ORIGINAL

IN THE SUPREME COURT OF OHIO

David Pheils, Jr.,	:	SP. CT. NO. 10-0054
Appellee,	:	ON APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS,
v.	:	SIXTH APPELLATE DISTRICT
David Palmer, et al.,	:	COURT OF APPEALS CASE NOS.: L-98-1053 & L-08-1333
Appellants.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, DAVID PALMER

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This Case Is One of Public or Great General Interest and Involves a Substantial Constitutional Question

The constitutional right to a fair trial is an inviolable right afforded to every litigant regardless of gender, race, ethnicity, religious/political beliefs, sexual preference and/or social standing. Said constitutional right includes but is not limited too:

1) A fair and impartial judge (due process) *U.S. v Scioto*, 521 F.2d 842 – *Liteky v U.S*, 114 S.Ct. 1147, 1162
2) The right to present all relevant evidence at trial that could not under ***any*** circumstance been discovered prior to trial – *See* Rule 60(B)
3) Fraud, misrepresentation and/or egregious misconduct of adverse (prevailing) party prior to and during trial– *See* Rule 60(B)

The prevailing party in this case was an "Officer of the Court" who was under a sworn duty to assist the court in the fair administration of justice, a duty Appellee treated with unabashed disdain as evidenced by the incontrovertible facts submitted to the inferior courts and addressed herein. Patently, the egregious misconduct of an Officer of the Court must be construed as a case of ***immense*** (great) public interest.

The 6th District Appeals Court erred in failing to properly apply the fundamental rights involving due process and absolute right to a fair trial as aforementioned. In denying Appellant's Rule 60(B) Motion, the lower courts disregarded irrefutable facts of Appellee's egregious and premeditated misconduct in concealing highly relevant evidence disproving his defamation claim until ***after*** the trial concluded. More importantly, the insubordinate courts mistakenly misapplied the time constraints (1 year) for the filing of said motion. Therefore, Appellant respectfully moves this Court to remind the lower courts of their duty to comply with the mandates of Rule 60(B) and the due process requirements of the U.S. and Ohio Constitutions.

I. STATEMENT OF THE CASE:

This litigation arose from a defamation claim brought by Appellee who is an Officer of the Court on April 27, 1995 alleging that Appellants began publishing and distributing defamatory materials about him that he claimed were false. Appellee also alleged that the statements were made with actual malice and intended to injure him professionally along with his reputation in the community. Appellee claimed the defamatory materials were placed on office windows, home mailboxes, and other public locations. Appellee further alleged that Appellant David Palmer trespassed on his property. Appellant put forth the defense of truth to the defamation claim.

This case was tried to a jury on Dec. 15, 1997 in the Lucas County Common Pleas Court and subsequently led to a jury award of $110,000, $10,000 and $800 for Appellee's defamation claim, civil conspiracy claim and intentional infliction of emotional distress claims respectively. On Dec. 22, 1997, the jury awarded Appellee $120,000 in punitive damages and on Dec. 23, 1997, the trial court entered judgment in Appellee's favor.

On Jan. 6, 1998, Appellants filed a Motion for a new trial which was denied on Jan. 27, 1998. On Feb. 24, 1998, Appellants filed their Notice of Appeal and on March 4, 1998 Appellee filed a Notice of Cross-Appeal.

II. STATEMENT OF FACTS:

On Jan. 20, 1987, Ok Sun Palmer was involved in a life-threatening auto accident in Michigan, rendering her permanently disabled and scarred. Appellants retained Pheils to pursue personal injury claims against the truck driver involved in the accident. In late Dec. 1987, Appellants discovered that Pheils' then-partner Dale Crandall forged Ok Sun

Palmer's name to five checks on her Mid-Am Bank account made payable to the Pheils firm. Mrs. Palmer's bank account contained reimbursements from Nationwide under the Michigan No-Fault Act for payment of medical care she received on Jan. 20, 1987. Dale Crandall was not authorized to write the checks (Tr. Trans. P. 425 ll. 12-16).

On 01/27/88, Pheils/Crandall sued Appellants for $566,000 claiming 30% of all future medical payments made by Nationwide under the No-Fault Act (Tr. Trans. p. 428) until Mrs. Palmer died. Subsequently, Pheils obtained a judgment for future No-Fault medical payments and collected $392,000, which was in addition to the $185,000 in fees approved by the Monroe County Michigan Circuit Court paid to Michigan counsel Randall J. Gillary in 1994 for settlement of future No-Fault medical payments. Pheils also received another $110,000 judgment which was paid by Mrs. Palmer from funds paid for her future medical bills by Nationwide.

III. PROPOSITION OF LAW AND SUPPORTING ARGUMENT

Proposition of Law No. 1:

Was nine-month delay in filing 60(B) motion on 11/13/98 unreasonable and/or did it constitute lack of due diligence?

Rule 60(B) 3 provides that the Motion be filed within one-year of the judgment date. The following facts prove that Appellants filing was timely.

1) 12-/23/97 – Date of trial court judgment
2) 11/25/97 – Date of filing of Rule 60(B) 3 Motion

At ¶41 of its 12/04/09 decision the Court of Appeals states:

"In addition, appellants failed to provide any explanation for the 11 month delay in filing the original motion for relief from judgment…"

This statement is erroneous in that Appellant's 11/13/98 motion for relief from judgment states:

"It is obvious from a review of the Appendix that a considerable amount of time was expended to review each item and to acquire the documentation which establishes the numerous wrongful claims for costs." (¶2 (lines 7-10)

It cannot be disputed that Appellants provided a reasonable explanation to the lower courts for the 11-month delay in filing the 60(B) motion. A cursory review of Appellant's 11/13/98 motion and supporting Memorandum establishes the following facts:

1) There were 101 pages of Exhibits attached to the motion that were detailed in Appendix "I" and "II"
2) The attached exhibits proved that Appellants reviewed court files in LCCP Case Nos. 88-0289/88-0200, 95-0285, 95-1150, 96-2729, 92-3758, and 98-1589, along with WCCP Case Nos. 94-CV-212, 91-CV-502, and 89-CIV0331
3) The timesheets of Pheils and Crandall consisted of 27 pages containing 549 separate entries

