiff is aware of any injury and the cause of such injury, the law allows the plaintiff a reasonable time to file suit. *Norgard v. Brush Wellman Inc.* (2002), 95 Ohio St. 3d 165. Instead, it is sufficient that a noteworthy event, or a cognizable event, has occurred, which would alert a reasonable person that a wrong has taken place. *Columbus Bd. Of Edn. v. Armstrong World* (1993), 89 Ohio App. 3d 846.

In the instant facts, it is undisputed that the "cognizable event" occurred between 1962 and 1990. As such, any reasonable inquiry, which counsel for Appellee

affirmatively states that he conducted, would clearly show that the discovery rule is inapplicable and that the claim is legally impossible.

Based upon the above cited Ohio law, there is no basis in law or fact that the instant claim is timely based upon the application of the discovery rule. One, the discovery rule is not applicable in assault cases. Second, there is undisputed evidence in the record that Appellee had knowledge of any alleged wrongdoing as early as the 1980's, which is more than a decade prior to the intial filing of Appellee's claim. Ohio law only provides that 2323.51 is met if the trial court concludes that. For these reasons, there is absolutely no basis in law or in fact that a reasonable lawyer would have brought the underlying claim because the claim is not warranted under existing law and there is no good faith argument for the extension, modification, or reversal of existing law.

In spite of this, the Fifth District held that "we cannot conclude that no reasonable lawyer would have brought such a claim in light of the existing law, even though we upheld the trial court's grant of judgment on the pleadings in the previous appeal" and revered the trial court's award of sanctions. (Opinion, par. 30). Interestingly, as stated above, in the previous appeal, the Fifth District held that Appellee had no viable claim pursuant to the discovery rule and that such a claim was time-barred. Then, several years later, the same court suddenly holds that the claim could have been brought by a reasonable lawyer. Simply stated, the Fifth District has been inconsistent in its decision regarding the exact same claim.

With this logic, there is currently precedent which would allow a party to bring a severely time barred claim just because there is a doctor who believes there is a *possibility, or speculation* of future harm. However, such a claim is contrary to existing

law, and the Fifth District erroneously held that such a claim was not frivolous, in spite of the voluminous evidence and law that the claim was severely stale. Based upon the foregoing, the holding of the Fifth District violates the purpose of the discovery rule and wrongfully sets the way for numerous suits which are now viewed as perpetual instead of having a clear expiration. Simply, this holding is contrary to the very purpose of the statute of limitations, in addition to the intended rationale of the discovery rule and, as such, sanctions are warranted.

Proposition of Law No. 2: An appellate court: a) may not disturb a trial court's findings of fact where there is competent, credible evidence to support the trial court's findings and b) absent an abuse of discretion, may not disturb a trial court's finding of frivolous conduct and imposition of sanctions.

In *Crooks v. Consolidated Stores Corp.*, supra, the Tenth District Court of Appeals held:

> This court has previously noted the distinction to be made, when reviewing a trial court's decision to impose sanctions under R.C. 2323.51, between questions which are purely of law, which will be addressed under a de novo standard of review, and those aspects of a trial court's decision which will be granted greater deference as involving primarily issues of fact. *Lantz v. Ross,* 1997 Ohio App. LEXIS 5213. In *Wiltberger v. Davis* (1996), 110 Ohio App. 3d 46, this court held no single standard of review applies in R.C. 2323.51 cases. The inquiry necessarily must be one of mixes questions of fact and law.
>
> With respect to purely legal issues, we are persuaded by the line of cases which provide for a de novo standard of review. When an inquiry is purely a question of law, clearly an appellate court need not defer to the judgment of the trial court. However, we do find some degree of deference appropriate in reviewing a trial court's factual determinations; accordingly, we will not disturb a trial court's findings of fact where the record contains competent, credible evidence to support such findings. This standard of review of factual determination is akin to that employed in a review of the manifest weight of the evidence in civil cases generally.
>
> Finally, where a trial court has found the existence of frivolous conduct, the decision to assess or not to assess a penalty lies within the sound discretion of

the trial court. The language of R.C. 2323.51(B)(1) unequivocally vests the trial court with such discretion.

