

**IN THE
SUPREME COURT OF OHIO**

State of Ohio ex. rel. THE CINCINNATI ENQUIRER	:	CASE NO. 2011- 1643
	:	
Petitioner	:	
	:	
vs.	:	RESPONDENT'S MOTION TO DISMISS
	:	
Hon. NADINE ALLEN, Judge Hamilton County Court Of Common Pleas	:	ORIGINAL ACTION IN MANDAMUS
	:	
Respondent	:	

**RESPONDENT ALLEN'S MOTION TO DISMISS
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

John C. Greiner (0005551)
 GRAYDON HEAD & RITCHEY, LLP
 1900 Fifth Third Center
 511 Walnut Street
 Cincinnati, Ohio 45202-3157

DDN: (513) 629-2734
 FAX: (513) 651-3836

jgreiner@graydon.com

JOSEPH T. DETERS
 Prosecuting Attorney
 Hamilton County, Ohio

Christian J. Schaefer (0015494)
 Assistant Prosecuting Attorney
 230 E. Ninth Street, Suite 4000
 Cincinnati OH 45202-2174
 DDN: (513) 946-3041
 FAX: (513) 946-3018
chris.schaefer@hcpros.org

Attorney for Petitioner

Attorneys for Respondent-Appellee

RECEIVED
 OCT 07 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 OCT 07 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

MOTION TO DISMISS

Now comes Respondent Judge Allen who moves to dismiss this action because
The Cincinnati Enquire failed to file a Motion as required by Sup. R. 45(F)(1) and thereby is not
an person aggrieved with standing to file a mandamus action as provided in Sup. R. 47(B).

Respectfully submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO



Christian J. Schaefer, 0015494
Assistant Prosecuting Attorney
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2174
513/946-3031
FAX 513/946-3018

ATTORNEYS FOR RESPONDENT

**IN THE
SUPREME COURT OF OHIO**

State of Ohio ex. rel. THE CINCINNATI ENQUIRER	:	CASE NO. 2011-1643
	:	
Petitioner	:	MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
vs.	:	
	:	
HON. NADINE ALLEN Judge, HAMILTON COUNTY COURT OF COMMON PLEAS	:	ORIGINAL ACTION IN MANDAMUS
	:	
Respondent	:	

STATEMENT OF FACTS

Attached to the petition is the indictment in case B-1001826 which purports to charge the accused with stealing several hundred thousand dollars from a victim. Also attached is an affidavit from attorney Jack Greiner of the firm Graydon Head & Ritchie, LLP, who recites that he (not an Enquirer reporter) heard of and attended a hearing in case number B-1001826 pending before Judge Allen. Mr. Greiner also has attached a letter which he sent to Respondent Judge Allen. Mr. Greiner's affidavit does not indicate how he happened to learn of the hearing or that he was in attendance while acting for his client Cincinnati Enquirer.¹

Omitted from Mr. Greiner's affidavit is that he or any one else acting for the Cincinnati Enquirer filed a written motion under Sup. R. 45(F)(1). Paragraph 8 of the Petition makes a ~~conclusory statement that the Cincinnati Enquirer was aggrieved by Judge Allen's alleged~~ specific failure to comply with the Sup. R. 44 through 47 occurred. It does not allege that a

¹ Gwen Morris, an attorney with Graydon Head & Ritchey is in the process of seeking divorce from the defendant in this case. See Morris v. Morris, case no. 10DR34142, Warren County Court of Common Pleas (Exhibits 3 and 4).

motion was filed with Judge Allen on behalf of the Cincinnati Enquirer.

Following the hearing Mr. Greiner happened to attend, the Court on its own motion issued orders on August 25, 2011 and October 3, 2011 concerning the sealed records. The first order makes clear that the order sealing the record is temporary, not permanent. The second, issued on October 3, 2011, limits the sealed documents to the indictment (which the Enquirer attached to its petition), a motion to take a deposition of deposition, and documents filed on or after August 25, 2011. (See attached "Exhibit 1" and "Exhibit 2").

ARGUMENT

FIRST PROPOSITION OF LAW

In order to become a "person aggrieved" by a court's failure to comply with Sup. R. 44 through 47, the person must first file a written motion with the court issuing an order under Sup. R. 45 to gain access to documents under Sup. R. 45(F)(1).

In this case Relator, the Cincinnati Enquirer did not file any motion as provided in Sup. R. 45(F)(1). Sup. R. 45(F)(1) provides:

(F) Obtaining access to a case document that has been granted restricted public access

(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.

Had the Cincinnati Enquirer filed such a Motion, the parties, the victim, and the Enquirer might have had the opportunity to develop a record on which the petition for a writ of mandamus could be determined.

The Rules of Superintendence go on to describe the remedy should the Court, after the filing of the written motion, deny the person who filed the written motion access to the records.

Sup. R. 47 provides:

(B) Denial of public access – remedy

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 pursuant to Chapter 2731. of the Revised Code.

Clearly, Sup. R. 47(B) does not contemplate that every person can file the writ of mandamus with this court every time a record is sealed without raising the issue with the court that sealed the records. Instead, it is limited to a “person aggrieved.”