The trial in this matter ran from 12/15/97 through 12/22/97. The newly discovered evidence in support of Appellants 11/13/98 Rule 60(B) Motion was as follows:

a) Pheils' $11,211.12 in claimed costs in LCCP 88-0289 filed on the day of trial
b) Pheils/Crandall's 02/05/98 claims for pro se attorney fees in WCCP 91-CV-502
c) Pheils' claims v. Ok Sun Palmer to collect on vacated $500 sanction imposed against David Palmer ***only*** on 02/23/98 in LCCP 88-0289

A. Pheils' $11,211.12 in claimed costs in LCCP 88-0289

The record before the lower courts proves the following:

1) 08/29/97 Appeals Court affirms trial court's judgment in favor of Pheils
2) 09/02/97 Pheils files motion for Order to Clerk to pay Plaintiff's Judgment from Cash Bond, which is denied by trial court pending decision from Supreme Court
3) 12/14/97 Supreme Court denies review
4) 12/15/97 Pheils files motion for an Order to the Clerk to pay Plaintiff Judgment from Cash Bond and for $11,212.12 in costs incurred in LCCP 88-0289

Irrefutable documentary evidence was provided by Appellants to the lower courts proving that Pheils' cost claims were a total sham. Examples are as follows:

1) ***$1.00*** – Garnishment Fee (1/5/96) – collection in WCCP 91-CV-502
2) $5.00 – Filing Fee (12/14/95) re: WCCP 91-CV-502
3) $12.00 – Witness Fee Charter One Bank (6/29/95) – LCCP No. 95-1150
4) $15.00 – Witness Fee Dr. Kragt (1/18/96) – collection in WCCP 91-CV-502

5) $40.00 – Filing Fee (1/3/96) – collection in WCCP 91-CV-502
6) $70.00 – Payment of Interpreter (7/13/95) – LCCP 95-1150
7) $125.00 – Filing Fee (12/22/95) – collection in WCCP 91-CV-502
8) $125.00 – Witness fee Dr. Kestenbaum (3/29/96)
9) $140.00 – Interpreter services (6/26/95) – LCCP 95-1150
10) $250.00 – Judicial report (1/4/96) – collection in WCCP 91-CV-502
11) $1,087.50 – Mediation Fee John Stoepler (4/15/96)
12) $2,476.30 – Gaines Reporting Service – depositions in LCCP 95-1150
13) $4,608.37 – Unique Investigative Services – surveil Palmers

The evidence as set forth above which was submitted to the inferior courts proves Pheils falsely claimed filing/garnishment fees to collect on the 12/1/95 judgment in WCCP No. 91-CV-502. Moreover, the witness fee that Pheils claimed he paid to his personal psychologist, Dr. Kestenbaum related to Pheils' claim for 30% of Mrs. Palmer's No-Fault medical benefits. The record before the lower courts proved that Dr. Kestenbaum never testified at the 04/01/96 trial in LCCP 88-0289. Claiming he was going to use the testimony of his personal psychologist at trial in support of claims for attorney fees doesn't pass the involuntary laugh test.

If in fact Pheils' cost claims were not a total sham, then why didn't he move the trial court for payment of the $11,212.12 on Sept. 2, 1997 when he filed his original Motion to pay Plaintiff's judgment from Cash Bond? Because if he had, said sham claims would have come to the attention of Appellants nearly three months before the trial in this case and would have been used at trial to destroy his defamation claim.

Had the jury been presented with the evidence of Pheils' sham costs as provided to the lower courts, and especially his claim for a ***$1.00 garnishment fee*** to collect on the judgment in WCCP 91-CV-502, ***after*** he had already collected over $500,000 from the Palmers it must be presumed that the outcome would have not been favorable to Pheils. In fact, Pheils' defamation claim would have been exposed to the jury for what it really

was and would have cemented Appellants defense of the truth of the alleged defamatory statements. Put simply, this ***newly discovered evidence*** would have conclusively proved that Pheils' defamation claim was a sham. (emphasis supplied)

B. Pheils 02/05/98 claims for pro see fees in WCCP 91-CV-520

Pheils' timesheets (Ex. 29 attached to 11/13/98 motion for relief from judgment) prove that they were contemporaneous with the first entry dated Nov. 29, 1995. Pheils intentionally concealed said timesheets from Appellants prior to trial. It was not until Feb. 5, 1998 that Pheils' sham timesheets came to the attention of Appellants.

The original motion for relief from judgment provided ample evidence to the lower courts that Pheils' timesheets were a total sham. In fact, said evidence proved that Pheils sued Appellants to collect pro se attorney fees for time spent on (a) collecting on the judgment in LCCP 88-0289, (b) pursuing his defamation claim in LCCP 95-1150, and (c) fees for responding to ethics complaints.

Had this ***newly discovered evidence*** not been intentionally concealed by Pheils and provided to the triers of fact, it clearly would have resulted in a different outcome. Again, why did Pheils wait nearly two years to submit his sham claim for pro se fees?

C. Crandall's 02/05/98 claims for pro see fees in WCCP 91-CV-520

Pheils' ex-partner Dale Crandall acted as his primary "character" witness at the trial herein. Crandall also concealed his contemporaneous timesheets beginning with entries on Nov. 29, 1995 from Appellants until Feb. 5, 1998.

Exhibit 30 attached to the original motion for relief from judgment (Crandall's timesheets) proved that he sued Appellants to collect pro se fees for (a) time spent

responding to ethics grievances, (b) collecting on the judgment in LCCP 88-0289, and (c) time spent in LCCP 95-1150 (Pheils' defamation suit.)

The most egregious example of Crandall's fraudulent claim for attorney fees was his claim of 6/11/97 stating "To court, testimony" 5.0 hours for $650 (pg. 10 of Ex. 30). Said 5.0 hours related to a case in the Monroe County Michigan Circuit Court wherein attorney E.J. Leizerman was suing Mrs. Palmer for 33% of all medical No-Fault benefits paid by Nationwide. Unbelievably, Leizerman previously defended the Palmers against Pheils/Crandall's claim for 30% of said No-Fault benefits in LCCP 88-0289.

Patently, had the triers of fact been presented with this newly discovered evidence of Crandall's fraudulent timesheets as set forth above, his credibility as Pheils' primary character witness would have been obliterated and the outcome adverse to Pheils.