In its Opinion, the Fifth District held that "we do not find Appellant's actions were dilatory nor to merely harass Appellee." (Opinion, par. 31). This holding of the Fifth District is an affirmative statement which shows that the court failed to defer to the trial court's holding that Appellee's actions did harass Appellant. Simply, the finding that the actions of Appellee were dilatory and harassing to Appellant is a conclusion that would have first required the Fifth District to make a determination that the trial court's findings of fact were not supported by competent, credible evidence. However, the Fifth District failed to make a ruling as to whether or not there is competent, credible evidence to support the trial court's findings of fact and/or to defer to the trial court's finding of fact, although it is required to do so under Ohio law.

Contrary to the above cited Ohio law, the Fifth District erroneously determined that there was no frivolous conduct by giving no deference to the trial court's determination that the primary factual reason for Appellee, in filing the case, knowing that the action was time barred, was that Appellee desired to cost his father legal expenses and had no regard for the outcome. Further, the trial court buttressed this finding with its factual findings that the conduct involving the discovery and related matters in the case served to increase the fees to be incurred. However, the Fifth District failed to hold that the trial court's findings were not based upon competent, credible evidence, but instead, applied a *de novo* standard by treating the entire decisions based upon the reasonable lawyer standard to include the discovery rule theory. In doing so, the majority's decision creates conflicting Ohio law that appears to suggest this it is the discovery of the *extent* of possible injury, which is the injury that permits the extension of

the filing deadline, and thus, creates diametric opposite law to every holding in Ohio, including the Ohio Supreme Court and other appellate districts. Simply, the Fifth District failed to properly follow Ohio law.

The Fifth District's holding suggest that if seventeen years pass, and a doctor has a hunch that an alleged, undocumented event may have caused trauma to a person's brain, that the alleged perpetrator is liable for any illness which has developed and the alleged victim can bring a claim, even though the alleged victim failed to advance that claim for at least seventeen years, for the reason that the doctors never previously related the two alleged events. In so concluding, the Fifth District has broken all precedents and settled law by applying a simplified legal analysis only to a part of the relevant statute.

However, the Fifth District's analysis utilized only a *de novo* analysis for its determination that Appellee did not engage in frivolous conduct. As stated above, the law is well established that an appellate court is to use deference to the trial court's factual findings, and will not disturb the factual findings where the record contains competent, credible evidence to support such findings. Also, trial courts are given full authority to award sanctions for frivolous conduct.

Here, the majority failed to defer to the trial court's factual findings relating to the existence of frivolous conduct for the purposes of harassment and incurring attorney's fees, a completely factual determination. Further, there is no assertion that the trial court's findings were not based on competent, credible evidence. Simply, the Fifth District did not make any additional factual findings.

As stated above, such a decision to award sanctions for frivolous conduct is within the sound discretion of the trial court, and should not be disturbed. The Fifth

District determined in its September 18, 2007 Decision that there was no frivolous conduct. According to well settled Ohio law, the Fifth District had to defer to the trial court's factual findings to the extent they were supported by competent, credible evidence. The Appellate Court made no specific finding on this issue. Moreover, despite no finding of an abuse of discretion, the award of sanctions was overturned. As such, the Fifth District was not within its discretion to overturn this part of the trial court's Decision. Simply, the Fifth District misapplied existing Ohio law.

Based upon the foregoing, the September 18, 2007 sets a dangerous precedent as it is contrary to existing Ohio law. The Fifth District has set a precedent which would allow Appellate Courts to disturb the factual findings of the trial court. As such, this issue should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the holding of the Fifth District is contrary to existing Ohio law, and such a decision dangerously undermines the legal and judicial system. For these reasons, these issues should be considered by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by ordinary U.S. Mail on this 2 day of November, 2007, to the following:

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOSEPH A. PINGUE, JR.

Plaintiff-Appellant

-vs-

JOSEPH A. PINGUE, SR.

Defendant-Appellee

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 06-CAE-10-0077

OPINION

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Civil Case No. 03-CVH-03-172

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY:

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2007 SEP 18 AM 10: 59
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 _____ **Deputy**

Hoffman, J.

{¶1} Plaintiff-appellant/cross-appellee Joseph A. Pingue, Jr. appeals the September 22, 2006 Decision and Entry entered by the Delaware County Court of Common Pleas, granting attorney fees in favor of defendant-appellee/cross-appellant Joseph A. Pingue, Sr., in the amount of $33,605.58. Appellee cross-appeals the same judgment as the entry denied his request for attorney fees for the previous appeal and counterclaim.

