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COURT OF CLAIMS
OF OHIO

2010 DEC 10 PM 4:49

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IN THE COURT OF CLAIMS OF OHIO

Eugene Wrinn, Jr.,	Case No. 2006-05934
Plaintiff,	Judge Alan C. Travis
v.	**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO CONTINUE DECEMBER 15, 2010 IMMUNITY HEARING**
Ohio State Highway Patrol,	
Defendant.	Cary R. Cooper (0013062) Jacqueline M. Boney (0013050) Sarah K. Skow (0081468) COOPER & WALINSKI, L.P.A. 900 Adams Street Toledo, Ohio 43604 Phone: (419) 241-1200 Fax: (419) 242-5675 cooper@cooperwalinski.com boney@cooperwalinski.com skow@cooperwalinski.com *Counsel for Plaintiff*

Granting the Ohio State Highway Patrol's ("OSHP") 11th-hour motion (served at 3:55 p.m. on Friday, December 10, 2010) to vacate the December 15 hearing date will be unfair to the Plaintiff, Eugene Wrinn, Jr. ("Wrinn"). The OSHP claims that it would be unjust for the Court to proceed because the OSHP was surprised to learn that Wrinn will call an expert witness to testify at the hearing. The OSHP, however, has no one to blame but itself for its predicament. The OSHP has had several years to conduct discovery and three months to hone-in on this hearing. But it has done neither, and this cannot be considered as a trial by ambush as the OSHP asserts. On the other hand,

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Wrinn has diligently followed the Court's rules and has invested time, effort, and expense in planning and preparing for the hearing. And many people have rearranged their schedules in order to be present next week. The Court should deny the OSHP's motion to vacate the hearing date.

The Court's September 1, 2010 Scheduling Order incorporated by reference the Court of Claims' "Additional Trial Requirements and Information" ("Rules").[1] The Rules included pretrial rules for the exchange of witness lists, exhibit lists, and expert opinions, if available. Wrinn prepared for the December 15, 2010 hearing pursuant to the Rules.

Wrinn understood the Rules to mandate that the parties exchange and file a witness list, exhibit list, and available expert opinion within seven days of the December 15, 2010 evidentiary hearing. Wrinn's counsel confirmed their understanding of the pre-hearing disclosure and exchange in response to the OSHP's counsel's inquiry about Wrinn's witness list.[2]

The OSHP did not respond that it would not follow the Rules regarding the parties' mutual exchange of evidence intended for use at the December 15, 2010 hearing. Wrinn electronically served his Immunity Hearing Statement, Exhibit List, Witness List, and Expert Report of Dr. Donald J. Van Meter, Ph.D. (hereinafter "Immunity Hearing Statement"), on the OSHP's counsel on December 8, 2010.[3]

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[1] *See* Sept. 1, 2010 Scheduling Order. By its Sept. 16, 2010 Scheduling Order, the Court vacated the original October 6, 2010 hearing date and rescheduled the hearing for Dec. 15, 2010.

[2] *See* Oct. 25, 2010 email from Sarah Skow to Eric Walker, Assistant Ohio Attorney General, attached as Exhibit 1.

[3] Wrinn over-nighted his Immunity Statement to the Court on Dec. 8, 2010; it was filed Dec. 9, 2010. Wrinn had to incur the costs of over-nighting his Immunity Hearing Statement to the Court because the parties were not able to confer on Wrinn's proposed stipulations, sent to the OSHP on Nov. 29, 2010, until mid-morning Dec. 8, 2010. The lack of stipulations that the parties could reach required Wrinn to expend additional, necessary costs to subpoena more witnesses and to revise his exhibit list.

The OSHP did not exchange or file an immunity hearing statement, witness list, exhibit list, or expert report, and has indicated to Wrinn's counsel that it has no intention to do so.[4] The OSHP and its counsel have advised Wrinn's counsel that the Rules do not apply to its disclosure of witnesses, exhibits, and experts because the Court had scheduled an immunity hearing and not a full trial. Despite the lack of information exchanged by the OSHP and its counsel, Wrinn and his counsel are prepared for the December 15, 2010 immunity hearing, and respectfully request that the Court proceed as scheduled.

The OSHP's belated claims of surprise and hardship are not persuasive because it never formally or informally requested whether Wrinn had an expert. Wrinn has diligently conducted discovery throughout the four-plus years of the pending action. He served the OSHP with many interrogatories and document requests, including those directed to the disclosure of experts and expert opinions.[5] The OSHP never served Wrinn with any discovery requests. In preparing for the hearing, Wrinn's counsel proceeded under their understanding that the parties should exchange witness information, including experts, pursuant to the pretrial statement deadline of seven days before the December 15, 2010 hearing. The Court has not previously ordered the parties to exchange expert disclosures at any time.