D. Pheils' claim v Ok Sun Palmer to collect on vacated $500 sanction imposed against David Palmer *only* in LCCP 98-1589

In attempting to collect on the judgment in this case, Pheils filed a foreclosure action against Mrs. Palmer's home in LCCP 98-1589 on 02/26/98. In this action (Ex. 28 of original 60(B) motion), Pheils falsely claimed to be entitled to the following:

1) $500 as a sanction imposed against David Palmer ***only***
2) $1,956.40 in costs (no costs ever imposed by Judge Bates)
3) $1,046.00 in interest from 03/29/94

The following irrefutable evidence was provided to the inferior courts in Appellants 11/13/98 60(B) motion proving Pheils' aforementioned claim was fraudulent.

1) 03/29/94 – Judge Bates sanctions David Palmer ***only*** for $500 (Ex. 26)
2) 04/08/94 – Pheils certificate of judgment v David Palmer only (Ex. 26)
3) 05/16/94 – Palmer files writ of mandamus v Judge Bates (Ex. 27)
4) 07/15/94 – 6th Appeals Court grants writ v Judge Bates (Ex. 27)
5) 08/31/94 – Trial court vacates $500 sanction (Ex. 27)
6) 09/06/94 – Pheils files release of judgment re: $500 sanction (Ex. 27)

For an Officer of the Court to put forth a fraudulent claim to collect $3,502.40 on a ***vacated sanction*** against Mrs. Palmer when it was proven that Judge Bates ***never sanctioned her*** is appalling to say the least. For the lower courts to rule that the discovery of said highly relevant evidence shortly after trial by Appellants was untimely is clearly erroneous. If in fact Pheils' claim to collect on a vacated $500 sanction was truly valid in March 1994 and collectable against Mrs. Palmer, then why did he wait until shortly after the trial herein concluded (nearly 4 years) before he made said claim?

Proposition of Law No. 2:

> Did Appellants fail to provide the lower courts with affidavits attesting to the accuracy of the documents and/or facts attached to the original and supplemental motion for relief from judgment?

In its Dec. 4, 2009 judgment, the Court of Appeals erroneously ruled that Appellants failed to provide any affidavits in their Rule 60(B) motion attesting to the accuracy of the facts and/or exhibits attached thereto. At ¶40 of its decision it states:

> "In support of their motion for relief from judgment, appellants submitted (1) exhibits of the costs incurred by appellee: and (2) time sheets allegedly reflecting attorney fees that appellee received in Pheils and Associates v. Palmer."
>
> "Nonetheless, the record of this cause does not contain any affidavits or other documents averring that these are true and accurate copies of these documents or swearing that these costs were allegedly related to other lawsuits-some involving these parties and some involving other individuals dating back to 1991."

The following facts clearly indicate that the Court of Appeals ruling was erroneous:

Attached as Exhibit 7 to Appellant's original Rule 60(B) Motion was David Palmer's affidavit which attested to the truth of the matters set forth in Appendix "I" and "II." In fact, David Palmer's affidavit (Ex. 7) is specifically referred to in the following numbered paragraphs of Appendix "I" and "II."

1) ¶4 of Appendix "I" refers to ¶ 2 of Appellant's affidavit – Ex. 7

2) ¶5 of Appendix "I" refers to ¶ 3 of Appellant's affidavit – Ex. 7
3) ¶11 of Appendix "I" refers to ¶ 4 of Appellant's affidavit – Ex. 7
4) ¶14 of Appendix "I" refers to ¶ 5 of Appellant's affidavit – Ex. 7
5) ¶15 of Appendix "I" refers to ¶ 6 of Appellant's affidavit – Ex. 7
6) ¶17 of Appendix "I" refers to ¶ 7 of Appellant's affidavit – Ex. 7
7) ¶19 of Appendix "I" refers to ¶ 8 of David Palmer's affidavit – Ex. 7
8) ¶3 of Appendix "II" refers to ¶ 9 of David Palmer's affidavit – Ex. 7
9) ¶6 of Appendix "II" refers to ¶ 10 of David Palmer's affidavit – Ex. 7

Moreover, attached to Appellants Supplemental Rule 60(B) Motion of August 15, 2008 is the affidavit of David Palmer dated August 13, 2008. At paragraphs 2 and 3 of said affidavit, Appellant avers that each and every document attached thereto is a true and accurate copy of original court filings, etc, and that each and every fact set forth in the Supplemental Memorandum and all attached Appendixes' are true and accurate. Said affidavits clearly establish that the subordinate courts' rulings were erroneous.

Proposition of Law No. 3:

Did evidence provided to the inferior courts constitute "newly discovered evidence" in accordance with Rule 60(B)?

Clearly the irrefutable facts provided to the inferior courts supported a finding that the discovery of (a) Pheils sham costs claims in LCCP 88-0289, (b) Pheils sham timesheets in WCCP 91-CV-502, and (c) Pheils' sham claim against Mrs. Palmer as to the $500 vacated sanction v. David Palmer ***only*** shortly after the trial herein constituted newly discovered evidence. At ¶40 of the Appeals Court's decision and judgment entry at line 14 it states:

> "Moreover, many of these documents existed at the time that judgment was entered [Dec. 23, 1997] in this case and, with due diligence, could have been discovered for the purposes of filing a motion for a new trial within 14 days of that entry. Indeed, some of these materials were those precluded from entry into evidence at trial by the common pleas court's grant of appellee's motion in Limine. The same is true of appellant's supplemental motion for relief from judgment."

The lower courts finding that many of these documents existed at the time judgment was entered is true; however, none of them were relevant in disproving Pheils' defamation claim until ***after*** he pursued said fraudulent claims during and/or shortly after the trial concluded.

It cannot be disputed that Pheils went to great lengths to conceal this newly discovered evidence from Appellants until after the trial concluded. Pheils' conduct was solely premised on his knowledge that had he pursued said sham claims prior to trial that Appellants would have been able to destroy his credibility before the triers of fact.

Therefore, the adverse rulings by the inferior courts in this regard are erroneous in that it clearly prevented Appellants from being afforded a fair trial by way of presenting evidence to the triers of fact as to the truth of the alleged defamatory material.

