IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel DENNIS J. VARNAU,	)	**CASE NO. CA2009-02-10**
Relator/Petitioner,	)	**RELATOR'S REPLY TO RESPONDENT'S REPLY TO RELATOR'S MOTION TO STRIKE and WENNINGER'S RENEWED MOTION TO STRIKE**; and **RELATOR'S NEW MOTION TO STRIKE**
-vs-	)	
DWAYNE WENNINGER,	)	
Respondent/Defendant.	)	

Now comes the Relator, Dennis Varnau, by and through counsel, and as his Reply to "Respondent's Reply to Relator's Motion to Strike and Wenninger's Renewed Motion to Strike," filed March 17, 2011, moves the Court to strike said Respondent's pleading and disregard it for all purposes, or in the alternative, deny it. As grounds for this request, counsel states that Respondent's "Reply" and "Renewed Motion" are improper and not well taken, for numerous reasons, as set forth in this Memorandum.

1. Respondent's "Reply" is a re-argument or new argument without leave of Court.

Relator simply filed a notice to the Court that previously filed Motion and Objections, which were fully briefed and even argued on the merits, and which this Court overruled as moot because the objectionable material was not relied upon, were no longer moot. There was no new or re-argument.

What Respondent did in response is to make new arguments that were not raised before at all. In fact, contrary to Respondent's misnomer of "renewed" preceding his request, he never in this Court objected to or moved to strike any evidence of Relator.

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

As a result, Respondent's entire pleading is nothing more than rearguing, and newly arguing, what he did not argue or present at all within the time allowed by this Court's prior scheduling orders. This Court issued several orders for dates to file motions, and respond and reply to same. All those dates not only have expired, but the case was argued and submitted on the merits. Respondent, without leave, took it upon himself to "reply" to a Motion to Strike filed on August 21, 2009 -- a year and a half ago.

As a result, the Respondent's March 17, 2011, "reply" is outside of the limits set by Rule and Order, including: Ohio R. Civ. P. 15(E) (prohibiting supplemental briefing without leave of court); to the extent applicable, Ohio R. App. P. 21(H), and 12th Dist. Loc. R. 7 (for scheduling orders for timing of filing arguments), 11(E) (allowing supplement authority only for what couldn't be in original briefs -- and all of Respondent's "new" authority predates his briefs by years and decades), and 12(C) (allowing supplemental authority not cited in briefs only before oral argument); and 20(H) (time for filing arguments in original actions). The entirety of Respondent's March 17, 2011, pleading is therefore improper and should be stricken and disregarded. Otherwise the Court's scheduling orders are irrelevant.

2. Respondent's Objection to Relator's evidentiary material was waived.

This Court will find no objection by Respondent to any of Relator's evidentiary material in any of the pleadings in this case. Because he did not object to it in the form and time this Court set, it is all out of time and was therefore waived. Failure to timely object to summary judgment material is waiver of any objection to it. Stegawski vs. Cleveland Anesthesia Group, Inc. (1987), 37 Ohio App.3d 78. See also, Tye vs. Bd. of Educ. of Polaris Joint Voc. School Dist. (1985), 29 Ohio App.3d 63 ("A party opposing summary

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

judgment may create a genuine issue of material fact through her own affidavits and other material not objected to . . ."); Brown vs. Ohio Cas. Ins. Co. (1978), 63 Ohio App.2d 97, 90-91 ("Therefore, because no objection was raised, it cannot be held that the trial court erred by considering the documents attached to the motion for summary judgment when ruling on the motion.").

As Respondent has suggested, his first (and only) objection was in the appellate briefing (before the Supreme Court). By raising it only then, it is also waived. See Goldfuss vs. Davidson (1997), 79 Ohio St.3d 116, 121.

3. Respondent's Waiver is the Law of the Case.

Respondent has also conceded he raised the objection in the Supreme Court merit briefing. As a result of that objection not having been granted, it was presumptively overruled. See Kostelnik v. Helper, 96 Ohio St.3d 1, 3, 2002-Ohio-2985, ¶ 13. Because he didn't object when he had the chance, and a judgment was rendered, it is also *res judicata*. The admissibility of Relator's material, for purposes of summary judgment, is now the law of this case and this Court is bound to allow it.