STATEMENT OF THE FACTS AND CASE

{¶2} During a visit with a neurologist on March 12, 2002, Appellant learned he suffered from post-traumatic stress disorder and had suffered an irreversible brain injury. The neurologist informed Appellant he is at greater risk for Parkinson's Disease and Alzheimer's Disease as a result of the brain injury. On March 6, 2003, Appellant filed a Complaint in the Delaware County Court of Common Pleas, asserting causes of action for assault, intentional infliction of emotional distress, and an unintentional infliction of emotional distress. Appellant named Appellee, his father, as defendant and alleged Appellee had physically abused him between 1962, and 1990. On May 1, 2003, Appellee filed an Answer raising the affirmative defense the applicable statute of limitations had expired. Appellee also filed a counterclaim for defamation.

{¶3} With the filing of his answer and counterclaim, Appellee propounded nineteen interrogatories and twenty requests for production upon Appellant. Appellant complied with Appellees' discovery, and thereafter propounded seventeen interrogatories and thirteen requests for production upon Appellee. Half of the interrogatories were explicitly geared toward the allegations Appellee asserted in his

counterclaim, and one-quarter of the interrogatories addressed information relevant to both the counterclaim and Appellant's complaint. Of the requests for production, one-quarter were directly and solely related to the counterclaim and approximately one-half were related to both the Complaint and counterclaim. The trial court conducted a pretrial on July 23, 2003. Appellee filed a Motion for Judgment on the Pleadings on August 13, 2003.

{¶4} Appellant filed a timely memorandum in opposition, to which Appellee filed a reply. Via Entry filed November 12, 2003, the trial court granted Appellee's motion and dismissed Appellant's case. The entry noted the case would continue as to Appellee's counterclaim for defamation. Appellant filed a timely Notice of Appeal to this Court, which affirmed the decision of the trial court. *Pingue v. Pingue,* Delaware App. No. 03-CA-E-12070, 2004-Ohio-4173. The Ohio Supreme Court declined jurisdiction.

{¶5} On April 26, 2005, Appellee filed a Motion for Sanctions and Request for Hearing. Therein, Appellee sought attorney fees against Appellant and Appellant's counsel pursuant to Civ. R. 11 and R.C. 2323.51. Appellee also filed a Motion to Reactivate Case in order to pursue his counterclaim. Appellant filed memoranda in opposition to both motions. Via Agreed Judgment Entry filed June 29, 2005, the trial court set a scheduling order, which included discovery cut off dates, dispositive motion deadline, and a trial date. Appellee filed a Motion for Summary Judgment on his counterclaim, which the trial court denied via Judgment Entry filed May 8, 2006.

{¶6} The trial court subsequently vacated the June 29, 2005 Judgment Entry, and scheduled a status conference to set new deadlines and discuss setting an oral

hearing on Appellee's motion for sanctions. The trial court conducted a hearing on the motion on May 24, 2006. Appellee presented evidence he incurred attorney fees in the amount of $58,820.76. Following the hearing, the trial court ordered the parties to file post-hearing briefs concerning their respective positions. On June 21, 2006, Appellee filed a Notice of Voluntary Dismissal of his counterclaim without prejudice.

{¶7} Via Judgment Entry filed September 22, 2006, the trial court awarded Appellee attorney fees in the amount of $33,605.58. The trial court found Appellee could not recover fees incurred in pursuing his counterclaim or defending the appeal. The trial court found the fees that were awarded were warranted because Appellant's action constituted frivolous conduct.

{¶8} It is from this judgment entry Appellant appeals, raising the following assignments of error:

{¶9} "I. THE TRIAL COURT ERRED IN HOLDING AS A MATTER OF LAW THAT PLAINTIFF'S "ENTIRE ACTION WAS FRIVOLOUS", AS PLAINTIFF'S CLAIMS WERE SUPPORTED BY A GOOD FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW OR FOR THE ESTABLISHMENT OF NEW LAW, AND BECAUSE PLAINTIFF'S CONDUCT DID NOT OTHERWISE FALL WITHIN THE FOUR GROUNDS OF R.C. 2323.51(2)(A).