Proposition of Law No. 4:

Did Appellants fail to explain delay in filing supplemental memo in support of Rule 60(B) motion on Aug. 15, 2009?

At ¶41 of its 12/4/09 judgment, the Court of Appeals ruled that "appellants failed to provide any explanation for the 10 plus year delay in filing their supplemental" motion for relief from judgment.

The trial court's August 20, 2008 Opinion and Order denying Appellants rule 60(B) motion states at ¶2 of page 2:

> "On August 8, 2008, the Chief Justice assigned this visiting judge to conduct all further trial court proceedings for this case. On the same day, this judge met with counsel in the Lucas County Court of Common Pleas Court to hear oral arguments on the pending motions. At that time, this judge ***directed counsel to file any further materials to support or oppose the pending motions no later than August 15, 2008."***

In accordance with the specific directions of the trial court on August 8, 2008, a Supplemental Memorandum was filed by Appellant on August 15, 2008.

The filing of a Supplemental Memorandum in compliance with and at the specific direction of the trial court cannot reasonably then be construed by a higher court as an untimely filing. To suggest that a litigant's conformance with a court directive in so acting would or could subsequently operate to his/her disadvantage would of course be unjust and likely unprecedented. Therefore, the Court of Appeals ruling in this matter is clearly erroneous.

Proposition of Law No. 5:

> Did the Court of Appeals err in ruling that the trial judge was not biased and was under no duty to recuse himself thereby depriving Appellant of his constitutional due process rights to a fair trial?

At ¶51 of page 18 of its judgment, the Court of Appeals failed to correctly rule on Appellant's argument that the trial court was under a duty pursuant to the Code of Judicial Conduct to recuse itself when the appearance of bias existed.

The irrefutable evidence provided to the lower courts clearly demonstrated that the trial judge was in fact biased against appellant and therefore was required to recuse himself. The Court of Appeals relied on the erroneous conclusion that only the Chief Justice could rule on matters of disqualification when in fact Rule 2.11 of the Code of Judicial Conduct states:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
> (1) The judge has a personal bias or prejudice concerning a party or personal knowledge of facts that are in dispute in the proceeding.

A litigant's right to have his/her case presided over by a fair and impartial judge is sacrosanct. A party is not required to prove that a judge is biased but is only required to establish that based on the facts a reasonable person would

conclude that the appearance of bias exists. (See *U.S. v Scioto*, 521 F.2d 842 – *Liteky v U.S*, 114 S.Ct. 1147, 1162)

The evidence provided to the lower courts regarding bias involving the trial court was overwhelming in scope and clearly went far and above the requirement of the "mere appearance of bias," some of which is as follows:

1. Repeated references to appellant as a liar
2. Falsely reporting to Lucas County Sheriff that appellant was stalking the trial judge and that he feared appellant would assault wife when he was not home to protect her
3. Trial judge's wife telling *Columbus Dispatch* that "everyone feared appellant"

It would be difficult to imagine a case wherein a trial judge exhibited a deep-seated hatred of a litigant as is the case herein. The evidence provided to the lower courts clearly proved that the trial judge was in fact biased.

It is also clear from the evidence provided to the inferior courts that the trial judge was discussing the underlying case in regards to appellant with his spouse, which led to her comments to the *Columbus Dispatch* as aforementioned. This conduct in and of itself mandated the trial court's immediate recusal in accordance with the Code of Judicial Conduct.

Despite the trial court's acknowledged dislike of appellant, the U.S. and Ohio Constitutions mandated he recuse himself. The lower courts refusal to recognize these facts was clearly erroneous in that it was a blatant denial of appellant's constitutional right to a fair trial presided over by an unbiased judge.

Proposition of Law No. 6:

Prior to presentation of evidence at trial, must the trial court determine whether unfair prejudice substantially outweighs its probative value?

At trial Pheils was allowed to present a videotape of Mrs. Palmer allegedly picking up a large rock and carrying a shopping bag. (Tr. Trans. P. 629 11. 4-6).

Now, whether Mrs. Palmer could in fact perform the tasks shown on the videos of Pheils' so-called PI is and was totally irrelevant to prove Pheils' claim at trial that she conspired with David Palmer to allegedly defame him.

It is undisputed of record that Mrs. Palmer cannot read or write English. This fact is not in dispute since the ***same*** trial court awarded Pheils $210 in costs on Dec. 16, 1997 during the trial herein for (a) $70.00 for payment of Interpreter and (b) $140 for interpreter services on 6/26/95. (See page 5 above)

Moreover, the trial court absolutely knew the 6th District Court of Appeals reversed Pheils' 10/22/91 judgment in LCCP 88-0289 pursuant to an appeal filed by attorney James Nooney. That reversal was based on the trial court's violation of Ohio law requiring it to appoint an interpreter for Mrs. Palmer. Since the trial judge was assigned after said reversal it would be frivolous to assert that he was not aware of her well-documented inability to read or write English.

Despite this undisputed fact the lower courts ruled that she was responsible for the "publication" of the allegedly defamatory material. How it is possible for someone who has repeatedly been adjudged by Ohio courts to be unable to read or write English then be liable for authoring and/or co-authoring allegedly defamatory material and/or conspiring with another in so acting?

The record before the inferior courts conclusively proves that Pheils' sole motive for introducing said video tapes to the triers of facts was to (a) show that the Palmers lived in a 3,500 square foot home in a gated community, and (b) that

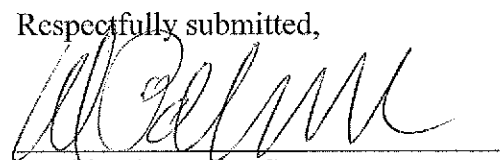
they were driving a BMW. Patently, said evidence had absolutely nothing to do with proving that Pheils was defamed.

If in fact appellants resided in (a) a multi-million dollar home in Boca Raton, Florida, (b) owned a million dollar home in Vail, Colorado and/or (c) drove a Rolls Royce, what possible relevance would said facts have to establish that Pheils was in fact defamed?

