

IN THE SUPREME COURT OF OHIO

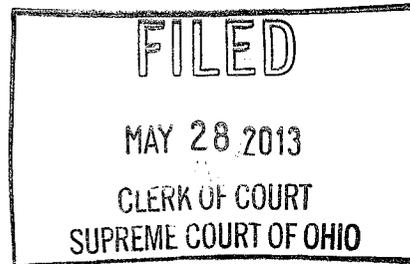
Hope Academy Broadway Campus, et al.,	:	Case No. 13-665
	:	
Plaintiffs-Appellees,	:	On Appeal from the Franklin County
	:	Court of Appeals, Tenth Appellate District
v.	:	
	:	
White Hat Management, LLC, et al.,	:	Court of Appeals Case No. 12AP-116
	:	
Defendants-Appellants.	:	

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEES HOPE
ACADEMY BROADWAY CAMPUS, ET AL.¹**

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF
PUBLIC OR GREAT GENERAL INTEREST

This appeal does not present an issue of public or great general interest. Contrary to what the White Hat Appellants² argue, this appeal does not involve their status as public officials, their use of public money, a declaration that all of their records are “public records,” or the extent to which state government or litigants generally may access the records of private entities that do business with the state. Instead, this appeal involves a discrete, fact-specific question concerning civil discovery—whether the trial court abused its discretion in finding that the White Hat Appellants failed to satisfy their evidentiary burden concerning their entitlement to a protective order. Ohio courts routinely consider these types of questions by applying the facts to well-settled law. This Court should not accept this appeal because it does not present any novel or important issue for the Court to decide.

*The Trial Court Resolved a Discovery Dispute by Applying Well-
Established Ohio Law*

This case involves a long history of the White Hat Appellants’ attempts to avoid the production of information concerning the operation of ten community schools and their use of public money. The trial court first granted the Schools’ motion to compel discovery on August 2, 2011.³ In that decision, the trial court rejected the White Hat Appellants’ argument that the Schools’ discovery requests were vague and that they sought information that is confidential,

² “White Hat Appellants” refers to White Hat Management, LLC, WHLS of Ohio, LLC, HA Broadway, LLC, HA Chapelside, LLC, HA Lincoln Park, LLC, HA Cathedral, LLC, HA High Street, LLC, HA Brown Street, LLC, LS Cleveland, LLC, LS Akron, LLC, HA West, LLC, and LS Lake Eric, LLC.

³ The White Hat Appellants did not attach a copy of the August 2, 2011 decision and entry to their Memorandum in Support of Jurisdiction, and the Schools are prohibited from attaching a copy to this Memorandum pursuant to S.Ct. Prac. R. 3.2(B). A copy of the decision and entry can be obtained online through the Franklin County Clerk of Courts in case number 10 CV 7423.

irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. (*See* 8/2/2011 Decision and Entry at 8-12.) The trial court therefore ordered the White Hat Appellants to respond appropriately to most of the disputed discovery requests. (*Id.*) The trial court's decision to compel discovery was not based on the White Hat Appellants' status as "public officials"—the trial court first made that determination two months later in its October 7, 2011 decision and entry. (*See* White Hat Appellants' Appendix at A-2.)

The Schools later served modified discovery requests, again seeking information about how the White Hat Appellants spent public money, including information concerning the White Hat Appellants' intercompany transactions. The White Hat Appellants responded by arguing, among other things, that the discovery requests sought confidential and proprietary information. The trial court's resolution of that discovery dispute is the subject of this appeal.

The Court of Appeals Decided the Threshold Question of Jurisdiction

The court of appeals dedicated much of its decision to explaining the constitutional confines of its jurisdiction. In this regard, the court of appeals cited established authority and explained how certain issues related to the parties' discovery dispute were immediately appealable, while issues pertaining to statutory construction and the White Hat Appellants' status as "public officials" were not. After deciding these threshold jurisdictional issues, it then turned to the merits of the discovery dispute.

