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Motion in Limine to Exclude Plaintiff's Proposed Exhibits (#26, 27, 110)

William D. Mason
Cuyahoga County Prosecutor

A. Steven Dever
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IN THE COURT OF COMMON PLEAS
FILED
CUYAHOGA COUNTY, OHIO

2009-06-27 P 3:55

ALAN J. DAVIS, Special Administrator
Of the Estate of
SAMUEL H. SHEPPARD

Judge Ronald Suster
Case No. 312322

Plaintiff
RONALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

MOTION IN LIMINE TO
EXCLUDE PLAINTIFF'S
PROPOSED EXHIBITS
(EVID. R. 802)

v.

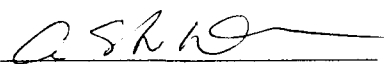
THE STATE OF OHIO

Defendant

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Defendant, State of Ohio, by and through counsel, William D. Mason, Prosecuting Attorney for Cuyahoga County, Assistant Prosecutor A. Steven Dever, and Assistant Prosecutor Dean Boland moves this Honorable Court to exclude Plaintiff's proposed Exhibits numbered: 26, 27, and 110 for the reasons set forth fully in the following brief.

Respectfully submitted,
William D. Mason
Prosecuting Attorney
Cuyahoga County


A. Steven Dever (0024982)
Dean Boland (0065693)
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(216) 443-5870
Attorneys for Defendant

BRIEF

Facts and Introduction

The current Plaintiff's Exhibit List contains one audiotape and two videotapes as proposed exhibits. Those exhibits are numbered on the current Plaintiff's Exhibit List as follows: 26, 27, and 110.

Law and Argument

Evid. R. 901(A) states "[t]he requirement of authenticity or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what it purports to be." As of today's date, these tapes have not been properly authenticated pursuant to the rule. While Plaintiff's attorneys may be able to properly authenticate these tapes pursuant to Evid. R. 901(A) at trial, the admissibility of the tapes as evidence would be improper and must be excluded pursuant to Evid. R. 802 as being hearsay evidence.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R. 801(C). Evid. R. 802 states that "[h]earsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of Ohio, any statute enacted by the General Assembly. . . by these rules, or by other rules proscribed by the Supreme Court of Ohio."

The audiotapes and videotapes at issue are not admissible to prove the truth of the matter asserted. See, e.g., State v. Mays, (8 Dist. 1996), 108 Ohio App.3d 598, 621 (videotape containing excerpts from a series of WEWS TV-5 news stories relating to welfare fraud held inadmissible as "rank hearsay" where there was no opportunity for cross-examination); State v. Lopez, (9 Dist. 1993), 90 Ohio App.3d 566 (audiotape of witness's interview with the prosecutor was properly excluded as hearsay).

There are approximately twenty-three exceptions to Evid. R. 802, and none of these exceptions apply to the use of the audiotapes and videotapes at issue. See Evid. R. 803; Evid. R. 804. The hearsay exceptions under Evid. R. 804(B) cannot conceivably be implicated by the use of these tapes. Though the declarants are in fact unavailable under Evid. R. 804(A), the use of their statements do not fall under the language of any of the five exceptions enumerated in Evid. R. 804(B).

More specifically, the Eberling interview with *Dateline* (Plaintiff's Exhibit 110) does not amount to a declaration against interest under Evid. R. 804(B)(3). The Ohio Supreme Court has stated that "[t]o

qualify as a statement against interest, it must be shown that the statement 'tended to subject' the declarant to criminal liability so that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true." State v. Gilliam, (1994), 70 Ohio St. 3d 17, 20. There is no indication that the interview with *Dateline* contains any statements which amount to a declaration against interest— specifically, any that subject Richard Eberling to criminal liability for the death of Marilyn Sheppard. Richard Eberling was simply attempting to interject himself into the spotlight and curry favor with Cynthia Cooper.


The only purpose for the use of these tapes is to implicate Richard Eberling in the death of Marilyn Sheppard. The only way to implicate Richard Eberling in her death with the use of these tapes is to offer the statements in the tapes to prove the truth of the matters asserted in those tapes. The hearsay rule prohibits exactly this.

Therefore, the audiotape and videotapes identified as Plaintiff's proposed exhibits 26, 27, and 110 are not admissible under Evid. R. 802, or any of the exceptions outlined in Evid. R. 803 or Evid. R. 804.

Conclusion

For the reasons above, the State of Ohio respectfully requests the court to exclude Plaintiff's proposed exhibits 26, 27, and 110 from this trial.

Respectfully submitted,
William D. Mason
Prosecuting Attorney
Cuyahoga County


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CERTIFICATE OF SERVICE

The foregoing Motion to Exclude Plaintiff's Exhibits was served upon plaintiff's counsel Terry Gilbert at 1370 Ontario St, 17th Floor, Cleveland, Ohio 44113 this 27 day of December, 1999 by Regular U.S. Mail.