IV. CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant respectfully request that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

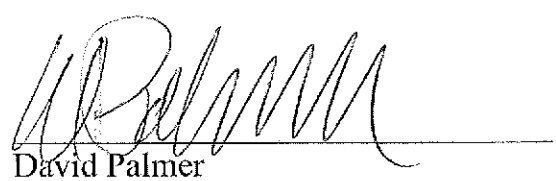
Respectfully submitted,



David Palmer, Pro Se

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was sent via electronic mail this 12th day of January, 2010, to David R. Pheils, Jr., at drpj@buckeye-access.com and drpj@acesstoledo.com, and Timothy James at james@rrmj.com and Lorri J. Britsch at britsch@rrmj.com.



David Palmer

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

David Pheils

Appellee/Cross-Appellant[1]

v.

David Palmer, et al.

Appellants/Cross-Appellees

Court of Appeals Nos. L-98-1053
L-08-1333

Trial Court No. CI 95-1150

DECISION AND JUDGMENT

Decided: DEC 04 2009

* * * * *

David Pheils, pro se

David Palmer, et al., pro se.

Timothy C. James for appellant Ok Sun Palmer.

* * * * *

HANDWORK, P.J.

{¶ 1} This cause comes before the court on appeal from a judgment of the Lucas County Court of Common Pleas.

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[1]Appellee filed a cross-appeal but never pursued that appeal.

E-JOURNALIZED
DEC - 4 2009

{¶ 2} The parties to this appeal have a history of extensive litigation. See, e.g., *Pheils v. Palmer* (Mar. 29, 1999), 6th Dist. No. L-98-1092; *Pheils v. Palmer* (May 14, 1993), 6th Dist. No. L-91-426. Initially, appellee, David R. Pheils, Jr., and his law firm represented OK Sun Palmer in litigation arising from an automobile accident in Michigan in 1987. *Palmer v. David R. Pheils, Jr. & Associates*, 6th Dist. No. WD-01-010, 2002-Ohio-3422, ¶ 2. Then, in 1991, appellants, OK Sun and David Palmer, sued Pheils and his associates for breach of privilege, defamation, and invasion of privacy. Id. at ¶4. Part of their action addressed the purportedly excessive fees charged by appellee in the original negligence action.

{¶ 3} In 1995, Pheils instituted the instant defamation action against appellants. Appellee claimed that appellants made the defamatory statements with actual malice. Appellee also sought compensatory and punitive damages for intentional infliction of emotional distress, and civil conspiracy. He also asserted that David Palmer trespassed upon appellee's property. David Palmer filed counterclaims against appellee alleging claims of malicious prosecution, fraud, and defamation.

{¶ 4} After a jury trial, the court entered judgment in favor of appellee, awarding him $110,000 on the defamation claim, $10,000 on the civil conspiracy claim, and $800 on the claim of the infliction of intentional emotional distress. The jury also awarded Pheils $120,000 in punitive damages. The jury further found in favor of appellee on the claims raised by appellants. Final judgment was entered by the common pleas court on December 23, 1997.

{¶ 5} Appellant, David Palmer, appeals that judgment and sets forth the following assignments of error:

{¶ 6} "I. TRIAL COURT ERRED WHEN IT ADMITTED SURVEILLANCE EVIDENCE AT THE TRIAL REGARDING APPELLANT DAVID PALMER."

{¶ 7} "II. TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT."

{¶ 8} "III. TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S MOTION IN LIMINE."

{¶ 9} "IV. TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL."

{¶ 10} "V. TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS TO A FAIR TRIAL."

{¶ 11} "VI. TRIAL COURT LACKED JURISDICTION TO RULE ON APPELLANT'S RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT."

{¶ 12} OK Sun Palmer filed a separate brief on appeal and maintains that the court below committed as error:

{¶ 13} "I. THE TRIAL COURT ERRED WHEN IT ADMITTED SURVEILLANCE EVIDENCE REGARDING APPELLANT, OK SUN PALMER."

{¶ 14} "II. The TRIAL COURT ERRED WHEN IT DID NOT GRANT APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE THE EVIDENCE DEMONSTRATES APPELLANT, OK SUN PALMER, DID NOT PARTICIPATE IN

THE PUBLICATION AND DISTRIBTION OF ALLEGEDLY DEFAMATORY MATERIALS AGAINST APPELLEE."

{¶ 15} "III. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S ORIGINAL AND SUPPLEMENTAL 60(B) MOTION FOR RELIEF FROM JUDGMENT."

{¶ 16} Appellants' Assignments of Error Nos. I address the same issue and shall, therefore, be considered together. In both of these assignments of error, appellants contend that the trial court abused its discretion in allowing, over appellants' objection, the testimony of appellee's private investigator, Michael Mullin, into evidence. This testimony related to OK Sun's mobility. They also argue that the court below abused its discretion in admitting a videotape of OK Sun made by Mullin into evidence. The objection to the testimony and the videotape was that it was untimely and that it was irrelevant to the question of whether OK Sun participated in the creation and distribution of the fliers to the point that it caused her unfair prejudice. The trial court overruled the objection holding:

{¶ 17} "I think it goes to the credibility of both Mr. and Mrs. Palmer. I think it would be best--having seen it before. I think you have had plenty of time to take—the tape had been noticed to the Defendant some time ago. You have had time really to depose this fellow. His testimony should be no surprise because he testified in a prior case."

{¶ 18} Briefly, in his complaint, appellee maintained that, commencing in May 1994, appellants began distributing fliers that indicated that he and his associates were, inter alia, "incompetent, dishonest, and corrupt." Pheils asserted that additional fliers bearing his photograph and containing the following language were distributed throughout Wood and Lucas Counties:

{¶ 19} "WANTED FOR BEING A CROOKED ATTORNEY

{¶ 20} "DAVID R. PHIELS, JR.

{¶ 21} "GUILTY OF FRAUD, GROSS INCOMPETENCE, CHARGING AN EXCESSIVE FEE, PERJURY AND EXTORTION."

{¶ 22} Other fliers stated that appellee was the "KING OF SLEAZE" and earned this title the "OLD FASHIONED WAY."

{¶ 23} Appellee testified that these fliers were put on the mailbox at his residence, taped on the windows of his automobile and his office, and posted on utility poles throughout Wood and Lucas Counties. He also stated that the fliers were placed in his neighbors' mailboxes. Pheils further indicated, through the testimony of his former associate, Dale Crandall, and a photograph, that the fliers were even taped to OK Sun's van. Moreover, appellee maintained that appellants sent letters to individuals claiming that Pheils committed, among other things, perjury, extortion, fraud, and deception.

