

IN THE SUPREME COURT OF OHIO

**DANIEL N. LAVIN, EXECUTOR OF  
THE ESTATE OF MARTHA K.  
LOTTMAN, DECEASED,**

Plaintiff-Appellee,

vs.

**PAUL B. HERVEY, ESQ., ET AL.,**

Defendants-Appellants.

**CASE NO. 2015-1648**

**APPELLEE'S PARTIAL MOTION TO STRIKE OR ALTERNATIVE TO  
SEAL APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

Appellee, Daniel Lavin, Executor of the Estate of Martha Lottman, Deceased, through counsel, hereby requests this Court strike the Statement of Facts portion of Appellants' Memorandum in Support, pages 4-7, or alternatively maintain Appellants' Memorandum in Support under seal. Defendants' Statement of Facts section is replete with defamatory accusations and unproven allegations which have nothing to do with the underlying case and appear to be included as an act of retribution. Appellee does not want to have this false, inappropriate, and irrelevant information before this Court or open to public view in this honorable Court.

The information contained throughout Appellants' Statement of Facts not only pointedly and falsely attacks Appellee's moral character (accusing him of fraud) and mental instability, but more importantly has nothing to do with the propositions of law as presented by Appellants in this case. In fact, very little factual predicate is needed to pass upon the limited review this Court will employ when deciding whether to accept jurisdiction of this matter.

Additionally, Appellants' Statement of Facts does nothing more than reincorporate defamatory accusations errantly filed by Appellant Paul Hervey in the trial court as an affidavit. For instance, at page 5 of their brief, Appellants state they "did not object to the request for an expedited hearing, desiring a quick end to what they consider a generally frivolous case prosecuted *by a man with acknowledged mental health concerns.*" (emphasis added). Appellants' accusation that Appellee is a man who has "mental health concerns" is now the third time they have included language in court filings which is not legally relevant and as such gives rise to a claim for Defamation. *See, e.g., Surace v. Wuliger*, 25 Ohio St.3d 229.

Further, Appellants' accusation that Appellee committed fraud constitutes defamation per se and must be stricken. *See Shepard v. Griffin Servs., Inc.*, 2d. Dist. No. 19032, 2002-Ohio-2283 (explaining accusations of fraud and deceit indicate that the person committed crimes of moral turpitude and therefore constitute defamation per se.)

Shortly after the affidavit was filed, Appellee immediately sent correspondence (Ex. A, November 17 email) to Appellants regarding this defamatory affidavit, stating:

Finally, as an officer of the Court, Mr. Hervey has a duty to immediately notify the Court of the items set forth in his Affidavit that were not true. Please instruct Mr. Hervey to review his Affidavit and notify the Court of the numerous inaccuracies.

Thereafter, Appellants' counsel represented that the removal of the affidavit would be brought before the Court's attention. Indeed, a hearing on Appellant's Motion to

Restrict Public Access was set to occur before the Court whereupon the matter could be brought up by Appellee. However, as the hearing on the matter of public access was not until February 11, 2015, Appellee's counsel again sent a letter to Appellants demanding that the affidavit be removed from public access in an effort to curtail continued fees, costs, and time associated with the matter. (Ex. B, January 30, 2015 letter). Unfortunately, the hearing did not go forward in light of the appeal.

These allegations are false, defamatory, and have nothing to do with the propositions of law presented. Appellee does not want to risk further dissemination of this information which accuses him of perpetuating fraud. In fact, Appellee has recently filed a defamation action for the information contained in this Affidavit in the Stark County Court of Common Pleas against Appellants in this action.

Appellee therefore respectfully requests this Court strike the statement of facts portion of the Memorandum. Specifically, Pages 4 – 7 should be stricken and any other material which does not pertain to the propositions of law as presented in this case. Alternatively, Appellee respectfully requests this Court maintain Appellants' Memorandum under seal so that the general public does not have access to these false accusations regarding Appellee's moral character.

Respectfully submitted,

/s/ Scott M. Zurakowski

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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing was served on October 28, 2015, pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

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