

ORIGINAL

In the
Supreme Court of Ohio

STATE, *ex rel.* THE CINCINNATI
ENQUIRER, a Division of Gannett
Satellite Information Network, Inc.

Case No. 2011-1643

Petitioner,

vs.

Original Action in Mandamus

HONORABLE NADINE ALLEN

Respondent.

REPLY BRIEF OF THE CINCINNATI ENQUIRER

John C. Greiner (0005551) *Counsel of Record*
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

COUNSEL FOR THE CINCINNATI ENQUIRER

Joseph T. Deters
Prosecuting Attorney
Christian J. Schaefer (0015494) *Counsel of Record*
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, OH 45202-2174
Phone: (513) 946-3041
Fax: (513) 946-3018
E-mail: chris.schaefer@hcpros.org

COUNSEL FOR HONORABLE NADINE ALLEN

FILED
FEB 13 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. STATEMENT OF FACTS.....	1
II. ARGUMENT.....	1
 <u>PROPOSITION OF LAW NO. 1.</u>	
A COURT OF COMMON PLEAS MUST ADHERE TO THE RULES OF SUPERINTENDENCE WHEN ISSUING ANY ORDER RESTRICTING PUBLIC ACCESS TO COURT RECORDS	1
 <u>PROPOSITION OF LAW NO. 2.</u>	
THE ENQUIRER IS THE REAL PARTY IN INTEREST IN THIS CASE	2
 <u>PROPOSITION OF LAW NO. 3.</u>	
A PARTY IS AGGRIEVED BY A COURT'S REFUSAL TO FOLLOW THE RULES OF SUPERINTENDENCE.....	3
 <u>PROPOSITION OF LAW NO. 4.</u>	
A COURT MAY RESTRICT PUBLIC ACCESS TO A COURT RECORD ONLY IF CLEAR AND CONVINCING EVIDENCE ESTABLISHES THE FACTORS PERMITTING THE RESTRICTION	5
 <u>PROPOSITION OF LAW NO. 5.</u>	
THE RULES OF SUPERINTENDENCE DO NOT REQUIRE AN AGGRIEVED PARTY TO FILE A MOTION WITH THE COURT PRIOR TO SEEKING A WRIT OF MANDAMUS	6
 <u>PROPOSITION OF LAW NO. 6.</u>	
WHERE THE RECORD DISCLOSES NO EVIDENCE THAT A VICTIM WILL BE MADE HOMELESS, MERE ALLEGATIONS TO THAT EFFECT ARE INSUFFICIENT TO JUSTIFY AN ORDER RESTRICTING PUBLIC ACCESS TO COURT RECORDS	6
III. CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Constitutional Provisions; Statutes; Rules:</u>	
Sup. R. 44 through 47	4
Sup. R. 45	6
Sup. R. 45(A)	5
Sup. R. 45(E)	3, 4, 5, 6
Sup. R. 45(E)(1)	5
Sup. R. 45(2)	5
Sup. R. 45(F)	3, 4, 6
Sup. R. 45(F)(1)	3, 6
Sup. R. 45(F)(2)	4
Sup. R. 47(B)	4

**REPLY BRIEF OF RELATOR, THE CINCINNATI ENQUIRER TO THE
MERIT BRIEF OF RESPONDENT NADINE ALLEN**

I. STATEMENT OF CASE AND FACTS

With due respect, Relator, The Cincinnati Enquirer ("The Enquirer") asks that this Court disregard Respondent's Statement of Case and Statement of Facts in their entirety. Neither Statement is based on any evidence that was in the record at the time Respondent issued the order sealing the record in this case. Both Statements are based upon obvious supposition, speculation, and conspiracy theory that do not further a rational understanding of the legal issue before the Court, that being whether Respondent complied with the Rules of Superintendence in sealing the record in the underlying criminal case.

II. ARGUMENT

PROPOSITION OF LAW NO. 1.

A COURT OF COMMON PLEAS MUST ADHERE TO THE RULES OF SUPERINTENDENCE WHEN ISSUING ANY ORDER RESTRICTING PUBLIC ACCESS TO COURT RECORDS.

