

**In the Supreme Court of Ohio**

DANIEL N. LAVIN, Executor

Plaintiff-Appellee,

v.

PAUL HERVEY, *et al.*

Defendants-Appellants.

CASE NO. 2015 - 1648

Appellate Case No. 2015 CA 00021

Trial Court Case No. 221652

**APPELLANTS' RESPONSE TO  
APPELLEE'S PARTIAL MOTION TO  
STRIKE OR, ALTERNATIVELY, TO  
SEAL APPELLANTS'  
MEMORANDUM**

Now come the Appellants, by and through counsel, and hereby oppose "Appellee's Partial Motion to Strike or Alternative to Seal Appellants' Memorandum in Support of Jurisdiction" filed October 15, 2015 ["Motion"]. There is no basis in the record or in the law for any portion of Appellants' Memorandum in Support of Jurisdiction to be stricken or sealed. Notwithstanding a variety of assertions not supported by the record and arguments of counsel, there is nothing to support such an extraordinary measure in the matter currently on appeal to this Court. Moreover, the Appellee's inability to cite any relevant authority is especially telling as to the invalidity of the subject Motion. Therefore, the Appellants respectfully request this Court overrule Appellee's Motion.

The Appellee claims that the Appellants included information in their Memorandum in Support of Jurisdiction that was "defamatory", "unproven", and had "nothing to do with the underlying case and appear to be included as an act of retribution." Appellants disagree as to each of these characterizations. The statements are true, remain the only sworn statement on the record in this case and are entirely relevant to the underlying case. Moreover, the Appellants are

not seeking retribution, but to defend themselves. It was the Appellee who made defamatory and false statements in the public record about the Appellants with his initial filings in this case. Indeed, the Appellants believed – and continue to believe – the underlying action is a generally frivolous case prosecuted by a man with an acknowledged mental health concerns.

Appellants' Memorandum in Support of Jurisdiction contains the required elements under this Court's Rules of Practice. While Appellee may not like portions of the Memorandum, they are based on the Affidavit of Appellant Paul Hervey's Affidavit, the *only* sworn testimony offered in this case. Furthermore, it was part of the Appellants' initial pleadings filed in October, 2014 and the Appellee made **no** effort on the record to strike Appellant Hervey's affidavit in the lower court.

The Probate Court certainly did not strike or seal any portion of the affidavit. While the Appellee made a similar motion in the court of appeals, that court declined to strike or seal the subject information. A copy of the relevant decision of the Fifth District Court of Appeals (dated April 24, 2015) is attached hereto as Exhibit "A". The Appellee did not appeal this decision. If Appellee disagrees with Appellants' verified statements, there are specific procedures in place for him to present his own version of the facts of the case. He has repeatedly failed to avail himself of any of these procedures, including those available as a part of the Fifth District's consideration of this same issue. See App. Rule 16(B).

Furthermore, there is no basis on which to seal the record in this matter. Under Sup.R. 45(A), court records are presumed open to public access, and therefore fall under the Ohio Public Records Act, R.C. §149.43; see also *State ex re. MADD v. Gosser*, 20 Ohio St.3d 30, 485 N.E.2d 706 (1985). The only exceptions are those records falling within one of the statutory exemptions enumerated in R.C. §149.43(A)(1)(a) through (cc). A party wishing to seal a public record bears

the burden of proving that one of the statutory exemptions contained in R.C. §149.43(A)(1)(a) through (cc) applies; see also *State ex rel Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 886 N.E.2d 206, 2008-Ohio-1770 (Ohio 2008); *Dream Fields L.L.C. v. Bogart*, 175 Ohio App.3d 165, 885 N.E.2d 978, 2008-Ohio-152 (1<sup>st</sup> Dist. 2008). The Appellee has not come close to meeting this standard. Appellee did not reference any exception listed in R.C. §149.43(A) in support of his motion to seal Appellants' brief, nor was any case law cited by Appellee in support of his motion to seal. Appellants' Memorandum in Support of Jurisdiction is a public record pursuant to R.C. §149.43 and Sup.R. 45 and therefore is not subject to being placed under seal without due cause as defined by statute.

Appellee cites one case in his Motion – as part of his argument that the information in question defames Appellee. While Appellants stand by their statements, it is not appropriate for the Appellee to make such a plea to this Court under these circumstances; not only have the courts below not ruled on the whether the statements are defamatory, the Appellee has not proffered any proof to the contrary. In order to prove a claim for defamation, Appellee must show: (1) that a false or defamatory statement was made; (2) that such statement was an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Shepard v. Griffin Services, Inc.*, 02-LW-1738, 2002-Ohio-2883 (2<sup>nd</sup> Dist. 2002), citing *Hodges v. Meijer, Inc.*, 129 Ohio App.3d 318 (1998), citing *Akron-Canton Waste Oil v. Safety-Kleen Oil Serv.*, 81 Ohio App.3d 591 (1992). Appellee fails on the *first* prong of proving defamation, as **no evidence** has been provided that any portion of Appellant Hervey's Affidavit is false. In fact, the *only* evidence presented in the lower court is Appellant Hervey's Affidavit. Moreover, *Shepard* makes no mention of striking or

sealing any portion of the record based solely on a party's unsubstantiated claim of defamation. *Shepard* ultimately found that there was not enough evidence to establish such a claim. Similarly, in this case, there is no evidence to support a claim of defamation.

WHEREFORE, for all of the foregoing reasons, the Appellants request that Appellee's Motion be overruled.

Respectfully submitted,



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**PROOF OF SERVICE**

This 5<sup>th</sup> day of November, 2015, a copy of the foregoing was served by electronic service upon Attorney Scott M. Zurakowski, Attorney for Appellee, [szurakowski@kwgd.com](mailto:szurakowski@kwgd.com).



G. IAN CRAWFORD

**EXHIBIT "A"**

NANCY S. REINHOLD  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

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In the Court of Appeals  
Fifth Appellate District  
Stark County, Ohio

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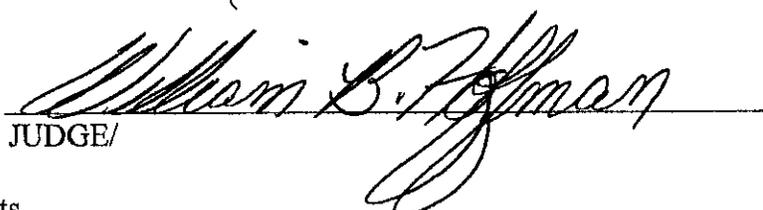
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**JUDGMENT ENTRY**

Upon the motion of the Appellee,

IT IS HEREBY ORDERED THAT the Appellee's Partial Motion to Strike or, Alternative, to Seal Appellants' Brief, is denied.

JUDGE/



cc: Atty. Crawford, for Appellants  
Atty. Zurakowski, for Appellees

ENTERED BY 15

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A TRUE COPY TESTED  
NANCY S. REINHOLD, CLERK  
Date 4-24-15