
IN THE SUPREME COURT OF OHIO

JOSEPH A. PINGUE, SENIOR,

Appellant,

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

vs.

JOSEPH A. PINGUE, JUNIOR,

Appellee.

Supreme Court Case No. 07-2039

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

MEMORANDUM IN RESPONSE OF PLAINTIFF/APPELLEE

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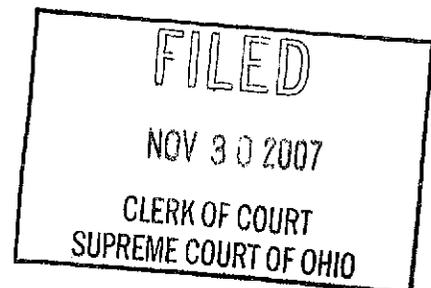


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STATEMENT OF PLAINTIFF/APPELLEE'S POSITION:
THIS CASE DOES NOT INVOLVE ANY CONSTITUTIONAL QUESTION,
AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This appeal is simply a reflection of the fact that the Defendant/Appellant is dissatisfied with the decision of the Court of Appeals. This case now involves no constitutional question at all, and in this phase, is not a case of public or great general interest. The ruling of the Court of Appeals was not based upon any change or modification of the law; it was simply the application of the facts of this case – both substantive and procedural - to established precedent.

Appellant's plea for review is, however, ironic: Appellant claims to be a "victim" of a frivolous claim although he was in fact the aggressor in the underlying case for years, as he pursued his Counterclaim long after Plaintiff/Appellee's claims against him had been dismissed; Defendant/Appellant ignores the authority of the Court and of the rule of law by continuing to assert in every filing that Plaintiff/Appellee's claims are frivolous although the Court of Appeals has ruled they were not; Appellant has spent years arguing that Appellee's exercise of his right to appeal an adverse decision is frivolous, but now seeks to exercise his right to appeal.

So much has been written about this case that a brief review of what actually happened is in order:

- March 12, 2002: Plaintiff/Appellee learned for the first time, after consultation with a neurologist and following an MRI of his brain, that he had irreversible, inoperable, brain damage – atrophy of the right temporal lobe - as a direct and proximate result of repeated abuse by Defendant/Appellant between 1962 and 1990;
- March 6, 2003: Plaintiff filed a four-page Complaint against Defendant;
- May 1, 2003: Defendant filed a three-page Answer, a two-page Counterclaim, nineteen Interrogatories and twenty Requests for Production. Defendant's counsel billed Defendant seven-tenths of an hour for preparing and revising this discovery. Plaintiff responded to Defendant's discovery within 28 days of service. Defendant's counsel initially billed Defendant four-tenths of an hour for receiving and reviewing these responses;

- June 30, 2003: Plaintiff propounded seventeen Interrogatories and thirteen Requests for Production to Defendant, most of which were explicitly geared toward his defense against the Counterclaim;
- July 23, 2003: a 20-minute Pretrial was held;
- August 12, 2003: Defendant filed his Motion for Judgment on the Pleadings. Between the Pretrial and the date this Motion was filed, no discovery was done, not one deposition was taken, no experts were retained, no motions were filed;
- November 12, 2003: the Trial Court granted Defendant's Motion, terminating Plaintiff's claims.

The only other things that happened in this case were:

- Defendant continued to press his Counterclaim against Plaintiff until June 21, 2006, two and a half years after Plaintiff's claim had been dismissed;
- Plaintiff appealed the decision of the Trial Court;
- Defendant moved for sanctions.

That's it. The Trial Court stated:

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.

It is hard to imagine how much more simply this case could have been handled, especially taking into account Plaintiff's need to defend himself against the Counterclaim. And although Defendant may have proposed staying discovery, he never agreed to stay his Counterclaim, or to agree to dismiss it should he be successful with his Motion for Judgment on the Pleadings:

Q. [By Plaintiff's Counsel] Mr. Graziano, tell me if I'm wrong about this. You never agreed that if -- if discovery was stayed and your prospective motion to dismiss or judgment on the pleadings was granted, that you would not pursue the counterclaim, did you?