{¶10} "II. THE TRIAL COURT ERRED AND COMMITTED AN ABUSE OF ITS DISCRETION BY AWARDING DEFENDANT ATTORNEY FEES AND EXPENSES FOR LEGAL SERVICES THAT WERE RELATED TO DEFENDANT'S COUNTERCLAIM WHEN: (1) DEFENDANT DID NOT MOVE FOR SUCH FEES, (2) DEFENDANT SPECIFICALLY SAID HE WAS NOT SEEKING FEES FOR THOSE

SERVICES, (3) DEFENDANT DEDUCTED THOSE FEES FROM THE BILLS HE PRESENTED TO THE COURT IN EVIDENCE, AND, FURTHER, WHERE THE COURT SPECIFICALLY HELD "THE FEES INCURRED IN PURSUING THE COUNTERCLAIM ARE NOT RECECOVERABLE, " BUT THEN AWARDED SUCH FEES.

{¶11} "III. THE TRIAL COURT ERRED AND COMMITTED AN ABUSE OF ITS DISCRETION BY AWARDING DEFENDANT ATTORNEY FEES AND EXPENSES FOR LEGAL SERVICES WHERE DEFENDANT FAILED TO MEET HIS BURDEN OF PROOF REGARDING WHICH FEES AND EXPENSES "WERE INCURRED AS A DIRECT AND IDENTIFIABLE RESULT OF DEFENDING THE FRIVOLOUS CONDUCT IN PARTICULAR.

{¶12} "IV. THE TRIAL COURT ERRED BY AWARDING SANCTIONS TO DEFENDANT FOR PLAINTIFF'S NON-FRIVOLOUS CONDUCT RELATING TO HIS DEFENSE AGAINST DEFENDANT'S AGGRESSIVE PURSUIT OF HIS COUNTERCLAIM WHEN THAT AWARD WAS BASED ON FACTUAL FINDINGS THAT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} Appellee cross-appeals, raising as error:

{¶14} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION IN FAILING TO GRANT CROSS APPELLANT ALL REASONABLE ATTORNEY'S FEES AND COSTS BASED UPON JUNIOR'S FRIVOLOUS CONDUCT.

{¶15} "II. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN FAILING TO IMPOSE SANCTIONS AGAINST APPELLANT'S ATTORNEY."

APPEAL I, III, IV

{¶16} Because Appellant's first, third, and fourth assignments of error are interrelated, we shall address said assignments of error together. In his first assignment of error, Appellant maintains the trial court erred in finding his entire action to be frivolous because his claims were supported by a good faith argument for an extension, modification, or reversal for existing law or for the establishment of new law, and because Appellant's conduct did not otherwise fall within the four grounds set forth in R.C. 2323.51(2)(a).

{¶17} In his third assignment of error, Appellant contends the trial court erred and abused its discretion in awarding attorney fees and legal expenses to Appellee as Appellee failed to satisfy his burden of proof regarding which fees and expenses were incurred as a direct and identifiable result of defending the alleged frivolous complaint.

{¶18} In his fourth assignment of error, Appellant argues the trial court erred in sanctioning him upon an erroneous finding he "engaged in a series of motions, discoveries, request for documents, interrogatories and other procedure that made the trial court process time consuming and expensive."

{¶19} R.C. 2323.51 grants a trial court the authority to award court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal, who was adversely affected by frivolous conduct. "Frivolous conduct", as defined in R.C. 2323.51(A)(2), includes conduct which "serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation", R.C.

2323.51(A)(2)(a)(i), or conduct "* * * not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law", R.C. 2323.51(A)(2)(a)(ii).

{¶20} The question of what constitutes frivolous conduct may be either a factual determination, or a legal determination. *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46. A determination conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law requires a legal analysis. *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 233. With respect to purely legal issues, we follow a de novo standard of review and need not defer to the judgment of the trial court. *Wiltberger,* supra, at 51-52. However, we do find some degree of deference appropriate in reviewing a trial court's factual determinations and will not disturb such factual determinations where the record contains competent, credible evidence to support such findings. Id.

{¶21} Where a trial court has found the existence of frivolous conduct, the decision whether or not to assess a penalty lies within the sound discretion of the trial court. Id. at 52. Abuse of discretion requires more than simply an error of law or judgment, implying instead that the court's attitude is unreasonable, arbitrary or unconscionable. *Tracy v. Merrell-Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152. Furthermore, R.C. 2323.51 employs an objective standard in determining whether sanctions may be imposed against either counsel or a party for frivolous conduct. *Stone v. House of Day Funeral Serv., Inc.* (2000), 140 Ohio App.3d 713.

