

FILED
 Lorain County Common Pleas Court
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 Tom Orlando, Clerk of Courts

**IN THE COURT OF COMMON PLEAS
 LORAIN COUNTY, OHIO**

GIBSON BROS., INC, et al.,

Plaintiffs,

v.

OBERLIN COLLEGE, et al.

Defendants.

CASE NO. 17CV193761

JUDGE JOHN R. MIRALDI



**SUPPLEMENTAL BRIEF OF WEWS-TV, ADVANCE OHIO, AND THE OHIO
 COALITION FOR OPEN GOVERNMENT TO PLAINTIFFS' OPPOSITION TO THEIR
MOTION FOR ACCESS TO SEALED CASE DOCUMENT**

In accordance with the Court's February 10, 2020 order, WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government (collectively, the "Media Movants") respectfully submit this supplemental brief addressing the Court's jurisdiction to decide their motion to unseal Exhibit G to defendants' combined summary judgment reply brief ("Exhibit G").

ARGUMENT

I. Media Movants' request for access to Exhibit G is a collateral issue under Ohio law.

The Ohio Supreme Court has long held that although a trial court generally loses jurisdiction over a case once it is appealed, the trial court retains jurisdiction "over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction." *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 378 N.E.2d 162, 165 (Ohio 1978); *see also In re S.J.*, 829 N.E.2d 1207, 1209 (Ohio 2005); *Yee v. Erie County Sheriffs Dept.*, 553 N.E.2d 1354, 1355 (Ohio 1990). Other such collateral issues have been found to include

requests for attorney's fees and costs,¹ motions for prejudgment interest,² imposition of sanctions,³ and modifications of child custody orders.⁴ While there is no bright-line rule as to the categories of issues that constitute collateral matters over which the trial court retains jurisdiction, the most "important consideration" is "whether the trial court's action [would be] inconsistent with the appellate court's ability to review, affirm, modify, or reverse the appealed judgment." *Pietrangelo v. Avon Lake*, 2016-Ohio-8201, ¶ 17 (Ohio Ct. App. 9th Dist.).

Here, a decision by this Court on Media Movants' pending request to unseal Exhibit G would have no bearing on the appellate court's ability to "review, affirm, modify, or reverse the appealed judgment," as Media Movants' request does not implicate the merits of the case or any of the issues raised on appeal. To the contrary, the "right of access to judicial records and documents is *independent* of the disposition of the merits" of a case. *FutureFuel Chem. Co. v. Lonza, Inc.*, 756 F.3d 641, 648 (8th Cir. 2014) (quoting *Stone v. Univ. of Md. Medical Sys. Corp.*, 855 F.2d 178, 180 n. * (4th Cir.1988)) (emphasis added).

Though it does not appear that any state or federal court in Ohio has had occasion to decide the precise question of whether a trial court retains jurisdiction over a motion to unseal judicial documents in a case in which an appeal is pending, decisions from courts in other jurisdictions are instructive. For example, in *FutureFuel Chem. Co. v. Lonza, Inc.*, the Eighth Circuit held that the district court retained jurisdiction to consider FutureFuel's objections to the court's stated intention to unseal documents in the case, despite a pending appeal challenging the district court's grant of summary judgment, because the "right of access to judicial records and

¹ *State ex rel. Neff v. Corrigan*, 661 N.E.2d 170 (Ohio 1996).

² *Enyart v. Columbus Metro. Area Community Action Org.*, 685 N.E.2d 550 (10th Dist. Franklin Cty. 1996).

³ *Middleton v. Luna's Rest. & Deli, L.L.C.*, 2012-Ohio-348 (Ohio Ct. App. 7th Dist.).

⁴ *In re Kessler*, 628 N.E.2d 153 (6th Dist. Huron Cty. 1993).

documents is independent of the disposition of the merits of a case” and therefore collateral to the issues on appeal. 756 F.3d at 648.

In *Expedited, Inc. v. TransAm Trucking Inc.*, No. 16-CV-0052-LTS, 2018 WL 9880439 at *2 (N.D. Iowa Oct. 9, 2018), the district court found the reasoning in *FutureFuel* to apply “with equal force” to the question of whether the court retained jurisdiction over a third party’s motion to unseal judicial documents: “[A] motion to intervene for the limited purpose of accessing records is collateral to a merits appeal and . . . therefore the notice of appeal [of the court’s summary judgment decision] does not divest this court’s jurisdiction to rule on the intervention motion.” *Id.* Similarly, the district court in *MetLife, Inc. v. Fin. Stability Oversight Council*, No. CV 15-0045 (RMC), 2016 WL 3024015, at *3 (D.D.C. May 25, 2016), *rev’d on other grounds*, 865 F.3d 661 (D.C. Cir. 2017), found that a third party’s motion to intervene for the purpose of unsealing judicial documents “was not mooted by this Court’s disposition of the case on the merits or by [defendant]’s subsequent appeal.” (citing *FutureFuel*, 756 F.3d at 648).

