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GIBSON BROS., INC., et al.

**IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO**

COURT OF APPEALS

FILED

LORAIN COUNTY

2020 AUG 14 A 10:57

COURT OF COMMON PLEAS
LORAIN COUNTY

Case No.: 20CA011648

NINTH APPELLATE DISTRICT

Appeal from Lorain County

Court of Common Pleas,

Case No. 17CV193761

-vs.-

OBERLIN COLLEGE, et al.

Defendants,

-and-

WEWS-TV

Appellant.

**PLAINTIFFS-APPELLEES' BRIEF ON LACK OF JURISDICTION
AND REQUEST FOR DENIAL OF APPEAL**

Now come Plaintiffs-Appellees, the Gibsons¹, and hereby moves to dismiss Appellant WEWS-TV's ("WEWS") appeal. This Honorable Court lacks jurisdiction as WEWS's proper remedy was not an appeal but a writ of mandamus.

I. BRIEF PROCEDURAL AND FACTUAL BACKGROUND

This case has been pending in the Lorain County Court of Common Pleas since November 7, 2017. Extensive discovery practice resulted in comprehensive pretrial orders as to the conduct of the trial. On May 8, 2019, jury selection began. The jury returned its verdicts against Oberlin College and Dean of Students Meredith Raimondo (collectively, "Oberlin") for compensatory damages on June 7, 2019 and punitive damages on June 13, 2019.

¹ "Gibsons" refers to Plaintiffs-Appellees/Cross-Appellants Gibson Bros., Inc., Lorna Gibson, Executor for the Estate of David Gibson, Deceased, and Allyn W. Gibson.

A. Exhibit G, Which Oberlin College Belatedly and Now, Even Later, WEWS Seek to Unseal is an Unauthenticated and Hearsay Document

Exhibit G is an attachment to Exhibit 10, which is an affidavit executed by Oberlin's counsel, Cary Snyder, of Oberlin's Combined Summary Judgment Reply Brief, filed with the trial court on March 22, 2019 (the "Reply Brief"), wherein Attorney Snyder attempts to cure multiple evidentiary deficiencies to insert Exhibit G into the case *for the purpose of alleging that the Gibsons were not private figures.* [see Reply Brief, pp. 10-11]. Exhibit G was never offered to support Oberlin's purported truth defense until August 28, 2019, nearly six (6) months after it was originally included in the Reply Brief and after Oberlin did not present *any* evidence to support the alleged truth defense during trial.

- 1. The putative contents of Exhibit G were never authenticated, no witness was ever called at trial to try to identify or authenticate, and its contents were never proffered or referred to in any way during the trial.**

Indeed, Exhibit G was subject to the parties' Stipulated Protective Order, has never been authenticated by anyone, and contains putative Facebook posts by a non-party to the litigation, Allyn D. Gibson ("ADG"). Furthermore, ADG has never been questioned about Exhibit G, he was never called at trial, and Exhibit G was never raised at trial.

- a. Oberlin did not seek to unseal Exhibit G until more than two months after the jury's adverse verdict and nationwide public denouncement of Oberlin's conduct.**

On August 28, 2019, more than two months following the conclusion of trial, Oberlin filed a motion with the trial court to unseal Exhibit G to the Reply Brief. Exhibit G was apparently recognized by Oberlin to not be of evidentiary quality, as Oberlin never attempted to authenticate, refer to at trial, call any witnesses regarding the putative contents, or proffer Exhibit G or any of its contents.

- b. The trial court properly exercised its discretion in denying Oberlin's post-trial motion to unseal materials that Oberlin did not utilize or proffer during the five-week trial.

The Gibsons' filed their Response in Opposition to Oberlin's motion to unseal Exhibit G on September 11, 2019, identifying that the true purpose of Oberlin's motion was to seek permission to facilitate an abuse of process and invasion of non-party ADG's privacy. Oberlin did not file a reply. On September 16, 2019, the trial court made its Entry and Ruling on Oberlin's Motion to Unseal Exhibit G of the Reply Brief, denying the motion. [See, Entry and Ruling on Defendants' Motion to Unseal Exhibit G of Defendants' Combined Summary Judgment Reply Brief, 9/16/19]. Specifically, the court stated, "*At trial, [Oberlin] made no attempt to introduce these materials as evidence of the Bakery's reputation in the community.*" [Id., p. 2 (emphasis added)].

B. Because Oberlin was Unable to Unseal Exhibit G, the Media Movants Sought a Second Bite of the Apple, Searching for a Way to Deflect the Public Narrative Against Oberlin

WEWS, along with Advance Ohio and the Ohio Coalition for Open Government (collective, the "Media Movants") did not express any interest in Exhibit G or any of the discovery issues during the course of litigation and the extended trial. Then, nearly two months after the trial court denied Oberlin's motion, the Media Movants filed a similar motion to unseal Exhibit G, repeating Oberlin's August 28, 2019 misleading claims that it related to their purported truth defense. [See, Motion of WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government for Access to Sealed Case Document and Memorandum of Law in Support Thereof, file October 21, 2019].