{¶22} In its September 22, 2006 Decision and Entry awarding attorneys fees, the trial court found as a matter of law Appellant's entire action was frivolous. A reading of the decision and entry reveals the trial court determined Appellant's conduct was frivolous not only because the claim was not warranted under existing law and could not be supported by good faith argument for an extension, modification, or reversal of existing law, or the establishment of a new law, but also the conduct was merely to harass Appellee. After concluding the entire action was frivolous, the trial court analyzed whether Appellee proved actual damages. In so finding, the trial court stated:

{¶23} "This court finds Defendant has proven that he has incurred attorneys fees as a direct result of the filing of this action and the way it was prosecuted at the trial level. In discussions with counsel the court suggested that the issue of the statue of limitations could be bifurcated, argued, and appealed. This would have substantially reduced Defendant's attorneys fees, yet would not have impaired Plaintiff's ability to present the discovery issue to the Court of Appeals as a matter of law. Plaintiff refused to bifurcate, and insisted on discovery which was long and expensive. It was almost as if, win or lose, Plaintiff was going to make Defendant spend a lot of money." September 22, 2006 Decision and Entry at 7-8.

{¶24} The trial court proceeded to determine the appropriate amount of fees, noting:

{¶25} "The court finds that Defendant has proven all of the relevant criteria such as the time required, the fee customarily charges, and so forth. The court finds that Defendant has proven by clear and convincing evidence that he has incurred attorneys

fees in the sum of $58,820.76. The court further finds that Defendant has proven attorneys fees for some services that may not be recompensable.

{¶26} "The fees incurred in pursuing the counterclaim are not recoverable.

{¶27} "The fees incurred on appeal are not recoverable. This court does not have the authority to award attorneys fees incurred on appeal. Those fees are within the province of the Court of Appeals, but even if they were not, this court would not allow the fees. Presenting the issue of the discovery rule in assault cases to the Court of Appeals is part of the procedure by which the law is changed and advanced. Had Plaintiff presented the issue to this court on a simple judgment on the pleadings procedure so as to get it to the Court of Appeals as expeditiously and inexpensively as possible, attorneys fees would not be granted. But Plaintiff did not. Plaintiff engaged a series of motions, discovery, requests for documents, interrogatories and other procedures that made the trial court process time consuming and expensive." Id. at 8-9.

{¶28} We find the trial court's judgment to be inconsistent. The trial court initially found Appellant did not have a good faith argument for an extension, modification, or reversal of existing law, or for the establishment of a new law. However, later the trial court subsequently notes part of the procedure by which the law is changed and advanced is through the presentation of an issue to the Court of Appeals and it would not have awarded attorney fees had Plaintiff expedited the presentation of the legal issue involving the discovery rule. Recognizing changes and advancements in the law only occur at the appellate level, yet simultaneously finding the entire action frivolous because the law is already well established appears incongruous. The only way to create change is to initiate change. In the legal arena, this requires the initiation of an

action by filing a complaint in the trial court even though the change may eventually occur at the appellate level.

{¶29} The trial court commented Appellant should have presented the issue on a simple judgment on the pleadings procedure in order to get the matter before the Court of Appeals as expeditiously and inexpensively as possible. To blame Appellant for failing to file a motion for judgment on the pleadings, which could have been done by either party, and which was, in fact, filed by Appellee five months after the filing of the Complaint, belies the trial court's holding Appellant solely responsible for not getting the issue to the Court of Appeals earlier.

{¶30} "Whether a claim is warranted under existing law is an objective consideration. The test * * * is whether no reasonable lawyer would have brought the action in light of the existing law. In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim." *Riston v. Butler,* 149 Ohio App.3d 390, 2002-Ohio-2308, at ¶ 30, quoting *Hickman v. Murray* (Mar. 22, 1996), Montgomery App. No. 15030 (citations omitted). Courts should apply R.C. 2323.51 "carefully so that legitimate claims are not chilled. A party is not frivolous merely because a claim is not well-grounded in fact. Furthermore, the statute was not intended to punish mere misjudgment or tactical error. Instead the statute was designed to chill egregious, overzealous, unjustifiable, and frivolous action." Id. at ¶ 29. We cannot conclude no reasonable lawyer would have brought Appellant's action in light of the existing law, even though we upheld the trial court's grant of judgment on the pleadings in the previous appeal.

