

COPY

IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel	)	CASE NO. CA2009-02-10
DENNIS J. VARNAU,)	
)	
Relator/Petitioner,	)	<u>RELATOR DENNIS VARNAU'S</u>
	)	<u>MOTION TO OVERRULE PRE-</u>
-vs-	)	<u>ARGUMENT RESPONDENT'S</u>
	)	<u>LATE OBJECTIONS TO</u>
DWAYNE WENNINGER,	)	<u>RELATOR'S SUMMARY</u>
	)	<u>JUDGMENT MATERIAL and</u>
Respondent/Defendant.	)	<u>ALTERNATIVE MOTION TO</u>
	)	<u>FILE SUPPLEMENTAL</u>
	)	<u>AFFIDAVITS FOR EXISTING</u>
	)	<u>EVIDENCE</u>

Relator moves the Court to issue a pre-argument ruling, overruling and denying Respondent's late objections to Relator's summary judgment evidence.

As grounds for this Motion, counsel states that on August 10, 2009, Relator filed Exhibits in support of his Motion for Summary Judgment and Opposition to Respondent's Motion. These were either copies of statutes, the words of Respondent himself, Respondent's own documents, or certifications of official public records obtained by subpoena and filed with the Court. Relator also filed his own affidavit, attached to his Motion, further verifying the authenticity and source of those Exhibits.

Throughout the remaining course of this case, including final briefing and argument, Respondent made no objections to any of it. For the first time, on direct appeal to the Ohio Supreme Court, Respondent complained about the admissibility of Relator's evidence. He purported to "renew" that objection for the first time in this Court, on remand, and apparently raises it now. Relator has opposed that objection on the grounds of waiver, res

judicata, and law of the case, all of which has been plead. See Relator's Reply, March 29, 2011.

The evidence is admissible for summary judgment proceedings, per Ohio R. Civ. P. 56(C), and Ohio R. Evid. 803(6), (8), (12), and 901(B)(7) and/or 902(2) and (4), among others, and Respondent likely knew this by not timely voicing objections when the evidence was first filed. But he raises the objections now.

It is not fair or equitable to allow an objection to be waived, the record closed, the Supreme Court remand a case for decision on the merits, and then for the first time allow a party to object to the Court's consideration of evidence on record with the Court for more than a year, when if raised in a timely manner any defect could have been (if there were any merit to it) cured originally, if necessary. It is also a handicap that the case will be argued, without knowing what evidence is actually before the Court.

It is therefore requested that the Court, pre-argument, overrule Respondent's objections as late, waived, or not well-taken for any other appropriate reason.

The nature of the objection is also not stated anywhere in any specificity. In the alternative to overruling the objection, whatever it is, it is requested that Relator be permitted to file supplemental affidavits from the document providers (which appears to be the basis for the objection), which, although redundant and not required by Rule 56, to cure whatever perceived objection there may be. This would not require any new evidence, but only the redundant swearing to the multiple certifications already on record since August 2009.

Wherefore it is requested that the Court overrule Respondent's objections, pre-argument, or alternatively permit filing of additional clarifying affidavits for the certified documents on file.


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, by ordinary U.S. mail this 18th day of May 2011.



Thomas G. Eagle (#0034492)