{¶ 24} According to appellee, OK Sun, who was seriously injured as a result of the 1987 automobile accident and had difficulty walking, not only participated in the creation of the fliers, but also, helped her husband in the distribution of the same. At trial, OK

Sun testified that she did not know anything about the fliers. Furthermore, she denied ever aiding her husband in creating and distributing those fliers. David Palmer also swore that he was the only person who investigated appellee's performance as an attorney, created the fliers and letters, and distributed them. He further testified that, physically, his wife had her "good days" and her "bad days."

{¶ 25} At trial, Mullin narrated during the playing of the surveillance tape, which shows OK Sun picking up a large rock, carrying two filled shopping bags plus her cane, and, on a third occasion, getting out of a car and carrying shopping bags without any difficulty. On cross-examination, appellants' attorney questioned Mullen on the issue of whether he ever saw OK Sun engage in any strenuous activities, such as running, jumping, mowing the grass, heavy lawn work, or riding a bike. Mullen answered: "No Sir."

{¶ 26} "Relevant evidence" is that evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Unfair prejudice is that evidence that might serve as an improper basis for a jury's decision. *Davis v. Killing*, 171 Ohio App.3d 400, 2007-Ohio-23, ¶ 16, citing *Hampton v. Saint Michael Hosp.*, 8th Dist. No. 81009, 2003-Ohio-1828, ¶ 55. In general, but not always, evidence is unfairly prejudicial when it evokes an emotional response from the jury rather than an intellectual response. Id. Examples are evidence that "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish." Id.

{¶ 27} In the present case, the videotape and Mullen's testimony were offered to show that OK Sun had the physical capacity to participate in the creation and distribution of the fliers that were the foundation of appellee's defamation action. Consequently, this evidence goes to the issue of whether the testimony of OK Sun and David Palmer was credible when they testified that she did not participate. This evidence was, however, not unfairly prejudicial because Mullin's testimony and the acts depicted do not evoke horror or appeal to a juror's emotions or the instinct to punish. They are simply acts that might be accomplished by OK Sun on one of her "good days." Therefore, OK Sun's Assignment of Error No. I is found not well-taken, and David Palmer's Assignment of Error No. I is found not well-taken.

{¶ 28} In his Assignment of Error No. III, David Palmer maintains that the trial court erred in granting appellee's motion in limine limiting the introduction of any evidence of fraud and/or perjury committed by appellee with regard to the costs and fees that he charged appellants in cases occurring prior to May 5, 1995. In addition, the court granted the motion in limine as to any acts, e.g., divulging attorney-client confidences prior to that date.

{¶ 29} A motion in limine is a preemptive trial tactic that obtains a ruling to exclude or limit the use of certain evidence which the movant believes to be improper, and is made in advance of the actual presentation of the evidence to the trier of fact. *State v. Winston* (1991), 71 Ohio App.3d 154, 158. "The motion asks the court to exclude the evidence unless and until the court is first shown that the material is relevant

and proper." Id. A decision to admit or exclude evidence is a matter left to the discretion of the trial court; thus, we will not disturb a trial court's ruling on a motion in limine absent a showing that the court's attitude was unreasonable, arbitrary, or unconscionable. *Tracy v. Merrell Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152.

{¶ 30} Here, those matters that appellant sought to include are bits and pieces of other cases, some of which did not involve appellants, that appellants wanted to use to attack appellee's credibility on the issue of defamation. According to appellants, these documents, e.g., "fraudulent" time sheets prepared and submitted by appellee in a 1991 case, would establish that the statements published by appellants were true as to appellee's excessive and/or fraudulent costs and fees. None of the documents, including portions of court transcripts and depositions, submitted by appellants are either authenticated original documents or sworn to and/or certified copies of the originals. See Evid.R. 901 and Evid.R. 1005. Moreover, appellant was allowed to testify to numerous instances that he discovered concerning Attorney Pheils' alleged excessive/fraudulent costs and fees. Therefore, the jury did have evidence before it upon which to determine the credibility of appellee. Accordingly, David Palmer's Assignment of Error No. III is found not well-taken.

{¶ 31} In his Assignment of Error No. VI, Palmer asserts that the trial court erred in overruling appellants' Civ.R. 60(B)(2) motion for relief from judgment. His sole argument in support of this assignment of error is that the trial court lacked the jurisdiction to determine this motion because Palmer filed an affidavit of prejudice

against the trial judge in the Supreme Court of Ohio. The Honorable Richard Markus rendered his decision on appellants' motion on August 20, 2008. This judgment is file-stamped as being journalized at "P 4:20." Attached to David's brief on appeal is a United States Postal Office tracking and confirmation sheet indicating that an unidentified "item" was sent by an unknown party to a second unknown party in Columbus, Ohio, at 9:40 a.m. on August 20, 2008.

{¶ 32} We reject David Palmer's argument for two reasons. First, this issue was never raised in appellants' motion for relief from judgment or in David Palmer's supplemental motion for relief from judgment and is, therefore, waived on appeal. *Mason v. Meyers*, 140 Ohio App.3d 474, 477, 2000-Ohio-1698 (Citations omitted.). Furthermore, we conclude that the tracking and confirmation sheet is insufficient evidence to establish that appellants' alleged affidavit of prejudice was filed in the Ohio Supreme Court on August 20, 2008, thereby precluding the trial judge from entering his judgment at a later point on that same date. Accordingly, David Palmer's Assignment of Error No. VI is found not well-taken.

{¶ 33} In her Assignment of Error No. III, OK Sun Palmer contends that the trial court committed reversible error when it denied appellants' motion for relief from judgment predicated on newly discovered evidence. David Palmer raises the same issue in his Assignment of Error No. II.

{¶ 34} In the case before us, appellee's claims were based upon the allegation that appellants defamed him by publishing materials that claimed he was guilty of fraud,

perjury, and charging excessive fees. As noted above, final judgment was entered in favor of appellee on these claims on December 23, 1997. Appellants filed a motion for a new trial on January 6, 1998, which was denied by the trial court on January 28, 1998.

