

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.)
 KATHLEEN DREAMER, ET AL.,)
)
 Appellees,)
)
 vs.)
)
 WILLIAM MASON, CUYAHOGA)
 COUNTY PROSECUTOR, ET AL.,)
)
 Appellants.)

Case No. 2010-1551
 On Appeal from the
 Cuyahoga County Court of Appeals
 Eighth Judicial District
 Court of Appeals Case No. 09 CA93949

MOTION TO STRIKE APPELLANTS' REPLY BRIEF

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STATE OF OHIO EX REL.
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Appellees,

vs.

WILLIAM MASON
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PROSECUTOR, ET AL.,

Appellants.

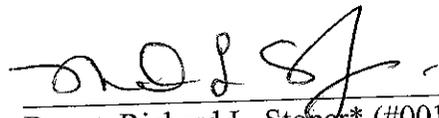
CASE NO. 2010-1551

On Appeal from the
Cuyahoga County Court of Appeals
Eighth Judicial District

MOTION TO STRIKE
APPELLANTS' REPLY
BRIEF

Appellees Kathleen Dreamer, Jacqueline Maiden, and Rosie Grier respectfully move this Court to strike Appellants' Reply Brief on the grounds that such brief improperly refers to matters that are not part of the record in this case, and, therefore, are not properly before this Court for consideration in this appeal. A brief in support of this motion is attached hereto and incorporated herein.

Respectfully submitted,



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BRIEF IN SUPPORT

On February 2, 2011, Appellants filed a Reply Brief with the Court containing a lengthy statement of facts. The majority of the so-called facts recited in Appellants' Reply Brief do not appear anywhere in the record. Appellants paraphrase at length testimony from the initial trial of Appellees despite the fact that the transcripts of that trial are not part of the record in this case. Appellants refer to specific witness testimony but fail to cite where this testimony appears in the record of this case.

Appellants additionally cite to a board meeting transcript that is not a part of the record in this case and was never provided to Appellees. These alleged facts, and the arguments based upon them, should be stricken for three reasons: 1) The trial testimony and board meeting transcript referenced in Appellants' Reply Brief are not a part of the record in this case; 2) the testimony referenced is derived from trial proceedings in which the trial judge was removed and the subsequently appointed trial judge granted a new trial and eventually dismissed the charges; and 3) Appellants did not even attach portions of transcripts of the trial testimony or board meeting they now seek to introduce as fact.

I. The Trial Testimony and Board Meeting Transcript Cited in Appellants' Reply Brief Are Not Part of the Record In This Case.

Appellees filed an original action in mandamus with the Eighth District Court of Appeals. The Court of Appeals' decision was based upon the original papers and exhibits to those papers filed with that court. The Court of Appeals' decision was not based upon any trial court testimony, nor did any party ever submit such testimony to the Court of Appeals for its consideration. Furthermore, the trial proceedings were not the basis for Appellees' claim in mandamus. Rather, Prosecutor Mason's actions and inactions that occurred *prior to* the trial of Appellees formed the legal and factual basis for Appellees' action in mandamus. Appellants' Reply Brief makes reference to the trial testimony and board meeting transcript for the first time on appeal in this Court.

This Court has held, "[a] reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal based on the new matter." *McAuley v. Smith* (1998), 82 Ohio St.3d 393, 396; 696 N.E.2d 572, citing *State ex rel. Brantley v. Ghee* (1997), 80 Ohio St.3d 287, 288; 685 N.E.2d 1243. See also *State v. Ishmail* (1978), 54 Ohio St.2d 402, para. 1 of Syllabus; 377 N.E.2d 500 ("A reviewing court cannot add matter to

the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.") In essence, the trial testimony paraphrased at length in Appellants' Reply Brief is an attempt to introduce matter to the record that was not part of the Court of Appeals' proceedings and was not considered by that court in reaching its opinion. Appellants raise these alleged facts and the arguments related thereto for the first time on appeal.

R. App. P. 9(A) provides, in pertinent part:

(A) Composition of the record on appeal

The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. ...

S. Ct. Prac. R. 5.1 states:

Composition of the record on appeal

In all appeals, the record on appeal shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with an electronic version of the transcript, if available; and certified copies of the journal entries and the docket prepared by the clerk of the court or other custodian of the original papers. *Where applicable*, the record on appeal shall consist of all the above items from both the court of appeals and the trial court. (emphasis added.)

In the present case, the testimony and proceedings from the original trial court are not applicable to the Appellees' action in mandamus which was filed under the original jurisdiction of the Court of Appeals. The Appellees' complaint for a writ of mandamus was never before the trial court. Instead, the Court of Appeals served as the de facto trial court for the Appellees' mandamus action. Appellants never sought to introduce trial court testimony or board meeting transcripts in support of its motion for summary judgment or in defense of the mandamus complaint. Even when the Court of Appeals requested both parties to supplement their pleadings

with additional affidavits, the Appellants did not produce the paraphrased trial testimony they seek to rely on presently. The record before this Court is properly made up only of the pleadings and exhibits filed with the Court of Appeals.

R. App. P. 9(A) and *S. Ct. Prac. R. 5.1* are similar in language and spirit. The Appellants' appeal to this Court is an appeal of right because the original action was first filed before the Court of Appeals. As such, case law from other Ohio courts of appeal, though not binding, may be instructive.