Indeed, Media Movants are aware of only one case in which a court declined to exercise jurisdiction over a request for access to sealed judicial documents due to a pending appeal. And, in that case, the district court failed to address the question of whether the request to unseal was independent of the disposition of the matters on appeal. At issue in *Abdelal v. Kelly*, No. 13CV04341ALCSN, 2017 WL 1843291 (S.D.N.Y. May 5, 2017), were two letter requests from *The New Yorker* magazine for access to certain sealed documents. *Id.* at *1. Electing to treat the letters as a motion to intervene, the district court denied the motion for lack of jurisdiction. *Id.* at *2. Unlike the decisions in *FutureFuel*, *Expedited*, and *MetLife*, the district court did not consider—as Ohio courts must—whether the magazine’s request for access to judicial documents was a collateral matter over which the court retained jurisdiction. Instead, the court

focused on the narrow question of whether lower courts retain jurisdiction over motions to intervene in general and, thus, neglected to give consideration to the collateral nature of the request underlying the intervention.⁵ Indeed, as the *Expedited* court correctly recognized when finding *Abdelal* unpersuasive, all of the cases cited by *Abdelal* for the proposition that the court was divested of jurisdiction involved matters *not* collateral to the issues on appeal. See *Expedited*, 2018 WL 9880439 at *2 (collecting cases and describing the jurisdictional issues considered in each). For example, in one such case, the jurisdictional question arose not in the context of (as here) a third party's motion with respect to an issue independent of the underlying decision appealed, but rather in the context of whether the court could rule on a potential intervenor's motion after the intervenor filed a notice of appeal of the court's "constrictive denial" of said motion. See *Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014). The district court's ruling in *Abdelal*, made without the benefit of any briefing from the magazine or the parties in the case on the issue of jurisdiction,⁶ has no application here.

Ohio law makes clear that the court's most "important consideration" in determining whether it retains jurisdiction over a pending motion is "whether the trial court's action [would be] inconsistent with the appellate court's ability to review, affirm, modify, or reverse the appealed judgment." *Pietrangelo*, 2016-Ohio-8201, ¶ 17. Here, the weight of authority shows that a third party's request to unseal judicial documents is precisely the type of collateral issue "independent of the disposition of the merits of a case" that has no bearing on the issues raised

⁵ Here, no motion to intervene is at issue, as Ohio Sup. R. 45(F) permits "any person" to request access to restricted judicial documents without requiring the requestor to move to intervene.

⁶ Noting that the court's own research had "not identified a case in which the . . . motion of intervention was made by a media organization for the limited purpose of modifying a protective order," the court invited any party aggrieved of its decision, including the magazine, to file a motion to reconsider pointing to "controlling decisions or other data that the court overlooked." *Abdelal*, 2017 WL 1843291 at *2.

on appeal or the appellate court's ability to review, affirm, modify, or reverse the appealed judgment.

II. The Court retains jurisdiction over Media Movants' motion.

As discussed in detail in Media Movants' Memorandum in Support of their Request for Access and Reply in Support of their Request for Access, Media Movants have a presumptive right of access to Exhibit G under the First Amendment and the Ohio Constitution. Such a right of access to judicial records and documents is independent of the disposition of the merits of a case. *FutureFuel*, 756 F.3d at 648. Because Media Movants' request is limited solely to the unsealing of Exhibit G, and does not involve any of the issues on appeal, an order of this Court unsealing Exhibit G would not impede, or be inconsistent with, the appellate court's ability to "review, affirm, modify or reverse" the appealed judgment in this case.

"Absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging the court's jurisdiction has an adequate remedy at law by appeal." *State ex rel. Enyart v. O'Neill*, 646 N.E.2d 1110, 1112 (Ohio 1995). There is plainly no "patent and unambiguous lack of jurisdiction" here. Media Movants' request for access to Exhibit G is a collateral issue which has no bearing on the merits of the underlying case. As such, this Court retains jurisdiction over Media Movants' motion to unseal during the pendency of the appeal.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Media Movants' Memorandum in Support of their Request for Access and Reply in Support of their Request for Access, Media Movants respectfully request that this Court grant their motion to unseal Exhibit G to defendants' combined summary judgment reply brief.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 11th day of March, 2020, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon all known parties and attorneys of record, including the following:

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