On December 3, 2010, in advance of the Rules' seven-day deadline, without any indication that the OSHP would provide Wrinn with its witness list, exhibit list, or any potential expert information, Wrinn provided a preliminary witness list to the OSHP's counsel, including the name of Wrinn's expert: Dr. Donald J. Van Meter, Ph.D. Five days later, during the parties' phone conference related to Wrinn's proposed stipulations, the State's counsel first inquired as to whether

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[4] In their Dec. 8, 2010 phone conference, the OSHP's counsel did confirm that the witnesses Wrinn had already subpoenaed would be at the Dec. 15, 2010 hearing, i.e., OSHP Sgt. Daren Johnson, OSHP Trp. Gerald Manley, and OSHP Lt. Kenneth Koverman.

[5] The OSHP never provided Wrinn with any expert information.

Dr. Van Meter was Wrinn's expert for the evidentiary hearing. Wrinn's counsel confirmed that Dr. Van Meter would serve as an expert for the December 15, 2010 immunity hearing and sent the OSHP's counsel Dr. Van Meter's December 4, 2010 Report that same day (December 8, 2010).

Wrinn's disclosure of his intention to call Dr. Van Meter as an expert complied with this Court's Rules. Wrinn did not intend the disclosure to be a surprise. The OSHP has had more than adequate opportunity to inquire of Wrinn's expert. It never did.

Vacating the hearing at this late date – simply because the OSHP did not conduct discovery – will result in practical and financial hardship to Wrinn and his counsel, who have expended considerable time and money in preparation for the December 15, 2010 hearing. Wrinn has issued outstanding subpoenas, with witness fees and mileage costs, to nine witnesses (over $250), many of whom are traveling to the Court from outside of Columbus. Wrinn will also incur $250 in costs for a non-refundable charge for a conference room and other costs related to the OSHP's 11th-hour continuance plea.

Wrinn and his family reside in New England and have made plans to take off work and to drive to Columbus for the December 15, 2010 hearing. Wrinn had to request time off from his employer months ago in order to attend the hearing. Wrinn did consider the OSHP's December 9 request to continue the hearing. But Wrinn, based upon the advice of counsel, declined the OSHP's request based upon the time and effort that may people have put into preparing for the hearing.

For the foregoing reasons, Wrinn requests that the Court deny the OSHP's Motion to Continue and Vacate the December 15, 2010 Immunity Hearing. If, however, the Court grants the OSHP's motion, Wrinn respectfully requests that the Court order the OSHP to reimburse Wrinn for his out-of-pocket expenses (that he will have to again incur), including subpoena expenses, witness fees, mileage, process server costs, non-refundable room costs and expenses, and any other reasonable expenses that Wrinn has incurred to prepare for the December 15, 2010 immunity

hearing. And further, that the Court order that if the parties are not able to resolve this expense reimbursement issue, that Wrinn may file a motion for any unresolved expenses.

Dated: December 10, 2010

Respectfully submitted,

Cary R. Cooper, by Jason Womack per telephone authority, Dec. 10, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 10th day of December, 2010 by ordinary U.S. mail, postage prepaid, upon: **James P. Dinsmore**, Assistant Attorney General, Court of Claims Defense Section, 150 East Gay St., 18th Floor, Columbus, Ohio 43215-3130; **Anthony Geiger**, Law Director, CITY OF LIMA, 209 N. Main St., 6th Floor, Lima, Ohio 45901; upon **Todd M. Raskin** and **Carl E. Cormany**, MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A., 100 Franklin's Row, 34305 Solon Road, Cleveland, Ohio 44139; upon **Michael S. Loughry**, MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A., 250 Civic Center Drive, Suite 400, Columbus, Ohio 43215; and upon **Jane M. Lynch** and **Jared A. Wagner**, GREEN & GREEN, LAWYERS, 800 Performance Place, 109 North Main Street, Dayton, Ohio 45402-1290.

Cary R. Cooper, by JASON WOMACK PER TELEPHONE
Cary Rodman Cooper AUTHORITY DEC. 10, 2010
Counsel for Plaintiff

Exhibit 1

Sarah Skow

From: Sarah Skow
Sent: Monday, October 25, 2010 9:40 AM
To: 'Eric A. Walker'
Cc: Cary Cooper; 'james.dinsmore@ohioattorneygeneral.gov'
Subject: RE: Wrinn

Dear Eric,

Good morning. We are currently in the process of determining which witnesses we will call or use via deposition transcripts for the immunity hearing. It is our understanding that pursuant to the Court of Claims rules and practices that we are to exchange witness and exhibit information the week before the hearing, on or before December 8, 2010. We request that you and Jim would also let us know what witnesses and exhibits you intend to use during the immunity hearing in advance of the December 8th deadline. Please contact me with any questions or comments. Thanks.

Sincerely,

Sarah

Sarah K. Skow
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From: Eric A. Walker [mailto:eric.walker@ohioattorneygeneral.gov]
Sent: Thursday, October 21, 2010 4:06 PM
To: Sarah Skow
Subject: Wrinn

Hi Sarah,

Could you please let us know the names of the witnesses you will use during the immunity hearing? Thank you.

Eric