A. [By Defendant's Counsel] Never told you I would not pursue the counterclaim.

* * *

Q. All right. The point was that at the time you requested me to stay discovery, there was a valid counterclaim pending against my client that you were not willing to trade off in terms of your ultimate success in the case; is that correct?

A. No. I said I wanted to stay all discovery on all claims.

Q Which would -- which would leave us in the position where at some point somewhere down the years we would then be looking at a counterclaim and have no discovery done with no indication at all that you were going to drop the counterclaim?

A. Right.

Transcript of May, 24, 2006 Motion Hearing, page 81, 86. Emphasis added.

Plaintiff appealed the Decision of the Trial Court dismissing his claims, which was affirmed by the Fifth District on August 9, 2004 (*Pingue. Sr. v. Pingue, Jr.*, 5th Dist. No. 03-CA-E-12070, 2004- Ohio-4173), and this Court declined jurisdiction on December 29, 2004, (*Pingue. Sr. v. Pingue, Jr.*, 104 Ohio St. 3d 1440, 2004-Ohio-7033), at which point Plaintiff's claims were over and done with. But on April 25, 2005, Defendant filed a Motion for Sanctions and on April 29, 2005, Defendant filed a Motion to Reactivate Case, for the express purpose of pursuing his Counterclaim. On August 1, 2005, Defendant filed a Motion for Summary Judgment on the Counterclaim, which was denied on May 8, 2006, the Trial Court holding:

Reasonable minds could only agree that the son's claim of physical abuse is nothing more than his subjective opinion passed on the discipline which his father administered. A statement of opinion can never be the basis for a defamation action.

The Court is aware that in light of what has been set out in this opinion, one might conclude that summary judgment in favor of Plaintiff would be proper. The Court explicitly makes no determination on that issue.

On May 17, 2006, Plaintiff filed a Motion for Judgment on the Pleadings as to the Counterclaim. Defendant never filed a response to this Motion and it was never ruled upon by the Trial Court. On May 24, 2006, the Court conducted a hearing on Defendant's Motion for Sanctions. On June 21, 2006, more than a month after the Hearing, Defendant filed a Dismissal of his Counterclaim. This was the first time that Plaintiff/Appellee was not facing claims against him.

On August 8, 2006, the Trial Court issued its Decision and Entry. In that Entry, it is significant that the Court incorrectly states the sequence of events regarding the Counterclaim, stating: "At Defendant's request the matter was reinstated on the docket, the counterclaim was dismissed, and a motion for attorneys fees was filed." In fact, Plaintiff was always faced with defending this Counterclaim; it was the last open claim in this litigation.

ARGUMENT IN SUPPORT OF PLAINTIFF/APPELLEE'S POSITION
REGARDING APPELLANT'S PROPOSITION OF LAW #1

Actually, Appellant's proposition of law is correct. It is his application of the substantive and procedural facts of this case to that proposition of law that is in error. Appellant wants the law to hold that a losing argument is a frivolous argument; Appellant is in effect lobbying for a "loser pays" rule. But the American system has not adopted a loser pays rule; the history of the law is the history of the evolution of the law by the reversal of precedent:

[O]ur legal system is in large part based on the considered evolution of law, and we rely today upon legal rights that would not have evolved in a climate that did not encourage responsible, creative, arguments for the extension of law. Therefore, we do not intend to discourage attorneys from making innovative arguments.

Riston v. Butler (2002), 149 Ohio App.3d 390, 397-398, 2002 Ohio 2308, at ¶47. Further:

"The history of the so-called discovery rule in Ohio is long and storied. The rule of discovery was originally recognized by this court in the medical malpractice context, but the rule has been generally accepted and applied in numerous areas of the law. See *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213. . . Of particular significance, the discovery rule has been judicially applied to the general statute of limitations for bodily injury actions under former R.C. 2305.10."

Browning v. Burt (1993), 66 Ohio St. 3d 544, 559.

