IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

State of Ohio, ex rel., Varnau	:	Case No. CA2009-02-10
Relator	:	
Vs	:	
Dwayne Wenninger	:	Respondent's Reply to Relator's Motion to Strike (and Wenninger's Renewed Motion to Strike)
Respondent	:	

Respondent Wenninger now replies to the renewed motion to strike as filed in this matter by Relator Varnau on or about March 7, 2011. Wenninger will attempt to address Varnau's various positions as set forth in a motion that was originally filed on or about August 21, 2009. However, prior to undertaking an analysis of Varnau's various positions, Wenninger notes that, in briefing this matter before the Supreme Court of Ohio (Case No. 10-1655), Wenninger at least partially addressed the same issues now as previously raised by Varnau and (at page 13 et seq. of Wenninger's Supreme Court brief) and moved to strike materials that were submitted by Varnau in support of summary judgment as the materials either lacked proper authentication or had no evidentiary value since they were unsworn statements. Wenninger renews his motion to strike as it has not been ruled upon. Specifically, Wenninger moves to strike any materials that Varnau has submitted that are not certified or properly authenticated as required by the *Ohio Rules of Evidence*, or are improper under *Ohio Rule of Civil Procedure 56(E)*

1. Failure to establish a foundation for the statements; (2) inadmissible hearsay: (3) conclusory statements: and (4) affidavit based upon record review

As background, as Varnau notes in his August of 2009 motion, the affidavits and public records that Wenninger submitted in support of summary judgment (specifically, the affidavits of Lee Spievack and Jamie Callender, along with related records) were gathered by Varnau pursuant to discovery subpoenas issued by Varnau. The affidavits of Spievack and Callender were within the

public record and either under seal or certified. As such, the records are self authenticating and admissible without further foundation. *Ohio Rule of Evidence (Ev. R.) 901(A) and 901(B)(7).* The tenor of Varnau's argument does not seem to dispute the foundation for admission of these affidavits as Varnau does not argue that the affidavits are other than what they purport to be. *Ev. R. 901(A).* Varnau's attack appears to be as to the substance of the affidavits.

Contrary to Varnau's position, a review of the affidavits of Spievack and Callender clearly established that each was under no legal disability; that they were otherwise familiar with the facts to which they affided; and were based upon personal knowledge (i.e., each affiant was competent). A tribunal does not leave the education and life experiences of a lay witness outside the hearing room when determining the competence of that witness. *See, State v. McKee* (2001), 91 Ohio St.3d 292 (drug user lay witness competent to express opinion as to identity of controlled substance). If denominated 'lay witnesses' (*Ev. R. 701*), in the event that Spievack or Callender rendered opinions through their affidavits, such opinions are admissible as lay opinions if rationally based upon the perception of the witness and helpful (perhaps, in this instance, determinative) of a fact in issue. *Matter of Ashley E.D.*, 2002-Ohio-6238 (Huron Co. App., ¶47).

At the time of making his affidavit, Callender was in the unique position of being an Ohio lawyer, a member of the Ohio Legislature and a member of the Ohio Board of Regents (OBOR). Callender's affidavit is fact based as a result of being a member of the OBOR. Callender states (at ¶5 of his affidavit): "During the time periods applicable to the facts of this case, that is from 1987 when Dwayne Wenninger received his two year diploma from Technicron Technical Institute through December of 1999, the Board of Proprietary School Registration (formerly known as the State Board of School and College Registration) was under the umbrella of the Ohio Board of Regents. Further, at the time that Dwayne Wenninger received his two year diploma from Technichron Technical Institute, proprietary schools were authorized to confer two year post secondary diplomas and associates degrees". This quote is not a legal opinion but is fact based upon knowledge, albeit, as a result of being a member of the OBOR. In the event that the statement is based upon the fact that Wenninger

received a two year diploma from Technichron Technical Institute, such fact is in, and supported by, this record. Further, Spievack's affidavit is in this record. Lastly, if Varnau's argument is based upon a hearsay objection (which, in part, it seems to be), all of the records are classified as non-hearsay as each is either recorded recollection, a record of regularly conducted activity, or part of a public record. *Ev. R. 803(5), (6) & (8)* and is in the record of this case.

