

SUPREME COURT OF OHIO

STATE EX REL., PAUL PERREA
412 Wood Avenue
Cincinnati, Ohio 45220

Relator,

-vs-

CINCINNATI PUBLIC SCHOOLS
2651 Burnet Avenue
Cincinnati, Ohio 45219

Respondent.

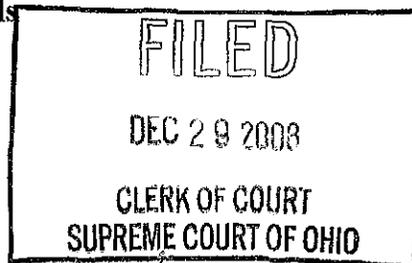
MANDAMUS PROCEEDING

CASE NO. 2008-0748

**MOTION TO STRIKE PORTIONS OF
AFFIDAVIT OF ELIZABETH HOLTZAPPLE**

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Relator, Paul Perrea, hereby moves to strike paragraphs 9, 10, and 21 and Exhibit G of the Affidavit of Dr. Elizabeth Holtzapple. The reasons are more completely set out below.

MEMORANDUM

The Supreme Court Practice Rules state that affidavits presented in original actions “shall be made on personal knowledge, setting forth facts admissible in evidence.” S. Ct. R. X, § 7. The Ohio Rules of Evidence state that hearsay is inadmissible. Ohio R. Evid. 802. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Ohio R. Evid. 801(C).

In this case, on November 4, 2008, Cincinnati Public Schools (CPS) filed Evidence Submitted by Respondent Cincinnati Public Schools. In that evidence, CPS included Affidavit of Dr. Elizabeth Holtzapple. In her affidavit, Holtzapple makes hearsay statements. For instance, in paragraph 9, she offers a “quote” that she received from West Ed, claiming that West Ed would charge \$547,034 per year to create 11th grade exams and revise portions of the 9th and 10th grade exams.¹ In paragraph 10, Holtzapple breaks down the \$547,034 to give a cost of revising the 9th, 10th, and 11th grade exams.² In paragraph 21, Holtzapple refers to Exhibit G as a copy of the “quote” from West Ed.³ Exhibit G contains an unsigned, undated list of numbers entitled, “Budget Submitted to Cincinnati Public Schools for Development of Assessments for Grade 11 and revision

¹ On June 27, 2008, I received a quote from West Ed regarding the cost of developing the 11th grade Semester Exams from scratch and replacing half of the exam questions currently used in the 9th and 10th grade Semester Exams. The cost for West Ed to provide these services would be \$547,034.

² The cost of revising the 9th and 10th grade exams alone would be \$270,000. If CPS were forced to revise its Semester Exams each year (grades 9-11) because the exams are made public, CPS would have to spend approximately \$405,000 per year. Because of this cost, CPS would have to discontinue the Semester Exams altogether if the exams were made public.

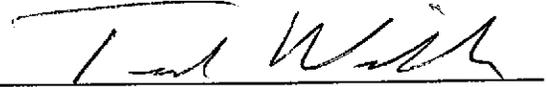
³ Exhibit G (Document Nos. CPS 057-CPS 058) is a true and accurate copy of a quote submitted to CPS by West Ed disclosing the costs of developing the 11th grade Semester Exams and revising the 9th and 10th grade Semester Exams by developing new questions for half of each exam.

of Grades 9 and 10.” (Holtzapple Affidavit, Exhibit G.)

In its Response in Opposition to Merit Brief of Relator (CPS Response Brief), CPS relies on the hearsay statements in Holtzapple’s affidavit. (CPS Response Brief at 6-7, 11, and 15.) In fact, the hearsay statements are the centerpiece of the CPS memorandum. For example, on page 7, CPS states: “The cost to CPS to revise half of the questions for the Semester Exams for all the courses in which it currently administers such tests would be \$405,000 per year. (Holtzapple Aff. ¶ 10).” (CPS Response Brief at 7.) On page 11, CPS states: “The usefulness of the tests will be compromised by their disclosure, and the development of the new tests will cost CPS at least \$405,000 per year. (Holtzapple Aff. ¶ 10).” (CPS Response Brief at 11.) And, on page 15, CPS states: “An order granting mandamus relief to Perrea would also effectively end the administration of Semester Exams at CPS. The time and expense to develop new tests each year — at least \$405,000 — is clearly prohibitive.” (CPS Response Brief at 15.)

By making these arguments, CPS is using the quote from West Ed for the truth of the matter asserted. Because the quote from West Ed is an out-of-court statement, the quote is inadmissible hearsay. Ohio R. Evid. 801(C). Based on the Supreme Court Rules, the hearsay cannot be properly included in the Holtzapple affidavit. S. Ct. R. X, § 7. For that reason, Relator, Paul Perrea, respectfully requests that this Court strike paragraphs 9, 10, and 21 and Exhibit G from the Holtzapple affidavit.

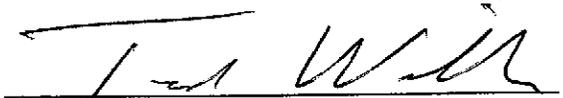
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above document was served by regular United States Mail on Mark Stepaniak, Taft Stettinius & Hollister, 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202-3957, this 24th day of December, 2008.



Ted L. Wills (0059473)