Respondent contends that a trial judge has "inherent authority ... to protect a victim and to protect her orders in the case over which she has jurisdiction from outside influence." (Respondent's Merit Brief, p. 9). By this statement, Respondent suggests that judges are free to do whatever they want, without regard to the law. Of course, that is not the case. Respondent can "protect victims" and "her orders" but only within the confines of the Rules of Superintendence. Respectfully, she ignored those Rules here, and for that reason this Court should grant the requested writ of mandamus.

PROPOSITION OF LAW NO. 2.

THE ENQUIRER IS THE REAL PARTY IN INTEREST IN THIS CASE.

There is no genuine issue as to the real party in interest in this case. This mandamus action originated when The Cincinnati Enquirer, through counsel, delivered a letter to Respondent asking that court to unseal the records in the underlying criminal case. The subject line of that letter reads "The Cincinnati Enquirer."¹ The very first line of the letter declares that it is written on behalf of The Enquirer.² The Affidavit supporting the Complaint for the writ of mandamus states that counsel represents "The Cincinnati Enquirer in this matter."³

The unrebutted record overwhelmingly establishes that The Enquirer is the real party in interest in this case. If Respondent genuinely felt that there was **any** question of this fact, Respondent could have simply asked if counsel was representing The Enquirer's interests in this proceeding or engaged in very simple discovery on the point. Neither was undertaken, because there simply is no genuine issue as to the real party in interest.

Regrettably, Respondent's Merit Brief materially misquotes The Enquirer as arguing that "...whether counsel for The Enquirer was actually representing The Enquirer in this matter is utterly irrelevant." What The Enquirer actually said in its Merit Brief was: "In addition, much of Ms. Higgins' affidavit, which raises unfounded and false accusations concerning whether counsel for The Enquirer was **actually** representing The Enquirer in this matter are utterly irrelevant."⁴ The difference between Respondent's misquote and the actual quote creates a material misimpression of the reality of The Enquirer's position on this point.

¹ Affidavit of John C. Greiner, Ex. B.

² *Id.*

³ Affidavit of John C. Greiner.

⁴ Merit Brief of The Cincinnati Enquirer, p. 6 (emphasis in original).

In short, The Enquirer is and has always been the real party in interest in this matter, notwithstanding any unsupported theories to the contrary.

PROPOSITION OF LAW NO. 3.

A PARTY IS AGGRIEVED BY A COURT'S REFUSAL TO FOLLOW THE RULES OF SUPERINTENDENCE.

In her earlier Motion to Dismiss, Respondent argued that The Enquirer is not aggrieved by her order sealing the record. This Court denied that Motion. Respondent's argument then and now is that The Enquirer failed to file a motion as required by Superintendence Rule 45(F)(1). Respondent contends that such an alleged failing precludes The Enquirer from proceeding in mandamus. Respondent is mistaken.

The Enquirer fully briefed this matter in its Memorandum in Opposition to the Motion to Dismiss. Without repeating that Memorandum here, the essential point is this – Rule 45(F)(1), by its plain terms, simply does not apply here. Rule 45(F) provides:

(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. [Emphasis added].

In short, where a court follows the procedure set forth in Rule 45(E), and restricts access to a particular case document, Rule 45(F) sets forth a procedure for challenging that restriction.

But here, Respondent did not restrict access to the record pursuant to Rule 45(E). She ignored that provision entirely.

Rule 45(E) sets forth the procedure for restricting public access to individual case documents and requires, among other things, findings by clear and convincing evidence. In this instance, Respondent issued an order on a blanket basis, sealing the entire record, rather than on a case document by case document basis. And Respondent made no findings and had no evidence, clear and convincing or otherwise, upon which to base a finding. In short, Respondent never triggered Rule 45(F) because she never applied Rule 45(E).

A full reading of Rule 45(F) makes it very clear that the facts here do not permit a Rule 45(F) motion. Rule 45(F)(2) provides in pertinent part:

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 access is no longer outweighed by a higher interest.

Thus, Rule 45(F) contemplates a scenario where the court had properly applied Rule 45(E) originally, but changed circumstances dictate relief from the original order. Here, the court never made an evidentiary finding that a higher interest outweighed the presumption of access. This is not a situation where a “changed circumstances” motion is warranted. Thus, mandamus is the appropriate relief.

Respondent failed to comply with the Superintendence Rules in a number of ways. As a result, The Enquirer was aggrieved. Rule 47(B) plainly states that “[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.” The Enquirer plainly meets that definition and has pursued that remedy.

PROPOSITION OF LAW NO. 4.

