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Memorandum in Opposition to Defendant's Motion in Limine

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Everything

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

Plaintiff

vs.

STATE OF OHIO

Defendant

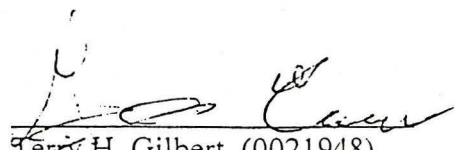
Judge Ronald Suster

Case No. 312322

MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTIONS IN LIMINE

Plaintiff, by and through undersigned counsel, hereby submits the attached Memorandum in opposition to the State's motions *in limine* requesting that this Court exclude various exhibits named in Plaintiff's Exhibit List. The reasons and authorities for denying the State's request are set forth in the attached Memorandum, which is hereby incorporated herein.

Respectfully submitted,


Terry H. Gilbert (0021948)

George H. Carr (0069372)

Friedman & Gilbert
1700 Standard Building
1370 Ontario Street
Cleveland, OH 44113
(216) 241-1430
Attorneys for Plaintiff

Memorandum in Opposition

I. Introduction

In accordance with this Court's original Case Management Order, Plaintiff submitted an Exhibit List on or about April 1, 1999. Subsequent pretrial conferences took place, and the parties were ordered to submit additional, more thorough exhibit lists by January 4, 2000. Prior to the submission of Plaintiff's First Amended Exhibit List, the State filed several motions *in limine*.

On December 22, 1999, the State moved to exclude Plaintiff's Exhibits 31, 32, 38, 40, 41, 42, 43, 44, 45, 46, 49, 77, 78, 79, 80, 91, 92, 93, 112, and 113 as hearsay.

On December 27, 1999, the State moved to exclude Plaintiff's Exhibits 26, 27, and 110 as hearsay.

On December 27, 1999, the State moved to exclude Plaintiff's Exhibits 47, 48, 52, and 97 as hearsay.

On December 29, 1999, the State moved to exclude Plaintiff's Exhibits 3, 4, 8, 9, 10, 68, 69, 70, 71, 72, 73, 74, 75, 76, 88, and 89 as irrelevant, more prejudicial than probative, and impermissible character evidence.

On January 3, 2000, the State moved to exclude Plaintiff's Exhibits 28, 29, 30, 33, 34, 35, 36, 37, and 39 as irrelevant.

On January 3, 2000, the State moved to exclude Plaintiff's Exhibits 65, 66, and 67 as irrelevant, impermissible character evidence, and more prejudicial than probative.

On January 4, 2000, the State moved to exclude Plaintiff's Exhibits 5, 7, and 100 as irrelevant, hearsay, and more prejudicial than probative.

On January 4, 2000, pursuant to this Court's prior Order, Plaintiff filed its First Amended

Exhibit List, which added a number of exhibits, and removed others, including some of those objected to by the State. Because of the changes in the Plaintiff's Exhibit List, and because of the duplicative nature of the State's objections, Plaintiff responds to all pending motions *in limine* through the instant memorandum.

II. Law and Argument

A motion *in limine* is designed "to avoid the injection into a trial of a potentially prejudicial matter which is not relevant and is inadmissible." In *Riverside Methodist Hosp. Assn. v. Guthrie*, the court of appeals set forth the required two-step procedure:

"First, a consideration of the motion *in limine* as to whether any reference to the area in question should be precluded until admissibility can be ascertained during trial. Second, at the time when the party desires to introduce the evidence which is the subject of the motion *in limine*, there must be a second hearing or determination by the trial court as to the admissibility of the evidence, which is then determined by the circumstances and evidence adduced in the trial and the issues raised by the evidence."

A motion *in limine* is, therefore, a precautionary request, directed to the inherent discretion of the trial judge.

"The sustaining of a motion *in limine* does not determine the admissibility of the evidence to which it is directed. Rather it is only a preliminary interlocutory order precluding questions being asked in a certain area until the court can determine from the total circumstances of the case whether the evidence would be admissible."

The inherent power of a court to control its proceedings is granted to it by Evid.R. 103(A) and 611(A). The use of the motion *in limine* serves the interest of judicial economy as well as those interests of counsel and the parties because it aids in reducing the possibility of the injection of error or prejudice into the proceedings

Owens-Corning Fiberglas Corp. v. American Centennial Insurance Co., 74 Ohio Misc. 2d 258, 259-60, 660 N.E.2d 819, 820-21 (1995), citing *Rinehart v. Toledo Blade Co.*, 21 Ohio App. 3d 274, 278, 487 N.E.2d 920, 924 (1985); *Riverside Methodist Hosp. Assn. v. Guthrie*, 3 Ohio App. 3d 308, 310, 444 N.E.2d 1358, 1361 (1982); *State v. Spahr*, 47 Ohio App. 2d 221, 353 N.E.2d 624 (1976); PALMER, OHIO RULES OF EVIDENCE RULES MANUAL (1984); *State v. Grubb*, 28 Ohio

St. 3d 199, 201, 503 N.E.2d 142, 145 (1986).

In the motions *in limine* it has filed, the State challenges various exhibits listed by Plaintiff as inadmissible. This is an improper use of the motion *in limine*; instead, the State may only use such a motion to preclude "questions being asked in a certain area until the court can determine from the total circumstances of the case whether the evidence would be admissible," PALMER, *supra*. Motions *in limine* may not be used to challenge the admissibility of physical or demonstrative evidence, as the State has attempted.

Even assuming *arguendo* that the State's motions are properly brought, they cannot be argued at this time. Until trial has started, and Plaintiff has had the opportunity to lay foundations for the introduction of the various exhibits at issue, explain the rationale for offering each exhibit into evidence, and solicit live testimony to both explain the purpose for which each item of evidence is offered and refute the State's challenges of hearsay, lack of authenticity, and relevance, this Court has no facts upon which to base a decision. Forcing Plaintiff to explain the purpose for which each exhibit is offered, the appropriate indicia of reliability, and the relevance of each item in pretrial motion practice is extremely wasteful, and would avoid the actual trial of facts entirely.

III. Conclusion

The State has misunderstood the nature of motions *in limine* and improperly asserts objections through its motions to trial exhibits, without any information as to the rationale for offering such exhibits. As this is an improper basis for a motion *in limine*, the State's motions should be denied. The State's use of motions *in limine* under present circumstance is tantamount to abuse of process, and attempts to keep relevant evidence from the finder of fact in violation of due process of law.

Additionally, because a response to each of the State's individual challenges and motions would not be in the interests of judicial economy, and would require evidentiary hearings and affidavits that would largely duplicate the trial itself, the State's motions should be denied as premature and unripe.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terry H. Gilbert", written over a horizontal line.

Terry H. Gilbert (0021948)

George H. Carr (0069372)

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1370 Ontario Street

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Attorneys for Plaintiff

Certificate of Service

The undersigned certifies that the foregoing Memorandum in Opposition to Defendant's Motions in Limine has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 7th day of January, 2000.


George H. Carr (0069372)
Attorney for Plaintiff