In dealing with *R.C. 149.351*, a similar term was interpreted by this Court. *Rhodes v. New Philadelphia*, (2011) 129 Ohio St. 3d. 305, dealt with a person, Rhodes, who attempted to extract substantial monetary forfeitures from a local government when the Rhodes learned that a decades old series of public records had been destroyed outside the provisions of the Ohio Public Records Act. This Court explained Rhodes mailed a public-records request to the city of New Philadelphia requesting certain reel-to-reel tape recordings made by the police dispatch department through the use of a now-antiquated “Dictaphone–Dictatape Logger” system. He requested access to every one of those tapes created from 1975 through 1995. In his reply, the New Philadelphia chief of police explained that the department had disposed of the recordings. Upon finding that the New Philadelphia Police Department had, in violation of *R.C. 149.351(A)*, ~~erased the recordings from its reel-to-reel tapes 30 days after each recording was made,~~ Rhodes filed a complaint for civil forfeiture under *R.C. 149.351(B)*. Rhodes stated in his complaint that New Philadelphia had acted unlawfully when it destroyed the recordings without the requisite approval and that he was entitled to a \$1,000 forfeiture for each improperly destroyed 24-hour

recording.

The Supreme Court determined that right to request records was personal to Rhodes and he was not an “aggrieved party.” The Supreme Court explained:

{¶ 16} Thus, in order for Rhodes to succeed in his civil action for forfeiture pursuant to R.C. 149.351, he must have requested public records, the public office must have been obligated to honor that request, subject to certain exceptions in R.C. 149.43(B), the office must have disposed of the public records in violation of R.C. 149.351(A), and Rhodes must be aggrieved by the improper disposal. However, the General Assembly did not provide a definition for the term “aggrieved” as it is used in R.C. 149.351(B).

The Supreme Court then noted that General Assembly did not make the enforcement mechanism of forfeiture available to “any person.” Forfeiture is available only to a person who has been “aggrieved” by the public office’s violation. *R.C. 149.351(B)*. In order to give effect to every term in a statute and avoid a construction that would render any provision meaningless, inoperative, or superfluous the Supreme Court concluded that the General Assembly did not intend to impose a forfeiture when it can be proved that the requester’s legal rights were not infringed, because the requester’s only intent was to prove the nonexistence of the records. *State ex rel. Rhodes v. New Philadelphia*, supra at [¶23].

Sup. R. 45 through 47 uses the same terminology this Court considered in *Rhodes*. The only reasonable interpretation is that to acquire the status of “person aggrieved” the person must, at minimum, file a written motion in the case from which sealed records are desired. This interpretation is not only reasonable based upon the recent caselaw of this Court. This interpretation also has practical benefits.

~~First, it gives the trial court an opportunity to re-consider its decision to seal the records~~
or modify its prior order. Sup. R. 45(F)(2) provides:

(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.

The benefit of requiring this step inures to the benefit of this Court and the courts of appeal by potentially reducing the number of writs which are actually filed. This initial filter of cases advances the goal of judicial economy.

The second benefit is that a record can be developed which could be the basis for this Court or a court of appeals to determine the petition for a writ of mandamus. In the case at bar, the need for more facts is obvious. Requiring the Cincinnati Enquirer to file a motion with Judge Allen could resolve these factual questions:

- 1) Is the accused offering to make restitution or partial restitution to the victim?
- 2) Is the victim a vulnerable, elderly person?
- 3) Will immediate publication of the arrangement hinder the ability of the accused to make restitution?
- 4) Will publication of the name and circumstances of the victim and potential receipt of restitution alert every charlatan in a three state area as to their next potential victim?
- 5) Would the Enquirer, as it does in rape cases, agree to protect the identity of elderly fraud victims so that any restitution paid is not taken by some other charlatan?
- 6) Is this case being driven by the friends and co-workers of a wife who happen to learn of court proceedings involving the husband?

- 7) Will interference by the wife reduce the ability of the victim to recover restitution?

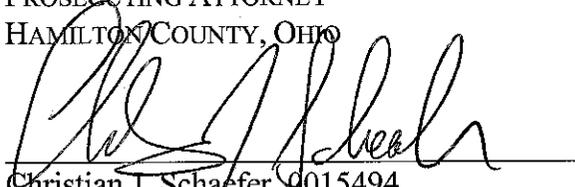
Since the Enquirer, represented throughout by counsel, did not file a motion, none of these questions are answered. It is however, telling that Mr. Greiner's letter immediately jumps to the conclusion that the Judge Allen was acting because of "defendant's desire to avoid embarrassment." There is nothing in Mr. Greiner's affidavit that would lead anyone to the conclusion suggested by his letter.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Mandamus should be dismissed.

Respectfully submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO



Christian J. Schaefer, 0015494
Assistant Prosecuting Attorney
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2174
513/946-3031
FAX 513/946-3018

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. Mail this

6th day of October, 2011 on:

John C. Greiner (0005551)
Graydon Head & Ritchey, LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157



Christian J. Schaefer, 0015494
Assistant Prosecuting Attorney