A COURT MAY RESTRICT PUBLIC ACCESS TO A COURT RECORD ONLY IF CLEAR AND CONVINCING EVIDENCE ESTABLISHES THE FACTORS PERMITTING THE RESTRICTION.

At page 15 of Respondent's brief, Respondent quotes a portion of Superintendence Rule 45(E) and then argues that the court is free to issue an order restricting public access in the absence of any record evidence supporting the order. The portion of the Rule that Respondent fails to quote makes clear that Respondent's argument simply inaccurate.

While Rule 45(E)(1), quoted by Respondent, permits the court to *sua sponte* issue an order, Rule 45(E)(2), omitted from the quote, permits the court to enter such an order only "if it finds by clear and convincing evidence" that the order is warranted. Rule 45(E)(1) must be read within the context of Rule 45(E)(2), and when it is so read, the error of Respondent's interpretation is apparent.

In this case, Respondent can direct this Court to **no** record evidence establishing that Respondent considered any evidence or made any of the findings required by Rule 45(E)(2). The Rule was simply not followed.

Finally in this regard, Respondent suggests at page 16 of her Merit Brief that parties to a criminal case have the freedom to enter a "consent decree" to restrict public access to the court record. The error of this suggestion could not be more certain or clear. The very purpose of the Superintendence Rules on access is to eliminate the type of in-chambers maneuvering that occurred here. The rules plainly state the presumption that court records are "open to public access,"⁵ and then outline in detail the circumstances under which a court may restrict public access to those otherwise open records. Neither the parties nor the court may skirt those rules via

⁵ Sup. R. 45(A).

a “consent decree.” To the extent that there is any uncertainty as to this point among trial courts in Ohio, this Court should clarify the applicability of these rules in no uncertain terms.

PROPOSITION OF LAW NO. 5.

THE RULES OF SUPERINTENDENCE DO NOT REQUIRE AN AGGRIEVED PARTY TO FILE A MOTION WITH THE COURT PRIOR TO SEEKING A WRIT OF MANDAMUS.

Respondent’s Fifth Proposition of Law is identical to Respondent’s Third Proposition of Law. As previously discussed, when a court has restricted access to court records “pursuant to division (E) of this rule [45],” Rule 45(F)(1) permits a party, by motion, to seek to have those records unsealed.⁶ Respondent did not comply with Rule 45(E), and thus Rule 45(F) is not applicable, and mandamus is appropriate.

PROPOSITION OF LAW NO. 6.

WHERE THE RECORD DISCLOSES NO EVIDENCE THAT A VICTIM WILL BE MADE HOMELESS, MERE ALLEGATIONS TO THAT EFFECT ARE INSUFFICIENT TO JUSTIFY AN ORDER RESTRICTING PUBLIC ACCESS TO COURT RECORDS.

Respondent contends that the decision to restrict public access to the court records in this case was necessary to somehow prevent the crime victim from being rendered homeless. (Respondent’s Merit Brief, p. 18). There is no evidence in the record to support this contention, which is what is required by the Rule. At best, Respondent can only say that information was “provided” to her by the lawyer for the victim and the lawyer for the criminal defendant, one of whom was admittedly self-motivated to avoid incarceration and the other of whom was influenced by the desire to secure compensation.

Such unsworn statements by attorneys on behalf of self-interested parties are not **evidence**, certainly not the clear and convincing evidence required by Rule 45 to permit the restriction of public access ordered here.

⁶ Sup. R. 45(F)(1).

III. CONCLUSION

The record in this case establishes without any question that in sealing the record in the case below, Respondent failed to comply with the requirements of the Superintendence Rules regarding access to court records. The Enquirer respectfully requests that this Court grant the writ of mandamus.

Respectfully submitted,

Of Counsel:

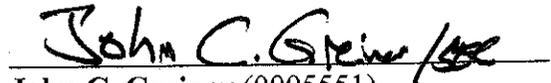
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836


John C. Greiner (0005551)
Counsel for The Cincinnati Enquirer
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *REPLY BRIEF OF THE CINCINNATI ENQUIRER* was served by regular U.S. Mail, postage prepaid, this 13th day of February, 2012, upon the following:

Joseph T. Deters, Esq.
Prosecuting Attorney
Christian J. Schaefer, Esq.
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, OH 45202-2174


John C. Greiner (0005551)