

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.	:	
THE CINCINNATI ENQUIRER	:	Case No. 2015-1222
	:	
STATE OF OHIO, ex rel.	:	
SCRIPPS MEDIA INC. D/B/A WCPO-TV	:	
	:	
STATE OF OHIO, ex rel.	:	
THE ASSOCIATED PRESS	:	Original Action in Mandamus
	:	
STATE OF OHIO, ex rel.	:	
RAYCOM MEDIA D/B/A WXIX-TV	:	
	:	
STATE OF OHIO, ex rel.	:	
HEARST CORPORATION D/B/A WLWT-TV	:	
	:	
STATE OF OHIO, ex rel.	:	
SINCLAIR MEDIA III, INC. D/B/A WKRC-TV	:	
	:	
<i>Relators,</i>	:	
	:	
v.	:	
	:	
JOSEPH T. DETERS, HAMILTON COUNTY	:	
PROSECUTING ATTORNEY	:	
	:	
<i>Respondent.</i>	:	

MEMORANDUM IN OPPOSITION TO RELATORS' MOTION TO STRIKE
APPENDIX TO MERIT BRIEF OF RESPONDENT

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For the most part this very important issue on what R.C. 149.43 provides and does not provide and the serious public policy issues involved in the case have been handled by exchanges by the direct parties in a high level of discourse. It is, then, unfortunate that at this late hour the Relators feel it necessary to resort to the use of language such as “attempt to ambush” and “worst sort of gamesmanship.” Respondent declines to respond in kind except to say that if there has been any sort of “gamesmanship” in this matter, it clearly emanates from Relators who saw fit to file this case only 2 days after their demand for release of “public records,” and the accompanying blizzard of paperwork generated by their attorneys. The issues are far too serious for this kind of conduct.

“Evidence Submission”

First, just to keep the record accurate, the evidence submission deadline was not January 19, 2016 as alleged by Relators but, rather, the correct date was January 29, 2016. Respondent accepts that this additional error by Relators is not substantive but what it does show is how Relators’ further arguments are permeated by the same sort of inaccuracies.

Relators correctly identify the material in question (Respondent’s Appendix, pages A1 through A19) as “attachments” and “extraneous material.” Relators then attempt to turn this information into “evidence” by referencing S.Ct.Prac.R. 12.06. Relators should have read the entire rule. There is no contention by Relators that Respondent’s material is in the form or content of “affidavits, stipulations, depositions” or even “exhibits” as revealed by Relators’ own use of the words “attachments” and “extraneous material.”

Descriptively, the key portions of the rule involve affidavits. These disputes always arise under the clause “setting forth *facts* admissible in evidence.” (Emphasis added.) This then raises

the questions of what is the definition of “Fact” and the definition of “Evidence”? In addition, what is the relationship between the two terms?

In one definition, clearly applicable here, Black’s Law Dictionary 498, (5th Ed. 1979) provides that “Evidence” is:

“Testimony, writings, material objects, or other things presented to the senses that are *offered to prove the existence or nonexistence of a fact.*” (Emphasis added.)

In the same edition, at pages 531 and 532, “Fact” is defined as:

“A thing done; an action performed or an incident transpiring; an event or circumstances; *an actual occurrence; . . .*” (Emphasis added.)

The recitation, on page 532, goes on to explain the interlocking and interfacing of “Evidence” and “Fact.” Thus, we find that evidence is “[a]n actual and absolute reality, as distinguished from *mere supposition or opinion.*” (Emphasis added.) Further “[f]act’ means reality of events or things the actual occurrence or existence of which is to be determined by evidence.”

From the foregoing it can be determined by even a cursory examination of Respondent’s Appendix materials, found at pages A1 through A19, presents neither “Evidence” nor “Facts.” The material merely amplifies Respondent’s arguments without in any way asserting that the material is either facts or evidence. Thus, Relators’ motion to strike should be denied.