On December 2, 2019, the Gibsons and non-party ADG filed their brief in opposition, noting the suspect motivation and timing by the Media Movants – particularly as Oberlin's lead trial counsel, Ron Holman, II, *was a television legal analyst for WEWS for more than ten (10)*

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years. [See, Plaintiffs' & Non-Party Allyn D. Gibson's Brief in Opposition to Motion for Access to Sealed Case Documents -or, in the alternative- Request to Hold Decision in Abeyance Until Completion of the Appellate Process].

On December 9, 2019, the Media Movants filed their reply, *within which they did not deny the connection to Oberlin's lead trial counsel*. [See, Reply of WEWS, Advance Ohio, and the Ohio Coalition for Open Government to Plaintiffs' Opposition to Their Motion for Access to Sealed Case Document]. The court, concerned whether it had jurisdiction over the matter as the appeals were pending, ordered the parties and non-parties to submit briefs on the limited issue of jurisdiction on February 10, 2020. In response, Oberlin filed a notice that they were not appealing the trial court's September 16, 2019 journal entry denying their motion to unseal Exhibit G.

Ultimately, the court determined that it did have jurisdiction to rule on the Media Movants' motion, and on April 29, 2020, denied the Media Movants' motion to unseal Exhibit G. [See, Entry and Ruling on Non-Parties' Motion for Acess (sic) to Sealed Case Document, 4/29/20, attached hereto as **Exhibit A**]. *The court specifically noted that Oberlin "made no attempt to introduce the contents of Exhibit G for any reason, nor did they call or attempt to call non-party Allyn D. Gibson as a witness during trial."* [Id., p. 2 (emphasis added)]. Further, the court stated that after "having considered all of the factors in Sup. R. 45(E)" it found that continued restriction of public access was warranted, with no less restrictive alternative to complete restriction, because of the particular importance of Sup. R. 45(2)(c), including the "risk of injury to persons, individual privacy rights and interests, and fairness of the adjudicatory process." [Id.].

On June 4, 2020, WEWS filed notice of the instant appeal based on the trial court's April 29, 2020 ruling. For the reasons identified below, this was improper and thus WEWS's appeal should be denied and dismissed for lack of jurisdiction.

II. LAW & ARGUMENT

A. A Direct Appeal is Not the Appropriate Procedural Remedy When a Trial Court Denies a Motion Under Sup.R. 45(E).

“A person who is denied access to court records has a specific remedy.” *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 13 (2014). That specific remedy, identified by the Ohio Supreme Court is to pursue an action in mandamus, not a direct appeal. *Id.*, quoting Sup.R. 47(B) (internal quotations omitted) (“A person aggrieved by the failure of a court or clerk of court to comply with the requirements of Sup.R. 44 through 47 may pursue an action in mandamus[.]”). This rule has been consistently upheld by courts across Ohio. *See, State v. Helfrich*, 5th Dist. Licking No. 18-CA-45, 2019-Ohio-1785, 2019 WL 2051027, ¶ 106, citing Sup.R. 47(B) (holding that the appellant “must file an original action in mandamus challenging the trial court’s restriction of access to court records.”); *N.L. v. A.M.*, 6th Dist. Lucas No. L-10-1307, 2010-Ohio-5834, ¶ 9, citing Sup.R. 47(B) (“appellant must file an original action in mandamus challenging the juvenile court’s restriction of access to court records.”); *State v. L.F.*, 12th Dist. Clermont No. CA2019-02-017, 2020-Ohio-968, ¶ 18 (citations omitted) (“a person aggrieved by a decision of a court to restrict access to court records must challenge that decision by pursuing an original action in mandamus, not by filing an appeal.”).

WEWS has not filed a writ of mandamus here. As such, because a direct appeal is not the appropriate remedy, WEWS’s appeal should be denied and dismissed. *See, N.L.* at ¶ 10 (the court was without jurisdiction to hear a direct appeal that should have been brought as a writ of mandamus and dismissed the action); *L.F.* at ¶ 18 (appeal failed because action should have been filed as mandamus, not an appeal).

B. This Court’s Holding in *S.C. v. T.H.* Does Not Apply Here and Thus a Direct Appeal is Still Not the Appropriate Remedy.