{¶ 35} On November 13, 1998, appellants' filed their motion for relief from judgment. Appellants based their motion on Civ.R. 60(B)(2), which relieves a party from a final judgment if that party offers evidence that could not, with due diligence, have been discovered in time to move for a new trial under Civ.R. 59(B). According to appellants, appellee improperly received fraudulent and excessive court costs in the amount of $11,211.12 from OK Sun Palmer in Lucas County Common Pleas Court Case Nos. 88-0289 and 89-0200. See *David Pheils & Assoc. v. Palmer*, 6th Dist. No. L-98-1110, 2009-Ohio-3491, affirming, inter alia, the trial court's award of costs. They therefore argued that this newly discovered evidence proved that the statements published by appellants were not defamatory or fraudulent.

{¶ 36} Appellants timely appealed the trial court's original judgment to this court. As a consequence, the common pleas court lost its jurisdiction to rule on the pending motion for relief from judgment. The Palmers filed for bankruptcy in August 1998. This case was not reinstated on our docket court until 2008. On June 25, 2008, we remanded this cause to the trial court for the purpose of obtaining a ruling on the Civ.R. 60(B) motion.

{¶ 37} On August 15, 2008, appellants submitted a "supplemental" motion for relief from judgment in which they raised new "evidence" that the common pleas court

excluded at trial. Supposedly, this evidence would demonstrate appellee's misconduct and fraud and would prove fatal to his defamation action. This evidence consists of evidence excluded at trial upon appellee's motion in limine, appellee's alleged misconduct during the course of this case, and "evidence" from other cases related to the litigation involving the parties to this appeal. As stated above, the trial court denied the Civ.R. 60(B)(2) motion on August 20, 2008, rendering this issue ripe for our review.

{¶ 38} In order to prevail on a motion to vacate made pursuant to Civ.R. 60(B), a movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time. *Jones v. Gayhart*, 2d Dist. No. 21838, 2007-Ohio-3584, at ¶ 9, citing *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, 150. In the case of a motion for relief from judgment based upon Civ.R. 60(B)(2), the motion must be filed within a reasonable time and not more than one year after the entry of judgment. The moving party's failure to satisfy any one of the three requirements will result in the motion being overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. The motion and supporting documents, if any, must contain operative facts which demonstrate the timeliness of the motion, the reasons for seeking relief, and the movant's defense. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 102-103.

{¶ 39} A motion for relief from judgment, under Civ.R. 60(B), is addressed to the sound discretion of the trial court, and such ruling will not be disturbed on appeal absent

a showing of an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion involves more than an error of judgment or law; it signifies that the trial court's attitude in reaching that judgment can be characterized as unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 40} "Newly discovered evidence refers to evidence in existence at the time of trial of which the aggrieved party is excusably ignorant." *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, ¶ 109. As applied here, the judgment for costs in the amount of $11,211.12 was entered in *Pheils and Associates v. Palmer*, supra, on December 17, 1997. Id. ¶ 1. In support of their motion for relief from judgment, appellants submitted (1) exhibits of the costs incurred by appellee; and (2) time sheets allegedly reflecting attorney fees that appellee received in *Pheils and Associates v. Palmer*. According to appellants, the costs incurred and attorney fees submitted did not relate to that case and were, therefore, evidence of the truth of the statements made by appellants in the materials that they created and distributed. Nonetheless, the record of this cause does not contain any affidavits or other documents averring that these are true and accurate copies of these documents or swearing that these costs were allegedly related to other lawsuits-some involving these parties and some involving other individuals-that date back to 1991. Moreover, many of these materials existed at the time that judgment was entered in this case and, with due diligence, could have been discovered for the purposes of filing a motion for a new trial within 14 days of that entry. Indeed, some of these materials were those precluded from entry into evidence at trial by

the common pleas court's grant of appellee's motion in limine. The same is true of appellants' supplemental motion for relief from judgment.

{¶ 41} In addition, appellants failed to provide any explanation for the 11 month delay in filing the original motion for relief from judgment and the 10 plus year delay in filing their supplemental motion. Even though a party has a potential right to file a motion to vacate a judgment up to one year after the entry of judgment, the motion is subject to the "reasonable time" requirement. *Adomeit v. Baltimore*, 39 Ohio App.2d at 106. A reasonable time is determined under the facts of each case. *Novak v. CDT Development Corp.*, 8th Dist. No. 83655, 2004-Ohio-2558, ¶ 12. In the absence of an explanation of the reason for a delay, the Eighth District court of Appeals found delays of four months or less unreasonable under Civ.R. 60(B). Id. Here, it is clear that the evidence appellants sought to use as a basis for their motion for relief from judgment was available either near to or at the time of the trial in the present case. Therefore, in the absence of a rationale for the delayed filing of their motion, we find that the 11 month delay was unreasonable. It follows that a 10 year delay in presenting their supplemental motion was also unreasonable. Accordingly, OK Sun Palmer's Assignment of Error No. III and David Palmer's Assignment of Error No. II are found not well-taken.

{¶ 42} OK Sun's Assignment of Error No. II asserts that the trial court erred in failing to grant appellants' motion for a new trial because the evidence at trial proved that she did not create or distribute the fliers defaming appellee. [2]

{¶ 43} Civ.R. 59(A)(6) states that a new trial may be granted to all or any of the parties upon all or any of the issues before the court if the verdict is not sustained by the weight of the evidence. "Unless the weight of the evidence supported a contradictory finding, appellate courts must defer to the conclusion of the trial court because it is better equipped than the appellate court to view the witnesses, observe their demeanor, gestures, voice inflections, and use these observations in weighing the credibility of the conflicting testimony." *Jacobs v. McAllister*, 6th Dist. No. L-06-1172, 2007-Ohio-2032, ¶ 19, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. The decision to grant a motion for a new trial is a matter within the discretion of the trial court. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224. Thus, the lower court's denial of appellants' motion for a new trial will not be disturbed unless this decision was arbitrary, unreasonable, or unconscionable. Id. (Citation omitted.)

{¶ 44} OK Sun Palmer claims that appellee failed to prove that David Palmer was acting as her agent because he failed to establish that she had the requisite control over her husband's actions; therefore, the trial court should have granted her motion for a new trial. We disagree. Appellee's theory of the case against both OK Sun and David Palmer

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[2]This issue was raised in appellants' motion for a new trial filed in the common pleas court.

was that they engaged in a civil conspiracy-not that David Palmer was an agent of OK Sun -to defame him.