Varnau posits that affidavits based upon a review of other records are not admissible. To the contrary, *Civ. R. 56(E)* states as follows (in pertinent part):

> Sworn or certified copies of all papers referred to in an affidavit shall be attached to or be served with the affidavit.

Clearly, the Rule contemplates affiants reviewing and/or attaching records in making an affidavit. In this case, the relevant and material documents for Spievack and/or Callender are (and have been) within this record. Where the materials relevant to the recitation in the affidavit(s) are already in this record, Wenninger submits that the materials need not be separately served. This is especially true when all the records were gathered as a result of subpoenas issued by Varnau.

Varnau cites the Court to three cases in support of his position: *St. Paul Fire & Marine Co. v. Ohio Fast Freight, Inc.* (1982), 8 Ohio App. 3d; *Spencer v. Lakeview School District*, 2006-Ohio-3429; and *AMF, Inc v. Mravec* (1981), 2 Ohio App.3d 29. Each case is readily distinguishable in that each was an evidentiary ruling in trial, not upon summary judgment.

In summary, the affidavits of Spievack and Callender are based upon personal knowledge by those competent to make the affidavits. Though Wenninger does not believe that the affidavits contain hearsay, if they do, such is, by the *Rules of Evidence* and *Civ. R 56(E)*, admissible. Lastly, the relevant and material aspects of the affidavits are fact based and not conclusory. Both Spievack and Callender were in a unique position to make their respective personal factual observations.

5. Documents prepared for litigation are hearsay

Varnau commences his argument with the proposition that "...the documents verify that they were prepared at the request of the attorneys and for the purposes of litigation between them".

Where is this concept verified in the documents? And, even if this proposition is true, so what? It is one thing for an attorney to have private correspondence with a doctor [*Johnson v. Cassens Transp. Co.* (2004), 158 Ohio App.3d 193, cited by Varnau] that would generally be classified as work product. It is quite another matter for a person to sign an affidavit knowing that it is going to be filed within the public record. Under Varnau's theory, an attorney could never prepare an affidavit for submission in summary judgment proceedings as that affidavit would be prepared for litigation purposes. Further, the attorney could never, thereafter, file the signed affidavit for summary judgment purposes without it being stricken as "hearsay prepared for litigation". The plain reading of Civ. R. 56 contemplates quite the contrary. *Civ.R. 56(E).*

6. Affidavits and statements of legal opinion are not admissible

Generally, Wenninger concurs with Varnau that ultimately, the Court renders the legal opinion(s) that control this case and an affidavit of any lawyer does not. However, where Varnau seems to lose his way is that Callender's affidavit is one of fact as to the reach of the OBOR and given as a member of the House of Representatives and the OBOR. Callender happens to be a lawyer who, as a result of holding positions wholly unrelated to acting as a lawyer, was in a unique position to explain the interrelationship of proprietary schools, two year degrees and the OBOR. In probability, Callender qualifies as an expert (as that term is defined *in Ev. R. 702* et seq.) on OBOR matters but that has little to nothing to do with his factual statements as to the OBOR. When the Court looks at Varnau's theory (that Technichron Technical Institute was not a two year school accredited by the OBOR), who better to set the record straight as to that fact than a member of the OBOR? Callender's affidavit stands unrefuted.

One last comment is in order. As stated earlier, in general, Wenninger concurs that this Court renders the ultimate legal opinion(s) in this matter. Accepting that concept as generally true does not mean that, in every instant, a legal opinion given in a summary judgment affidavit will be rejected (i.e., might one be necessary, from time to time, in the legal malpractice setting?). Further, the Court,

if the Court chooses to do so, it may accept any evidence if it is otherwise relevant and will aid in a determination of the cause. *Ev. R. 401.*

CONCLUSION

Based upon the foregoing reasons, the Court should overrule Varnau's motion to strike the fact based affidavits of Spievack and Callender that stand unrefuted.

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CERTIFICATE OF SERVICE

I certify that on March 16, 20110, I served this pleading by ordinary mail, postage prepaid on Thomas G. Eagle, 3386 N. State Route 123, Lebanon, Ohio 45036.

Gary A. Rosenhoffer