{¶31} The trial court also implicitly found Appellant's conduct to be frivolous as such was merely to harass Appellee. Following this Court's affirmance of the trial court's decision granting Appellee's motion for judgment on the pleadings, the matter returned to the trial court solely on Appellee's counterclaim. Appellee himself filed a motion to reactivate the case and filed a motion for summary judgment on the counterclaim. Although Appellee was ordered by the court to produce all outstanding discovery requested by Appellant at the commencement of the action, such would not have been necessary if Appellee had not continued to pursue the counterclaim. We find Appellant's discovery was related, in part, to the counterclaim, which remained pending during the previous appeal and after this Court affirmed the trial court's granting Appellee's motion for judgment on the pleadings. Appellee continued to pursue his counterclaim, which was not dismissed until June 21, 2006, almost two years after the date this Court's issued its opinion in the first appeal. The trial court itself had set deadlines and discovery cutoff dates relative to the counterclaim. We do not find Appellant's actions were dilatory nor to merely harass Appellee.

{¶32} Appellant's first, third, and fourth assignments of error are well taken, and sustained.

II

{¶33} Based upon our disposition of Appellant's first, third, and fourth assignments of error, we find Appellant's second assignment of error to be moot.

CROSS APPEAL I, II

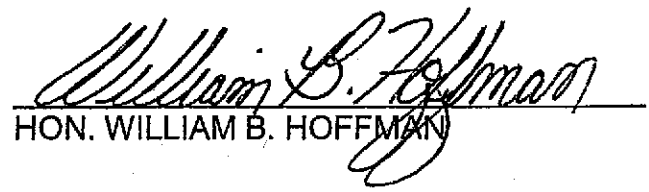
{¶34} In light of our disposition of Appellant's appeal, we overrule both of Appellee's cross-assignments of error as moot.

{¶35} The judgment of the Delaware County Court of Common Pleas is reversed.

By: Hoffman, J. and

Delaney, J. concur;

Gwin, P.J. dissents



HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY

{¶36} I respectfully dissent from the majority's disposition of this case.

{¶37} R.C. 2323.51(A) (2) defines "frivolous conduct" as any of the following:

{¶38} "(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

{¶39} "(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

{¶40} "(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

{¶41} "(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief".

{¶42} This is an action for assault, intentional infliction of emotional distress, and unintentional infliction of emotional distress brought by appellant against his father. In the complaint, appellant alleges appellee physically abused appellant between the years of 1962 and 1990. Appellant alleges on March 12, 2002, his neurologist informed him he had suffered an irreversible brain injury and suffered from post-traumatic stress disorder. Appellant also learned he is at

greater risk of contracting Parkinson's disease and Alzheimer's disease as a result of his brain injury.

{¶43} In a deposition taken in 1991 plaintiff testified that he had pain in his ears and jaw. (Deposition of Joseph A. Pingue, taken Sept. 9, 1991, filed April 26, 2005 at 17). [Hereinafter "Depo."]. Approximately two year's earlier plaintiff consulted a physician who informed him that the pain was caused by being struck in the head many times. (Depo. At 21). In spite of this knowledge plaintiff waited until 2003 to file a complaint.

{¶44} The present case involves, not a plaintiff who failed to discover *any* injury, but a plaintiff who failed to discover the full extent of his injuries before the statute of limitations expired. There is no requirement that a plaintiff must discover the full extent of his or her injuries before the statute of limitations begins to run.

{¶45} Once a plaintiff knows of an injury and the cause of the injury, the law gives the plaintiff a reasonable time to file suit. *Norgard v. Brush Wellman, Inc.,* 95 Ohio St.3d 165, 2002-Ohio-2007 at ¶ 19, 766 N.E.2d 977. The Supreme Court recognized in *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398, that an injured person need not be aware of the full extent of the injury before there is a "cognizable event" triggering the statute of limitations. "Instead, it is enough that some noteworthy event, the cognizable event, has occurred which does or should alert a reasonable person" that a wrong has taken place. Id. at 58, 538 N.E.2d at 402. See, also, *Columbus Bd. of Edn. v. Armstrong World* (1993), 89 Ohio App.3d 846, 851, 627 N.E.2d 1033, 1037 (the

discovery rule states that the cause of action accrues when the plaintiff knew or, in the exercise of reasonable diligence, should have known, of the injury).