Contrary to the facts here, in *S.C. v. T.H.*, T.H. requested the trial court to *restrict* public

access to or redact the record of an eviction case filed against her, and later dismissed. 9th Dist. Summit No. 29594, 2020-Ohio-2698, ¶ 2. The court denied T.H.’s request, and she filed a direct appeal. *Id.* As this Court noted in its decision, there was no case law addressing “a direct appeal of a trial court’s denial of a person’s motion under Sup.R. 45(E) to have court records *redacted or access to them restricted.*” *Id.* at ¶ 8 (emphasis added). However, as this Court identified in its decision, where the court is continuing to restrict access, a writ of mandamus, as detailed above, is the appropriate remedy. *Id.*

Because WEWS is challenging the trial court’s decision to keep the records sealed, *S.C. v. T.H.* is inapplicable. Accordingly, WEWS’s direct appeal should be denied and dismissed.

III. CONCLUSION

For the foregoing reasons, the Gibsons respectfully state that this Honorable Court lacks jurisdiction and thus this appeal should be denied and dismissed.

DATED: August 10, 2020

Respectfully submitted,

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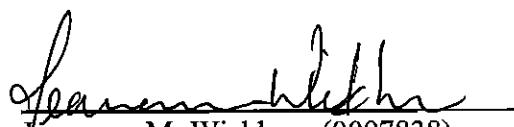
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ORIGINAL



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

**TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge**

Date 4/29/20

Case No. 17CV193761

GIBSON BROS INC

Plaintiff

JACQUELINE BOLLAS CALDWELL

Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE

Defendant

JOSH M MANDEL

Defendant's Attorney ()-

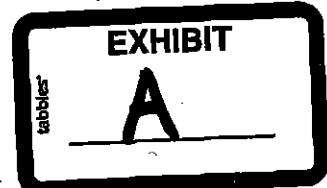
**ENTRY AND RULING ON NON-PARTIES'
MOTION FOR ACESST TO SEALED CASE DOCUMENT**

This matter comes before the Court upon non-parties WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government's Motion for Access to Sealed Case Document, seeking an order unsealing Exhibit G to the Affidavit of Attorney Cary M. Snyder, counsel for Oberlin College and Meredith Raimondo in the above-case. The above case has concluded, and an appeal of the judgment is pending before the Ninth District Court of Appeals.

Following the conclusion of the trial in this matter, the Defendants filed a similar motion which the Court denied on September 8, 2019. Now, the above-mentioned non-parties have filed a motion arguing that under Sup. R. 45, the Court should unseal the exhibit. The exhibit at issue contains unauthenticated Facebook postings purportedly belonging to non-party Allyn D. Gibson. After the movants initial motion, the Court asked the parties to brief the issue of jurisdiction in light of the pending appeal. Each party then submitted a short brief regarding jurisdiction over the unsealing in addition to their briefing on the movants initial motion to unseal.

Ohio Sup. R. 45 addresses public access to Court records in a variety of different contexts. Ohio Sup. R. 45(F) states:

1. Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted public access pursuant to division (E) of this rule. The court shall give notice of the motion to all parties in the case and, where possible, to





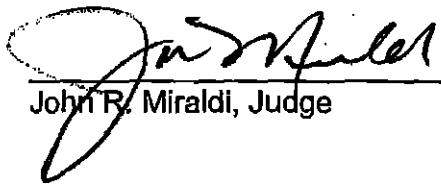
the non-party person who requested that public access be restricted. The court may schedule a hearing on the motion

2. A court may permit public access to a case document or information in a case document if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest. When making this determination, the court shall consider whether the original reason for the restriction of public access to the case document or information in the case document pursuant to division (E) of this rule no longer exists or is no longer applicable and whether any new circumstances, as set forth in that division, have arisen which would require the restriction of public access.

Here, access was originally restricted to Exhibit G under the parties' Mutual Protective Order. That order was agreed-to by the parties and approved and entered by the Court on June 8, 2018. The contents of Exhibit G and their admissibility was at issue during pretrial motions in limine, at which time, a preliminary ruling was issued that these materials could not be utilized as character evidence, but the Court withheld ruling on their admissibility for other purposes. The Defendants made no attempt to introduce the contents of Exhibit G for any reason, nor did they call or attempt to call non-party Allyn D. Gibson as a witness during trial.

At this juncture, the Court, under Ohio Sup. R. 45(F)(2) must consider whether the original reason for restricting public access no longer exists, and whether any new circumstances identified in Sup. R. 45(E) have arisen which would require the continued restriction of public access. The Court, having considered all of the factors in Sup. R. 45(E), hereby finds that the continued restriction of public access is warranted. Of particular importance is Sup. R. 45(2)(c), which includes the risk of injury to persons, individual privacy rights and interests, and fairness of the adjudicatory process. Because of the nature of the information at issue in Exhibit G, the Court also finds that there is no less restrictive alternative to complete restriction.

IT IS SO ORDERED.


John R. Miraldi, Judge

cc: All Parties