II

Relators’ Brief

In passing it is worthy of note that on page 13 of the Reply Brief of Relators, Relators make direct reference to a law review article authored by Chief Justice Thomas Moyer which, they purport, buttresses their argument about the balancing of public and private interest within

Ohio's Public Records Act. No one, and certainly not Respondent, would assert that this was "evidence" and, therefore, should be stricken from the brief. This is no different than Respondent's submissions which merely supplement the arguments of both Relators and Respondents. The fact that Respondent's material is contained in an Appendix rather than the body of the Brief is of no moment. What is of some interest is Relators' allegation and statement that Respondent included the informational material ". . . knowing that Relator would have only 7 days to respond, is the worst sort of gamesmanship." Of course, Relators fail to note that including such material in their Reply Brief gave *no* time for Respondent to answer if, even, Respondent would have been inclined to do so, which, of course, he was not. We leave it to the Court to decide who is engaging in "gamesmanship."

Perhaps what is really alarming Relators is the inclusion, at pages A18 and A19 of the Appendix, this Court's own article published in the February, 2016, *CNO Review*. That article, entitled "Balancing," details how this Honorable Court proceeded in its advising Ohio courts how to resolve issues involving open access to court records with privacy concerns.

In the article, which is neither evidence nor does it present any fact at issue in this case, at page 7, states:

"Before restricting access [to case documents], though, the court must find 'by clear and convincing evidence' that the presumption in favor of public access is outweighed by a 'higher interest.' In determining whether a higher interest trumps the public's right to examine the record, the court considers these elements:

...

Whether factors that support restricted public access exist, including risk of injury to persons, *individual privacy rights* and interest, proprietary business information, *public safety, and fairness of the adjudicatory process.*" (Emphasis added.)

Really, that says it all and the information provided in the article is for assisting this Court in its deliberative process¹. It clearly is not evidence.

III

Case Law

In this case Relators essentially seek to have video from a body camera, worn by a police officer during an investigatory stop, released in real time without regard to the effect immediate release of the video could have upon a criminal investigation or public safety. This is an issue of first impression for this Court. In order to fully inform the Court of the issues and potential consequences of any eventual decision, the Respondent included in the Appendix to his Merit Brief five articles including one from this Court. Those articles speak for themselves but, in any event, by any stretch of the imagination, they certainly are not “evidence” or specific facts of this case to be decided by the Court.

Relators now complain about Respondent including these articles, which include newspaper articles, in the brief’s Appendix. In that regard then, it is pertinent to note that this Court, on many occasions has cited in its official opinions and dissents a variety of printed news sources, such as the *Columbus Dispatch*, *Toledo Blade*, *Cleveland Plain Dealer* and the *Hanna Report*, among others. Many of these cases are of recent vintage. See such as *Cuyahoga County v. Testa*, 2016-Ohio-134; *Dodd v. Croskey*, (2015) 143 Ohio St.3d 293; *Fairfield Bd. of Commrs. v. Nally*, (2015) 143 Ohio St.3d 93; *In re: Judicial Campaign Complaint against O’Toole*, (2014) 141 Ohio St.3d 355; *Cleveland Right to Life v. State Controlling Board*, (2013) 138 Ohio St.3d 57; *Schusheim v. Schusheim*, (2013) 137 Ohio St.3d 133. None were ever used as “evidence” or

¹The remaining portions of the Appendix to Respondent’s Brief are designed to assist the Court in its deliberations with examples of how other authorities, such as the Governor and General Assembly, are considering these weighty matters. (Appendix A-1 thru A-17).

intended to prove “facts.” As here, they have been used to illustrate and augment arguments.

There is a world of different in these two concepts.

IV

Conclusion

Based upon all of the foregoing, Respondent respectfully requests that the Court deny Relators’ Motion to Strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served upon each party of record in this case by U.S. mail on the 9th day of March, 2016, addressed to:

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