Concerning the discovery dispute, the court of appeals held that "the trial court did not abuse its discretion in finding that the materials sought in discovery were not proprietary and confidential." *Hope Academy Broadway Campus v. White Hat Mgt., LLC*, 10th Dist. No. 12AP-116, 2013-Ohio-911, 2013 Ohio App. LEXIS 813, ¶ 24. The court of appeals applied well-established Ohio law concerning the invocation of trade-secret protection, namely that the party

seeking protection has the burden of establishing entitlement to protection based on the consideration of several factors. *Id.*, citing *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 526, 687 N.E.2d 661 (1997). The court of appeals affirmed the trial court because the only evidence the White Hat Appellants offered in support of their claims was insubstantial and nonspecific. *See id.* at ¶ 25-27. The court of appeals noted that the White Hat Appellants merely were trying to avoid public scrutiny and their “testimony provided few specific details to demonstrate a clearly defined and serious injury that would result from production of the requested materials.” *Id.* at ¶ 33-34.

Instead of raising any proposition of law concerning the resolution of these discovery issues, the White Hat Appellants ask this Court to accept jurisdiction to consider three propositions of law that are wholly irrelevant in the context of the discovery dispute and not properly before the Court in any event.

*The White Hat Appellants Fail to Challenge the Court of Appeals’
Decision on Jurisdiction*

As an initial matter, the White Hat Appellants do not raise propositions of law concerning the threshold questions that would allow this Court to consider their proposed issues on the merits. The White Hat Appellants’ three propositions of law relate to their status as “public officials” and the trial court’s construction of R.C. 3314.024. Before this Court can address these issues, it must first determine that the trial court’s rulings on these issues were final appealable orders.

The court of appeals dismissed the White Hat Appellants’ first, second, third, seventh, eighth, and ninth assignments of error on this basis. *Id.* at ¶ 16, 40, 43-44. Nowhere do the White Hat Appellants challenge the legal rationale or authority for the dismissal. Consequently, neither the propriety of the dismissal of those assignments of error nor the underlying issues raised in

them can be considered by this Court. *See, e.g., Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation and Dev. Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2, ¶ 18. The White Hat Appellants' failure to raise any proposition of law concerning the final appealable order questions conclusively establishes the decision of the court of appeals in that respect, foreclosing consideration of the underlying issues in this appeal. *See Meyer v. United Parcel Serv.*, 122 Ohio St.3d 104, 2009-Ohio-2463, 909 N.E.2d 106, ¶ 8 n. 3.

*The Trial Court's Refusal to Enter a Protective Order Was Not
Based on Its Interpretation of R.C. 3314.024 or the White Hat
Appellants' Status as "Public Officials"*

Even more significantly, although the White Hat Appellants and the *amicus curiae* premise their memoranda on the notion that the discovery orders were driven by statutory interpretation—namely, their status as “public officials” and the meaning of R.C. 3314.024—they never explain with any precision how the public-official question or R.C. 3314.024 relates to the underlying discovery issues. The White Hat Appellants' argument that there was an “inextricable connection” between the discovery orders and these findings is unfounded. The trial court examined the statutory framework governing community schools to determine the appropriate scope of the Schools' claims, thus defining the scope of what is relevant in the litigation. The trial court recognized that the litigation concerns “a dispute over how a contract has been performed” and simply permitted discovery concerning the White Hat Appellants' performance under their contracts. (*See White Hat Appellants' Appendix at A-37; see also id. at A-26.*)