The highest principals of the legal profession involve fighting for justice for people who have suffered at the hands of others. The Ethical Considerations of our profession, are ". . . aspirational in character and represent the objectives toward which every member of the

profession should strive. . .” Ethical Considerations 7-3 states “While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law;” Ethical Considerations 7-4 states: “The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.” Appellee’s cause of action closely tracks the Supreme Court’s decision in *O’Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84 (see below). The issue of whether Plaintiff’s assertion that his claim was either warranted under existing law or could be supported by a good faith argument for an extension, modification, or reversal of existing law, *R.C. 2323.51*, is founded solely on a legal issue, and therefore requires a legal, not a factual, analysis. *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227. With respect to purely legal issues, the Fifth District simply followed its own precedent that “we follow a *de novo* standard of review and need not defer to the judgment of the trial court.” *Gump v. Walker*, 5th Dist. No. 2004-CA-367, 2005-Ohio-5820.

Applying this standard, the Court found that Appellee’s actions were not frivolous; they could not conclude that no reasonable lawyer would have brought the action in light of the existing law. “The sanctions statute is to be applied carefully so that legitimate claims are not chilled. . . A party is not frivolous merely because a claim is not well-grounded. . .” *Riston v. Butler* (2002), 149 Ohio App.3d 390, 397-398, 2002 Ohio 2308, at ¶35. How far from *O’Stricker* are the facts of this case?

“WHEN AN INJURY DOES NOT MANIFEST ITSELF IMMEDIATELY. . .”

Plaintiff’s facts as alleged, and the inferences from those facts, make it clear that Plaintiff is complaining of injuries, such as irreversible brain damage, brain atrophy of the right frontal lobe, increased risk to contract Alzheimer’s disease and Parkinson’s disease, and Post Traumatic Stress

Disorder, that did not manifest themselves at the time of the batteries that caused them, and that he did not know about until March 12, 2002.

“. . . THE CAUSE OF ACTION ARISES UPON THE DATE ON WHICH THE PLAINTIFF IS INFORMED BY COMPETENT MEDICAL AUTHORITY THAT HE HAS BEEN INJURED”

Plaintiff’s claims state the exact facts that the Supreme Court deemed so important in *O’Stricker* - the revelation by a medical professional that a layperson has an injury that they did not know about because of the nature of the injury and the kind of diagnostic tests required to discover that injury.

“. . . OR UPON THE DATE ON WHICH, BY THE EXERCISE OF REASONABLE DILIGENCE, HE SHOULD HAVE BECOME AWARE THAT HE HAD BEEN INJURED, WHICHEVER DATE OCCURS FIRST”

Knowledge that you have been hit is not the same as knowledge that you have suffered brain atrophy of the right frontal lobe or a psychological injury known as Post Traumatic Stress Disorder. Here Plaintiff seeks redress for unknown, and at the time unknowable, injuries, in a Complaint filed less than a year after those injuries were discovered. Further, *O’Stricker* questions:

Justice in this case cries out for a remedy. How can anyone be precluded from asserting a claim by a statute of limitations which expires before the discovery of the injury? How can anyone charged with the responsibility of administering justice allow such an absurdity?

O’Stricker, supra, at 89.

ARGUMENT IN SUPPORT OF APPELLEE’S POSITION REGARDING PLAINTIFF/APPELLANT’S PROPOSITION OF LAW #2

The Trial Court erred and committed an abuse of its discretion by awarding Defendant/Appellant attorney fees and expenses for legal services that were related to his 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 recoverable,” but then awarded such fees.

The Trial Court’s Decision awards fees and expenses that Defendant excluded from his claim, and that the Court explicitly said it would not award.

Defendant’s Motion for Sanctions requests only fees for defending Plaintiff’s claims. At the Motion Hearing, Defendant disavowed any fees relating to his Counterclaim. Motion Hearing, page 27. At the Motion Hearing, Defendant explicitly “reduced” the amount of his bills by withdrawing the fees relating to his Counterclaim, and in his post-hearing brief, Defendant again disavowed any such fees. In its Decision, the Court stated “The fees incurred in pursuing the counterclaim are not recoverable.” But the Decision included those fees.