It is well-established that decisions (the presumptive denial of Respondent's objections to Relator's summary judgment evidence) made by a reviewing court (here the Supreme Court in its appellate jurisdiction) regarding legal questions remain the law of that case for all subsequent proceedings at both the trial (here) and appellate levels. Nolan v. Nolan (1984), 11 Ohio St.3d 1, syl.; Marder v. Marder, 2009-Ohio-3420 (Cler. App.), ¶14. This doctrine is generally considered necessary to ensure consistency of results in a case, and to avoid what Respondent attempts here -- endless litigation -- by settling the issues, and

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. Hopkins v. Dyer, 104 Ohio St.3d 461, 2004-Ohio-6769, ¶15.

What Respondent wants to do cannot be allowed: have this Court re-address, and reverse, a presumptive overruling by the higher court on an objection never made in this Court when the Orders and rules said to do so, and made for the first time (but made, and presumptively overruled) on appeal. All of the above authorities prevent the second bite at the apple he did not utilize before.

4. Respondent's Objections are not well taken and Relator's are.

Relator's objections to those materials are well taken and supported, and for the reasons and authority previously cited and incorporated by reference. Respondent's objections (waived) and opposition to Relator's objections (out of time), are just not.

Proving something is what it purports to be (authenticity) does not make it relevant, or admissible. One cannot prove (authenticate) something, that is otherwise inadmissible, and then claim it is admissible only because it is what it is authenticated to be.

Respondent presents nothing that permits a legislator or lawyer to render a legal opinion or their view of the construction of a statute, in the guise of evidence or an expert opinion of any kind. See Hahn v. Jennings, 2004 WL 2008474, at ¶ 17-19 (attorney "expert witness" affidavit disregarded, as a legal opinion on interpretation of the law, which is for the court and not any expert witness).

Even if an expert could testify on legal or document construction issues, neither Callender's or Spievak's affidavit qualifies them as an expert on anything. The affidavits fail to establish the credentials of the alleged expert witness or the foundation for what they rely

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

upon, that would be admissible, all also in violation of the Rules of Evidence. Expert affidavits offered for or in opposition to summary judgment must comply with Civ. Rule 56(E) *as well as* Ohio R. Evid. 702-705. See, e.g., Miltenberger vs. Exco Co., 1998 Ohio App. LEXIS 5540, * 17 (Butler App., Nov. 23, 1998). These just do not.

Respondent's attempt to distinguish Relator's cited authority on the admissibility of evidence for summary judgment, because it dealt with admissibility at trial, misunderstands the burdens on summary judgment. To be admissible for summary judgment, the evidence must also be admissible at trial. Tokles & Sons, Inc. vs. Midwestern Indemnity Co. (1992), 65 Ohio St.3d 621; Fisher vs. Lewis (1988), 57 Ohio App.3d 116; Olverson vs. Butler (1975), 45 Ohio App.2d 9.

In one breath, Respondent states that the objectionable material is "public record" -- being material he submitted in the irrelevant board of elections litigation -- to argue that it is admissible; and then denies it is material produced for litigation, to argue it is not inadmissible. It is in that record, was put there for that case by Respondent, and cannot now claim it was anything but litigation material.

Although it is not exactly known what Respondent is objecting to, all of Relator's material was certified, and therefore authentic and non-hearsay; or incorporated into an affidavit; or admitted by Respondent himself. This is why failure to object before a case is submitted is important, and why Respondent's objections were waived.

Wherefore, Respondent's March 17, 2011, pleading should be stricken, disregarded, and/or denied.

THOMAS G. EAGLE CO., L.P.A.

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

Thomas G. Eagle (#0034492)
Counsel for Relator
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone: (937) 743-2545
Fax: (937) 704-9826
E-mail: eaglelawoffice@cs.com

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, Attorneys for Respondent, by ordinary U.S. mail this 24th day of March 2011.

Thomas G. Eagle (#0034492)

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826