The trial court's refusal to issue a protective order was driven by basic principles of pre-trial discovery, not the statutory frameworks involving community schools or public officials. The trial court recognized that “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject involved in the pending action if the information

sought appears reasonably calculated to lead to the discovery of admissible evidence.” (See White Hat Appellants’ Appendix at A-38, citing Civ.R. 26(B)(1).) Because the trial court found that the sought-after materials were relevant to the litigation, the White Hat Appellants were required to establish their right to a protective order under Civ.R. 26(C). See *Covington v. Metrohealth Sys.*, 150 Ohio App.3d 558, 2002-Ohio-6629, 782 N.E.2d 624, ¶ 24, citing *Lemley v. Kaiser*, 6 Ohio St.3d 258, 263-264, 452 N.E.2d 1304 (1983). The trial court found that the White Hat Appellants’ did not satisfy their burden, and the court of appeals appropriately reviewed that determination for abuse of discretion. See *Hope Academy Broadway Campus*, 2013-Ohio-911, 2013 Ohio App. LEXIS 813, at ¶ 23.

This Appeal Will Have No Impact on Other Litigants or Cases

The White Hat Appellants now contend that the discovery orders will prevent them from un-ringing the proverbial bell, arguing that the trial court’s discovery orders will have deleterious effects on “every private company which does business with the state of Ohio.” (Memorandum in Support of Jurisdiction at 1) The White Hat Appellants repeatedly refer to a bell that cannot be un-rung while steadfastly ignoring the fact that this maxim applies only in the context of privileged, proprietary, or confidential information. See *Concheck v. Concheck*, 10th Dist. No. 07AP-896, 2008-Ohio-2569, 2008 Ohio App. LEXIS 2186, ¶ 10. Both the trial court and court of appeals found that the materials at issue were not confidential or proprietary, and the White Hat Appellants made no other claim of privilege. The White Hat Appellants must produce their financial and business records because they failed to meet their evidentiary burden.

This failure of proof will have no impact on future litigants. Other litigants may or may not meet their evidentiary burdens in the future. Furthermore, other private entities that do business with the state have no reason to fear being labeled “public officials” or being required to

produce their financial and business records because the trial court made neither determination based on the White Hat Appellants' status as state contractors.

The White Hat Appellants' propositions of law involve issues that are not properly before the Court in this appeal. The court of appeals recognized that it lacked jurisdiction to consider six of the White Hat Appellants' nine assignments of error because the issues related to interlocutory orders going to the merits of the Schools' claims. The White Hat Appellants fail to challenge the dismissal of six assignments of error in their Memorandum in Support of Jurisdiction and therefore have waived those issues. But even if this Court disregards the White Hat Appellants' failure to raise these threshold issues, if the Court were to accept this appeal, it at most would be called upon to decide whether the courts below properly applied well-settled law to the facts adduced at an evidentiary hearing on discovery.

This appeal is not about the White Hat Appellants' status as public officials or their receipt and use of public money. It concerns a discovery dispute and nothing more. The court of appeals correctly held that the trial court did not abuse its discretion in refusing to enter a protective order. The decision of the court of appeals was fact specific and consistent with well-established principles of Ohio law regarding discovery. Because White Hat fails to raise or identify any legal issue that warrants the attention of this Court, their request for discretionary review should be denied.

STATEMENT OF THE CASE AND FACTS

This case arises from ten substantially identical management agreements entered between the Schools and the White Hat Appellants in November 2005. Under the management agreements, the White Hat Appellants received 95% or 96% of the operational funds and 100% of the grant funds received by the Schools from the Ohio Department of Education. These percentages applied to the more than \$90 million in public money received by the Schools from

2007 to 2010, which is the three-year period before the Schools filed this litigation. Thus, more than 95% of this \$90 million passed through the Schools to the White Hat Appellants in exchange for the White Hat Appellants' services in operating the Schools' daily operations, including their staffing, academic, and purchasing needs.

After a deterioration of academic performance, the Schools began to seek information about how the White Hat Appellants were operating the schools and spending the public money they received. The Schools sued the White Hat Appellants in May 2010 after the White Hat Appellants refused to provide any meaningful information. The complaint stated claims for declaratory judgment, breach of contract, breach of fiduciary duties, injunctive relief, and an accounting. The Schools named the Ohio Department of Education as a defendant because they were challenging the constitutionality of R.C. 3314.026.