In Defendant’s Exhibit A at the Motion Hearing, the bill totals \$4,541.50. This includes Professional Services and \$134.50 in Costs Advanced (of that, \$100 is the fee charged by the Clerk of Courts for the costs deposit for the Counterclaim). At the Motion Hearing, pages 32-33, Defendant makes it clear that he is withdrawing portions of the bill because they go to his Counterclaim, and that the maximum total sought for fees is \$3,616.00. Nevertheless, the Court’s Decision makes the award, based on Exhibit A, \$4,676.00 – the TOTAL amount of all fees and expenses, including the portion Defendant himself withdrew as attributed to the Counterclaim.

In fact, the Court’s award is based on 9 separate bills (Exhibits A – H and FF). All except H and FF are for time before the Trial Court granted Defendant’s Motion for Judgment on the Pleadings in November, 2003. Despite the fact that no one thought that the award should include things related to the Counterclaim, and despite the fact the those bills unquestionably contain significant amounts of time and expenses related to the Counterclaim, the Court’s award

for all billing before November, 2003 is for 100% of the time and expenses on those bills, with no allowance for the “Counterclaim time” that everyone agrees is there. For example, \$925.50 in fees should have been taken out of Exhibit A, per the Defendant. Motion Hearing, page 32 .

This can't be right as everyone agrees some of that time concerned the Counterclaim, as did some of the expenses, yet the Court did not delete the Counterclaim time or expenses.

In March, 2003, the *Norgard* opinion that held “. . . a cause of action based upon an employer intentional tort accrues when the employee discovers, or by the exercise of reasonable diligence should have discovered, the workplace injury and the wrongful conduct of the employer” was less than a year old. *Norgard v. Brush Wellman*, (2002), 95 Ohio St.3d 165. In the years before that there was an almost unbroken chain of cases that generally accepted and applied the discovery rule in numerous areas of the law: *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84 (extension of discovery rule to asbestos-related disease); *Skidmore & Hall v. Rottman* (1983), 5 Ohio St. 3d 210, (extension of discovery rule to legal malpractice); *Cincinnati Gas & Electric Co. v. Gen. Elec. Co.* (S.D.Ohio 1986), 656 F. Supp. 49, 74 (extension of discovery rule to fraud); *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St. 3d 69 (extension of discovery rule to adoption); *Browning v. Burt* (1993), 66 Ohio St. 3d 544 (extension of discovery rule to negligent credentialing); *Liddell v. SCA Services of Ohio* (1994), 70 Ohio St. 3d 6 (extension of discovery rule to negligent exposure to toxic gas); *Ault v. Jasko* (1994), 70 Ohio St. 3d 114 (extension of discovery rule to sexual abuse); *NCR Corp. v. U.S. Mineral Products Co.* (1995), 72 Ohio St. 3d 269 (extension of discovery rule to asbestos removal); *Collins v. Sotka* (1998), 81 Ohio St. 3d 506 (extension of discovery rule to the date of conviction for assault/murder) (overruling *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213).

Why did Joseph Pingue, Jr. think that he had a right to hold Defendant accountable

through the court system? These excerpts from his Affidavit give the background:

3. All through my childhood and teenage years, I was brutally beaten by my father. I was hit so hard I would see stars, slapped with an open hand, hit with a closed fist, kicked on all body parts including private parts, had chunks of my hair pulled out, was stripped naked and beat with a belt, to the point I had bruises and welts and cuts, sometimes so bad I had to miss school because of the visible injuries.
4. I absolutely stand behind the truth of the fact that my father beat me, mercilessly and violently, on hundreds of occasions. I personally saw him viciously and maliciously beat my mother, beat my sister Diana, and to a lesser extent beat my sister Maria, and to still a lesser extent my brother Michael. Certainly I knew that I had suffered injuries, such as a dislocated shoulder, bleeding, bruises, and other external physical trauma as a result of these beatings. However, I did not know until advised by my neurologist, Dr. Nahid Dadmehr, on March 12, 2003, that I had suffered permanent brain damage, which was diagnosed with the aid of the MRI.

* * *

6. During my childhood and teenage years, I repeatedly witnessed my father subject my mother and sister Diana to more of the same kind of beatings – too many to count.

* * *

10. Exhibit 1 is a DVD that contains true and accurate reproductions of videotapes showing my father striking me, and the time immediately before and after striking Diana Pingue, in which I can confirm the identity of those in the films, including myself, my mother, my father, my sister, and my other relatives, and true and accurate reproductions of audio recordings in which I can identify the voice of my father, my grandmother, and my mother.