{¶46} In determining whether the claim itself is frivolous, the test is whether no reasonable lawyer would have brought the action in light of the existing law. *Riston v. Butler,* 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857, citing *Hickman v. Murray* (Mar. 22, 1996), Montgomery App. No. CA 15030. "'In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim.'" Id. at ¶ 30, quoting *Hickman v. Murray.*

{¶47} The Ohio Supreme Court has stated:

{¶48} "When a trial court has determined that reasonable inquiry by a party's counsel of record should reveal the inadequacy of a claim, a finding that the counsel of record has engaged in frivolous conduct is justified, as is an award, made within the statutory guidelines, to any party adversely affected by the frivolous conduct." *Ron Scheiderer & Assoc. v. City of London* (1998), 81 Ohio St.3d 94, 97-98, 689 N.E.2d 552. Considering the course of this litigation and the trial court's findings, it is apparent that a reasonable inquiry would have revealed the legal impossibility of the claim. The cognizable event in the case at bar occurred, according to appellant's complaint between 1962 and 1990. Although a discovery rule has been adopted for accrual of actions for bodily injury by *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, a discovery rule has not been adopted with respect to actions for assault and battery. *Grooms v. Grooms* (Feb. 26, 1985), 10th Dist. No. 84AP-773.

{¶49} "Although she may not have known at that time of the total extent of her physical injuries, she did know that defendant had committed an assault and battery upon her causing physical injury. At that time, she knew she had sustained bodily injuries as a result of defendant's wrongful conduct in committing the assault and battery, and her cause of action for assault and battery accrued.

{¶50} "No new cause of action for assault and battery accrued when plaintiff later discovered that the extent of her bodily injuries was greater than she originally realized. A claim for assault and battery is not divisible with part of it accruing at one time, and a part, later. Discovering that the extent of physical injuries is greater than originally realized does not create a new accrual date for the cause of action for assault and battery." *Grooms*, supra.

{¶51} Under a de novo review of the facts and the law, I would conclude the trial court properly granted appellee's motion for sanctions.

HON. W. SCOTT GWIN

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOSEPH A. PINGUE, JR.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
JOSEPH A. PINGUE, SR.	:	
Defendant-Appellee	:	Case No. 06-CAE-10-0077

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas is reversed. Costs assessed to Appellee.

HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2007 SEP 18 AM 10:59
JAN ANTONOPLOS
CLERK

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

CASE NO: 06 CAE 10 0077

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2007 SEP 18 PM 2:56
JAN ANTONOPLOS
CLERK

JOSEPH A PINGUE SR

vs

JOSEPH A PINGUE JR

CLERK'S CERTIFICATE OF MAILING BY ORDINARY MAIL
(RULE 4.6 (D), OHIO CIVIL RULES)

I hereby certify that, pursuant to written instructions received by this Office from the attorney for Plaintiff/Defendant, I complied with said written instructions and mailed the documents requested to be served to the following named person/persons at the address/addresses indicated, by ORDINARY UNITED STATES MAIL on this date: September 18, 2007

Document(s) mailed: **OPINION/JUDGMENT ENTRY FROM 5TH DISTRICT APPEALS COURT**

ATTN: JEFFREY D BOYD
7792 OLENTANGY RIVER ROAD SUITE K
COLUMBUS, OHIO 43235

JAMES R BILLINGS / ROBIN L JINDRA / BENJAMIN ZACKS
33 SOUTH JAMES ROAD 3RD FLOOR
COLUMBUS, OHIO 43213

DELAWARE COUNTY COMMON PLEAS
COURT JUDGE (HAND DELIVERED)

JAN ANTONOPLOS
DELAWARE COUNTY CLERK

DMCline, DEPUTY

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOSEPH A. PINGUE, JR.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
JOSEPH A. PINGUE, SR.	:	
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CASE NO: 06 CAE 10 0077

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VS

JOSEPH A PINGUE JR

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(RULE 4.6 (D), OHIO CIVIL RULES)

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DELAWARE COUNTY CLERK

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HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY

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COURT JUDGE (HAND DELIVERED)

JAN ANTONOPLOS
DELAWARE COUNTY CLERK

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