

In the
Supreme Court of Ohio

MATTHEW RIES, ADMR., et al.,	:	Case No. 2012-0954
	:	
Plaintiffs-Appellants,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
THE OHIO STATE UNIVERSITY	:	
MEDICAL CENTER,	:	Court of Appeals
	:	Case No. 11AP-1004
Defendant-Appellee.	:	
	:	

**RESPONSE OF DEFENDANT-APPELLEE
THE OHIO STATE UNIVERSITY MEDICAL CENTER TO MOTION TO STRIKE**

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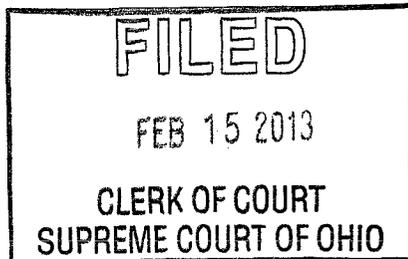
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RESPONSE OF DEFENDANT-APPELLEE
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Ries moves to strike The Ohio State University Medical Center's brief and supplement as being in violation of the Court's rules. Because neither document should be stricken, the Court should deny the motion.

1. Ries principally argues that the Medical Center's brief should be stricken because it mentions new factual developments. In doing so, he fails to distinguish merits arguments from jurisdictional ones. At no point did the Medical Center's brief use new facts or evidentiary materials to address the *merits* of the questions presented in this case. The Medical Center did not cite new facts in the Statement, it did not use new facts to argue that the judgment below should be affirmed, and it did not mention new facts in reference to the Medical Center's second Proposition of Law—the only proposition of law that goes to the merits of this case.

Instead, the Medical Center alerted the Court to intervening developments only to argue that this case should be dismissed as improvidently accepted. The Court granted review over this case to address questions about a form contract provided to all Ohio State physicians and about an employment structure where Ohio State physicians signed contracts with both the Medical Center and its administrative practice plan, OSUP. As a factual matter, that is no longer true. Soon, no Ohio State physician will be bound by an arrangement like Dr. Husain's because no Ohio State physician will sign contracts with both the Medical Center and OSUP. *See* Medical Center Br. at 10-12. *As a result, the question presented in this case will affect no future Ohio State physician.*

Put another way, the public-or-great-general-interest aspect of this case is now moot. For over a century, the Court has recognized that attorneys, as officers of the court, may inform tribunals of factual developments that affect their cases. *See Miner v. Witt*, 82 Ohio St. 237,

238-39 (1910) (“[S]uch a fact, when not appearing on the record, may be proved by extrinsic evidence.”). Since that time, counsel has been allowed to present intervening developments to the Court. *See, e.g., Smith v. Bd. of Tax Appeals*, 159 Ohio St. 183, 184 (1953) (per curiam); *State ex rel. Snyder v. Bd. of Elections*, 146 Ohio St. 556, 557 (1946); *State ex rel. Mason v. Palmer*, 120 Ohio St. 617, 617 (1929).

Parties may not only mention new events; they may also prove an “event that causes a case to become moot . . . by extrinsic evidence outside the record.” *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St. 3d 126, 2002-Ohio-7041 ¶ 8 (per curiam). The Court has allowed this practice in a wide variety of contexts. *E.g., State ex rel. Hilltop Basic Res., Inc. v. City of Cincinnati*, 118 Ohio St. 3d 131, 2008-Ohio-1966 ¶ 15 (per curiam) (mediation resulted in a settlement); *State ex rel. Nelson v. Russo*, 89 Ohio St. 3d 227, 228 (2000) (per curiam) (relator in mandamus action performed the requested act); *Bachus v. Loral Corp.*, 67 Ohio St. 3d 300, 301 (1993) (change to governing Rule of Civil Procedure became effective after case was submitted); *Pewitt v. Superintendent*, 64 Ohio St. 3d 470, 472 (1992) (per curiam) (prisoner in habeas corpus case released from confinement).

In fact, it would be inadequate for parties to address recent developments *without* offering evidence outside the record. The Court has criticized parties for offering “no proof” of intervening developments “aside from the bare unverified assertions in their appellate brief.” *Dupuis*, 2002-Ohio-7041 ¶ 9. Consistent with lawyers’ duty of candor to the tribunal, *see* Ohio Prof. Cond. R. 3.3(a), parties may correct outdated statements of fact when they affect the continuing vitality of a pending matter.

This Court’s rules point the same way. Supreme Court Rule of Practice 7.10 provides that the Court may “dismiss the case as having been improvidently accepted” not just if the

merits of the case become moot but also if it “later find[s] that there is no substantial constitutional question or question of public or great general interest.” Sup. Ct. Prac. R. 7.10. One of the ways that the Court may “later find” that a case should be dismissed as improvidently accepted is by reference to new events.

Simply put, due to new developments in how the Medical Center employs physicians, this case no longer involves a question of public or great general interest. The Court’s rules, as well as longstanding practice, allow parties to notify the Court of such intervening real-world developments. The Medical Center does not rely on any intervening developments in support of its arguments on the merits, and instead referred to new materials only to show that this case should be dismissed as improvidently accepted. Because that sort of reliance is permissible, the motion to strike should be denied as to the Medical Center’s brief.

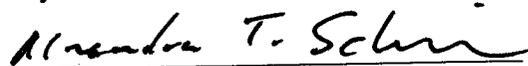
2. Ries is even further off-base when he argues that the Medical Center’s supplement “attempt[s] to place additional, new evidence before this Court.” Ries Mot. to Strike at 2. This claim flagrantly mischaracterizes the supplement, which contains nothing new. The supplement is made up entirely of items from the lower-court record—namely, Dr. Husain’s two contracts, a resolution of The Ohio State University Board of Trustees, the transcripts of two depositions, and the transcript of the Court of Claims immunity hearing. All of that was introduced in the proceedings below. The Medical Center’s supplement thus conforms exactly with this Court’s rules that supplements “contain[] those portions of the record necessary to enable the Supreme Court to determine the questions presented” and that “the record on appeal shall consist of [*inter alia*] [t]he transcript of proceedings and exhibits.” Sup. Ct. Prac. R. 15.01(A)(1), 16.09(A), (C). Because the supplement contains no new material, Ries’s motion to strike should also be denied on this score.

CONCLUSION

For these reasons, the Court should deny the motion to strike.

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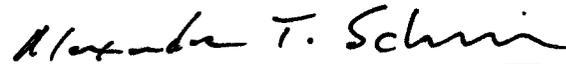
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response of Defendant-Appellee The Ohio State University Medical Center to Motion to Strike was served by U.S. mail this 15th day of February, 2013, upon the following counsel:

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