Given these facts, why wouldn't Plaintiff think he deserved some right to hold his assailant accountable?

Why did Mr. Pingue, Jr's. lawyer think that Plaintiff had a right to hold Defendant accountable through the court system? The key facts of this case, which should have been accepted as true by the Trial Court, followed very closely the rule of *O'Stricker* (in italics):

- *"When an injury does not manifest itself immediately"* – Plaintiff's brain injury did not manifest itself immediately;
- *"...the cause of action arises upon the date on which the plaintiff is informed by*

competent medical authority that he has been injured – “On March 12, 2002, Plaintiff learned for the first time, after consultation with a neurologist, that he had suffered an irreversible brain injury as a direct and proximate result of this abuse”. Complaint, ¶ 2.

And what of the directives from this Court that:

... this court believes a liberal interpretation of the time of accrual is appropriate in this and all actions alleging the infliction of bodily injury which only manifests itself at a point subsequent to the alleged negligent conduct of defendant.

O’Stricker, supra, at 89, or of the Fifth District:

It has been noted, however, that in some instances, application of this general rule would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence.

Fritz v. Bruner Cox, LLP (2001), 142 Ohio App.3d 664, 670.

Must Plaintiff/Appellee ignore the injustice that would occur if the statute of limitations denies a remedy to a man who has been brain damaged, but didn’t know it until after the statute expired? If so, then what did Justice Stratton mean when she said:

Justice in this case cries out for a remedy. How can anyone be precluded from asserting a claim by a statute of limitations which expires before the discovery of the injury? How can anyone charged with the responsibility of administering justice allow such an absurdity?

O’Stricker, supra, at 89.

The Trial Court did address the applicability of sanctions against Plaintiff/Appellant’s

Counsel:

[The Trial Court, addressing Plaintiff’s Counsel] This court feels, and I think I am entirely justified in feeling this way, that the affidavits and other matter that have been submitted by counsel reflect the integrity and professionalism of counsel on both sides in this case. It is the Court’s opinion that none of you would be playing fast and loose with the rules of evidence or the truth.

Hearing, pages 112 -113, and:

[The Trial Court, addressing Plaintiff’s Counsel] As I mentioned before, I believe you behaved responsibly, professionally in this matter that a Rule 11 is - - it would

be an affront or perceived as an affront professionally to do it.

Id., page 118. These findings of fact are supported by the great weight of the record in this case, and cannot be reversed absent an abuse of discretion.

VII. CONCLUSION

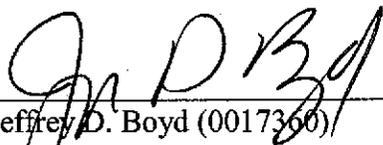
Plaintiff/Appellee Joseph Pingue, Jr. had three options:

- Take the abuse and do nothing. He did this for years, until his doctor told him he had irreversible, inoperable, brain damage – atrophy of the right temporal lobe - and was looking at a lifetime of illness, impairment and enormous medical expenses;
- File a lawsuit before his injury had manifested itself, in which he could not make a claim for his injury;
- File a lawsuit based on the same legal theory that many others had used to avoid the “absurdity” of “a statute of limitations which expires before the discovery of the injury.”

He chose the latter. He lost the case, but it was brought in good faith, based on a long line of legal precedent. That Plaintiff lost the case does not mean it was frivolous to try to win.

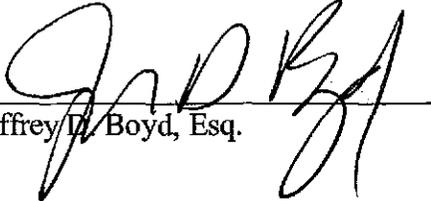
For the foregoing reason Plaintiff/Appellee respectfully requests that the Defendant/Appellant’s Memorandum in Support of Jurisdiction be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served by regular U.S. mail, postage prepaid, November 30, 2007, on James R. Billings, Esq. and Robin L. Jindra, Esq., 33 South James Road, 3rd Floor, Columbus, Ohio 43213.



Jeffrey D. Boyd, Esq.