{¶ 45} The elements of a civil conspiracy claim under Ohio law are: (1) a malicious combination of two or more persons, (2) resulting in injury to person or property, and (3) an unlawful act independent from the actual conspiracy. *Berardi's Fresh Roast, Inc. v. PMD Enterprises*, 8th Dist. No. 90822, 2008-Ohio-5470, ¶ 45. The unlawful act alleged in this case was defamation. Defamation is a false publication either spoken or written that injures a person's reputation. *Dale v. Ohio Civ. Serv. Emp. Assn.* (1991), 57 Ohio St.3d 112, 117. To prove defamation, the injured party must show that: (1) a false and defamatory statement was made about plaintiff; (3) the statement was published without privilege to a third party; (4) it was made with fault of at least negligence on the part of the defendant; and (5) it was either defamatory per se or caused special harm to the plaintiff. *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 601 (Citation omitted.).

{¶ 46} It is undisputed that fliers were created and published attacking appellee's character, claiming, inter alia, that he was a "crook," that he committed fraud and perjury, and that he charged excessive attorney fees. These fliers were introduced into evidence at trial. This was defamation per se because it reflected upon appellee's character in such a manner that it injured him in his trade or profession. *Becker v. Toulmin* (1956), 165 Ohio St. 549, 553. There is also no issue as to whether appellee suffered damages as a result of the defamation. The sole question, therefore, is whether evidence was offered to

show that OK Sun maliciously conspired with David Palmer in the creation of and/or publishing of the defamatory fliers.

{¶ 47} A civil conspiracy is "a malicious combination of two or more persons to injure another, in person or property, in a way not competent for one alone."

{¶ 48} *Minarik v. Nagy* (1963), 8 Ohio App.2d 194, 196. The element of a "malicious combination to injure" does not require a showing of an express agreement between defendants, but only a common understanding or design, even if tacit, to commit an unlawful act. *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 219. (Citations omitted.) The element of malice is "inferred from or imputed to a common design by two or more persons to cause harm to another by means of an underlying tort, and need not be proven separately or expressly." *Gosdon*, supra, at 219-220.

{¶ 49} In the present case, the evidence offered at trial showed that David Palmer is unemployed. In addition, testimony was adduced from David and OK Sun indicating that the couple's home, as well as all of the parties' funds, were held solely in the name of OK Sun. She further attested, however, that David Palmer exercises the control over those funds, but that she does not sign any documents, including checks, presented to her by her husband unless he provides "an explanation." OK Sun and David also acknowledged that she owned the van that was used to transport the fliers for distribution. Evidence offered at trial demonstrated that some of these fliers were posted on the van itself. While OK Sun agreed that she would ride in the van, she denied ever doing so when any fliers were posted thereon. Nonetheless, an exhibit entered into evidence at

trial revealed the fact that appellee saw OK Sun riding in the van festooned with said fliers on a day that David Palmer taped one of the fliers to appellee's office window. Based upon the foregoing, we find that the decision of the trial court denying appellants' motion for a new trial under Civ.R. 59(A)(6) as to OK Sun is not arbitrary, unreasonable, or unconscionable. Therefore, her Assignment of Error No. II is found not well-taken.

{¶ 50} In his Assignment of Error No. IV, David Palmer challenges the court's denial of appellants' Civ.R. 59 motion for a new trial on a different basis. He claims that the trial court erred in failing to grant his motion for a new trial, because appellee committed perjury during the damages hearing in order to persuade the court to award him punitive damages. David claims, as he did below, that he is entitled to a new trial under Civ.R. 59(A)(2) due to the misconduct of the prevailing party. Specifically, he contends that appellee perjured himself by testifying that he had not collected on a judgment in the amount of $316,314.71 in a separate case against OK Sun Palmer. In the lower court, appellants claimed that the jury would not have awarded appellee substantial punitive damages if its members had known that appellee had collected significant amounts of money from them. The "proof" of the purported payment consists of an uncertified judgment allegedly from "Case No.88-0289 89-0200" and is, therefore, not admissible evidence. That is, Evid.R. 1005 restricts secondary evidence offered to prove the contents of a public record, in this case, the record of a lawsuit, to either a certified copy of the record or an uncertified copy supported by the sworn testimony of a person with knowledge who testifies that the copy is true and correct. *State v. Flege*, 2d Dist.

No. 06-CA-113, 2007-Ohio-2134, ¶ 37. Therefore, the common pleas court did not abuse its discretion in denying appellants' motion for a new trial premised upon this allegation, and David Palmer's Assignment of Error No. IV is found not well-taken.

{¶ 51} Finally, in his Assignment of Error No. V, David Palmer contends that the trial judge, the Honorable Richard McQuade, violated his due process rights to a fair trial. In particular, he claims that the judge displayed "actual bias" toward appellants. The Due Process Clause of the United States Constitution entitles defendants in both civil and criminal cases to a trial before a tribunal that is fair and impartial, and not predisposed to find against them. *Marshall v. Jerrico, Inc.* (1980), 446 U.S. 238, 242. Nevertheless, R.C. 2701.03 is the sole means by which a litigant may claim that a common pleas judge is biased and prejudiced. *State v. Scruggs*, 10th Dist. No. 02AP-621, 2003-Ohio-2019, at ¶ 15, quoting *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 11. See, also, *Berdyck v. Shinde* (1998), 128 Ohio App.3d 68, 81. Only the Chief Justice of the Ohio Supreme Court or his designee has the authority to pass upon the disqualification of a common pleas court judge. *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441; *State v. Dougherty* (1994), 99 Ohio App.3d 265, 268-269. Thus, if David Palmer believed that Judge McQuade was biased or prejudiced against him, his remedy was to file an affidavit of disqualification for prejudice with the clerk of the Supreme Court of Ohio. R.C. 2701.03. Accordingly, we lack the authority to render a decision as to disqualification or to void a trial court's judgment on the basis of alleged bias. As a result, David Palmer's Assignment of Error V is found not well-taken.

{¶ 52} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____ JUDGE

Thomas J. Osowik, J. _____ JUDGE

John R. Willamowski, J. _____ JUDGE
CONCUR.

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.