An appellate court's review is strictly limited to the record that was before the trial court. "Evidence not part of the record that is attached to, or contained within, an appellate brief cannot be considered by a reviewing court." *Redell v. Napper* (2003), 2003 Ohio 2719 at para. 5. "[A]n exhibit attached to or new facts included in an appellate brief cannot be considered as a part of the record on appeal." *Papadelis v. First American Savings Bank* (1996), 112 Ohio App.3d 576, 581; 679 N.E.2d 356. Pursuant to *R. App. P. 12(A)*, an appellate court is confined to reviewing the record as defined by *R. App. P. 9(A)*. *R. App. P. 9(A)* limits the appellate court's consideration to "original papers and exhibits thereto *filed* in the trial court..." (emphasis added). *Pullman Power Products Corp. v. Adience, Inc.* (2003), 2003 Ohio 956 at para. 14, footnote 1.

Amazingly, Appellants only now offer this testimony in a brief, after having numerous opportunities to introduce it before the Court of Appeals. Appellants did not introduce this testimony in defense of Appellees' complaint for a writ of mandamus, in its motion for summary judgment, nor when the Court of Appeals requested both parties to supplement their pleadings with additional affidavits. The testimony paraphrased in Appellants' Reply Brief, and the arguments based thereon, are not a part of the record before this Court and should be stricken.

II. The Facts and Arguments in Appellants' Reply Brief Are Derived From A Trial That Was Set Aside.

The paraphrased trial testimony that Appellants seek to introduce for the first time on appeal comes from a trial that was set aside due to the disqualification of the trial judge. *Aff. of Disqualification in Case No. 483027*; See also, *Exhibit E* attached to Respondent's Motion for Summary Judgment. The subsequently-appointed trial judge granted Appellees' motion for a new trial, which never went forward. The case was eventually dismissed, through a diversion program, without any finding of guilt ever being entered against Appellees.

Appellants only seek to introduce this paraphrased testimony in an attempt to confuse the issues and portray Appellees in a negative light, even though the testimony has nothing to do with the legal or factual issues surrounding Appellees' mandamus action. The trial court testimony suddenly offered by Appellants for the first time before this Court centers around the Appellees' participation in the election recount. The underlying conduct of Appellees was already settled at the trial court level and the charges were dismissed. All that is sought in the present mandamus action is a decision on the issue of Prosecutor Mason's refusal to apply for the appointment of counsel, despite operating under an admitted conflict of interest.

III. Appellants Provide Absolutely No Substantiation of The Facts In Their Reply Brief.

Appellants seek to introduce new facts by paraphrasing trial testimony and by citing a board meeting transcript without providing any transcripts or other means of authenticating the facts supposedly contained therein. Additionally, Appellants do not even cite to a transcript of the testimony. Neither this Court, nor Appellees, has any means of knowing what the footnote-cited witnesses actually testified to in whole or in part. In their statement of facts, Appellants additionally cite to a board meeting transcript that is not a part of the record, was never provided to Appellees, nor was ever provided to this Court. Appellants' decision to cite these alleged facts

for the first time on appeal in their Reply Brief with no substantiation or specific citation is improper.

IV. Appellants Failed To Provide Any Affidavit From Assistant County Prosecutor Reno Oradini Before The Court of Appeals.

In the Reply Brief, Appellants categorically deny, for the first time in the present case, that Assistant County Prosecutor Reno Oradini made any statement concerning payment of Appellees' attorneys' fees. *Appellants' Reply Brief* at pg. 15. However, Appellants did not provide an affidavit from Assistant County Prosecutor Oradini before the Court of Appeals, even after that court requested additional affidavits in support of the parties' pleadings. As such, Appellants' now proffered denial of any such statement is not a part of the record before this Court. Appellants, now realizing that they failed to controvert Appellees' assertions before the Court of Appeals, seek to deny this statement without any support in the record.

CONCLUSION

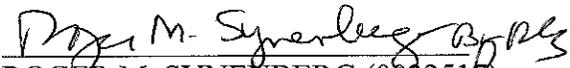
Almost the entirety of Appellants' Reply Brief is based upon information which is not part of the record on appeal before this Court. These facts were not introduced before the Court of Appeals, despite numerous opportunities to do so. These alleged facts and the legal arguments based upon them are raised for the first time on appeal to this Court. These alleged facts are taken from a trial that was set aside due to the disqualification of the trial judge, before the charges were eventually dismissed. Additionally, neither this Court nor the Appellees have any way to authenticate or verify Appellants' alleged facts because Appellants provided no transcript of the selected testimony, or even a citation to a transcript.

Nearly the entire statement of facts is made up of evidence not a part of the record before this Court, nor the Court of Appeals in rendering its decision. If this Court were to consider

these alleged facts and the legal arguments based upon them, it would be considering evidence which was not before the Court of Appeals in rendering its opinion. For the foregoing reasons, Appellees' respectfully request this Court to strike the Appellants' Reply Brief in its entirety.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing *Motion to Strike Reply Brief* was served by regular U.S. Mail on this 11th day of February, 2011 to the following:

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And

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Richard Stoper