In addition to the discovery orders over which the White Hat Appellants now seek discretionary review by this Court, the trial court granted in part and denied in part the Schools' motion for summary judgment on their declaratory judgment claim. An appeal concerning that decision is pending in the Tenth District Court of Appeals, Case No. 12AP-496. The Schools' other claims remain pending in the trial court.

ARGUMENT IN RESPONSE TO APPELLANTS' PROPOSITIONS OF LAW

Appellants' Proposition of Law No. 1: A private, corporate entity may not be treated as a "public official" outside the context of R.C. Chapter 117.

As discussed above, the White Hat Appellants' first proposition of law addresses an issue that is not properly before the Court. The trial court's discovery orders did not hinge on whether the White Hat Appellants are "public officials," and the court of appeals properly dismissed the assignments of error concerning that issue for lack of a final appealable order. Again, the White Hat Appellants do not challenge the jurisdictional analysis performed by the court of appeals.

The White Hat Appellants' failure to raise a proposition of law concerning this threshold issue is fatal to this appeal.

But even if the first proposition of law is considered, it fails to articulate any cogent basis for reversal of the discovery orders. The White Hat Appellants present irrelevant and legally unfounded arguments concerning the trial court's construction of R.C. Chapter 117. Their arguments disregard the distinctions between "public offices" and "public officials" as those terms are separately defined by R.C. 117.01(D) and R.C. 117.01(E).

The White Hat Appellants' reliance on the *Oriana House* cases is equally misplaced. The White Hat Appellants incorrectly state that the Tenth District held that "[p]rivate companies that operate public entities pursuant to management contracts are *not* 'public officials' under the auditor's statute." (Memorandum in Support of Jurisdiction at 11, citing *Oriana House, Inc. v. Montgomery*, 10th Dist. No. 03AP-1178, 2004-Ohio-4788, 2004 Ohio App. LEXIS 4317, ¶18) The Tenth District held that Oriana House was not a "public office." *Oriana House*, 2004-Ohio-4788, 2004 Ohio App. LEXIS 4317, at ¶18. The White Hat Appellants again disregard the distinction between a "public office" and a "public official." Further, the *Oriana House* cases did not hold that a private entity receiving public money can never be a public official. For these reasons, the Tenth District's holding in *Oriana House* does not govern this dispute.

The holding of this Court in *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193, likewise is irrelevant to this case. *State ex rel. Oriana House* was a public-records case under R.C. Chapter 149.43. *Id.* at ¶ 1. This is not a public-records case. Therefore, this Court's holding concerning when a private entity may be considered "public institution" under R.C. 149.011(A), has no bearing on the issues here.

The White Hat Appellants' first proposition of law incorrectly assumes that the trial court's finding that they are public officials inappropriately disrupts "the statutory scheme for oversight of academic and fiscal performance." (Memorandum in Support of Jurisdiction at 9) The White Hat Appellants fail to identify any basis to support this assertion. What is more, the first proposition incorrectly assumes the White Hat Appellants' "public official" status was the impetus for the decision not to enter a protective order. For these reasons, the Court should not accept jurisdiction on the first proposition of law.

Appellants' Proposition of Law No. 2: Where a trial court relies, in part, upon an error of law in finding that claimed confidential and proprietary business records need not be protected from public disclosure, the appellate court should remand with instructions to reconsider without relying on the error of law.

Just like the first proposition of law, the White Hat Appellants' second proposition of law purports to raise an issue that is not properly before the Court. The second proposition is premised on the faulty assumption that the trial court denied a protective order because the White Hat Appellants are "public officials." Because the court of appeals properly dismissed the assignments of error concerning that issue for lack of a final appealable order, and the White Hat Appellants do not raise a proposition of law concerning the final appealable order question, this Court cannot consider the second proposition of law.

Even if the second proposition were considered, however, the Court could not grant the relief requested by the White Hat Appellants. App.R. 16(A)(8) requires an appellant to state the precise relief it seeks on appeal. The White Hat Appellants did not ask the court of appeals to "remand with instructions," but instead asked the court of appeals to "reverse and vacate the February 6, 2012 Amended Decision and Entry." The White Hat Appellants cannot now assert error on the part of the court of appeals for failing to grant relief that was never requested. Indeed, the White Hat Appellants waived their right to request a "remand with instructions" from

the court of appeals and cannot now ask this Court to direct the court of appeals to do so. *See State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992), citing *Republic Steel Corp. v. Cuyahoga Cty. Bd. of Revision*, 175 Ohio St.179, 192 N.E.2d 47 (1963), syllabus.

What is more, the White Hat Appellants' argument in support of their second proposition of law is laden with unsubstantiated assertions that the trial court's discovery order is "interwoven" with the finding that the White Hat Appellants are public officials. They argue that "the trial court's determination that [the] White Hat Appellants are public officials will lead to the production of confidential and proprietary business records." (Memorandum in Support of Jurisdiction at 13). Not only do these arguments misconstrue the legal rationale behind the trial court's discovery orders, but they also expose the fallacy of the second proposition of law (and this appeal in general).

The trial court refused to enter a protective order because the sought-after materials are relevant to the litigation and the White Hat Appellants failed to demonstrate any reason why they should be withheld from the Schools. The court of appeals affirmed after finding no abuse of discretion. Thus, both courts below have determined that no "confidential and proprietary business records" exist. The White Hat Appellants do not contest that finding on appeal to this Court. Instead, they attempt to inject issues pertaining to statutory construction and their status as public officials. Just as the court of appeals held that it lacked jurisdiction to consider these issues, the Court should not accept jurisdiction on the White Hat Appellants' second proposition of law.

Appellant's Proposition of Law No. 3: Financial reporting requirements of an Education Management Organization, absent a contractual obligation, are defined by the Ohio Auditor of State and the Legislature

In addition to the jurisdictional flaws previously addressed in relation to the first and second propositions of law, the White Hat Appellants' third proposition of law lacks merit for an additional reason.

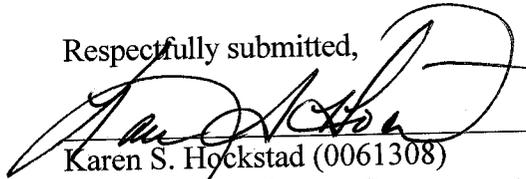
This appeal concerns settled principles of discovery in civil litigation. It has nothing to do with other financial reporting requirements the White Hat Appellants may be required to make. Consequently, it makes no difference whether the White Hat Appellants have satisfied their annual financial reporting requirements under R.C. 3314.024. Even if they have, this would not discharge their discovery obligations as defendants in a civil lawsuit. The trial court refused to enter a protective order because the White Hat Appellants failed to prove that they had confidential and proprietary business records to protect. On appeal, the court of appeals correctly held that the trial court's ruling on R.C. 3314.024 was neither a final appealable order nor interrelated with the denial of a protective order.

In their third proposition of law, the White Hat Appellants apparently argue that R.C. 3314.024 somehow shields their records from discovery in civil litigation. The White Hat Appellants cite no legal authority to support this position. More importantly, however, this position belies the entire basis for this appeal. Indeed, settled discovery principles served as the exclusive reason immediate appellate review was warranted in any respect at this juncture. Now, with their third proposition of law, the White Hat Appellants apparently seek to abandon the only legally supported basis for their appeal by arguing that the rules of civil discovery do not apply to them. Because the third proposition of law ignores well-established principles of discovery, the Court should not accept jurisdiction on this basis.

CONCLUSION

The trial court and court of appeals applied well-established Ohio law to the facts of this case. The discovery orders do not create uncertainty in the law or present any novel or substantial issues for this Court to consider. Therefore, the Court should deny the White Hat Appellants' request for jurisdiction.

Respectfully submitted,



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