Case No. 20CA011648

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

GIBSON BROS. INC., et al.,
Plaintiffs-Appellees,

v.

OBERLIN COLLEGE, et al.
Defendants,

and

WEWS-TV
Appellant.

APPEAL FROM THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
CASE NO. 17CV193761

APPELLANT'S REPLY BRIEF
ORAL ARGUMENT REQUESTED

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INTRODUCTION

The sealed document at issue in this case was filed with the trial court as an exhibit to Defendants' summary judgment reply brief ("Exhibit G"). Defendants relied on Exhibit G in support of their arguments as to the applicable standard of liability—a question resolved by the court on summary judgment. R. 269 at 10–12; R. 281.

Federal and Ohio Supreme Court precedent make clear that judicial documents—including documents filed in connection with a summary judgment motion, such as Exhibit G—are afforded a presumptive right of public access under the First Amendment and the Ohio Constitution. *See In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir.2019); *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶ 8. Moreover, as a document "submitted to a court," Exhibit G is a judicial record to which a presumption of public access also applies under the Ohio Rules of Superintendence. *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, 974 N.E.2d 89; Sup.R. 44(C)(1).

Ignoring this clear, controlling precedent, Plaintiffs-Appellees (collectively, "Gibson") mischaracterize Exhibit G, claiming it is akin to unfiled discovery material to which, they argue, a presumptive right of

access does not apply. Further, in a flimsy effort to excuse the trial court's reversible failure to make "specific, on the record findings" that a compelling interest outweighs the public's constitutional rights of access, *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13–14, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("*Press-Enterprise II*"), Gibson proffers self-serving speculation as to the court's reasons for denying Appellant's motion to unseal Exhibit G (the "Motion"). But these *post hoc* rationalizations do nothing to alter the fact that the court made no factual findings to justify sealing.

None of the unsupported and meritless arguments asserted by Gibson—which rely on inapposite authority and are directed at inapplicable legal standards—provide any basis for restricting public access to Exhibit G. For the reasons herein and in its opening brief, Appellant WEWS-TV ("WEWS") respectfully requests that this Court vacate the trial court's order denying the Motion (the "Order") and remand with instructions to grant the Motion.

ARGUMENT

I. This Court Has Jurisdiction Over WEWS's Appeal.[1]

Gibson misrepresents the Ohio Supreme Court's decisions in *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 11, and *State ex rel. Harris v. Pureval*, 155 Ohio St.3d 343, 2018-Ohio-4718, 121 N.E.3d 337, ¶ 11, as holding that "mandamus is the **sole remedy** for the denial of access to court records." Plaintiffs-Appellee's Brief (hereinafter "Br.") at 5 (emphasis in original). In both cases, Gibson's citations to authority are taken out of context.

In *Pureval*, the court concluded that the Rules of Superintendence, rather than the Public Records Act, applied to appellant's mandamus request for access to court records. *Pureval*, 2018-Ohio-4718, ¶ 10. Unlike the Public Records Act, the Rules do not provide for statutory damages. Affirming denial of appellant's damages request, the court explained that appellant's mandamus action was "the *only* remedy provided by Sup.R. 47(B). The Rules of Superintendence do not authorize statutory damages under any circumstances." *Id.* at 11–12 (emphasis in original). Thus, the court in *Pureval* did not hold that direct appeal is unavailable—an issue

[1]WEWS further refers the Court to the Statement of WEWS-TV in Response to Magistrate's July 20, 2020 Order and WEWS-TV's Response to Magistrate's August 18, 2020 Order, which WEWS incorporates by reference.

that was not before it—but rather that an award of statutory damages is unavailable.

Similarly, *Lyons* holds that while "[m]andamus is the appropriate remedy to compel compliance with the Public Records Act, R.C. 149.43(C)(1), and to enforce the provisions of the Superintendence Rules granting public access to court records," it goes on to find that "[t]o be entitled to extraordinary relief in mandamus, [a party] must establish a clear legal right to the sealed records, a clear legal duty on the part of the court to unseal them, *and the lack of an adequate remedy in the ordinary course of law*." *Lyons*, 2014-Ohio-2354, ¶ 11 (emphasis added). Here, WEWS has an adequate remedy at law: appeal of the Order denying its Motion, over which this Court has jurisdiction. *See* Ohio Constitution, Article IV, Section 3(B)(2). Because WEWS has such an adequate remedy, direct appeal to this Court is appropriate.[2]

II. WEWS Has Standing to Request that Exhibit G be Unsealed.

Gibson claims that Sup.R. 45(F) "does not grant standing to nonparties to assert state or federal constitutional challenges to a trial court decision restricting access to case documents." Br. at 8. But Sup.R. 45(F)

[2]Alternatively, should this Court conclude that direct appeal is unavailable, WEWS will file a request for a writ of mandamus in due course.

does exactly that. Sup.R. 45(F)(1) provides that "[a]ny person, by written motion to the court" may request access to "case documents" sealed by a trial court. Indeed, since the enactment of the Rules in 2009, Ohio courts have routinely heard motions by nonparties—including, as here, members of the press—seeking access to sealed case documents on statutory and constitutional grounds. *See, e.g.*, *Lyons*, 14 N.E.3d 989; *State ex rel. Cincinnati Enquirer v. Hunter*, 1st Dist. Hamilton No. C-130072, 2013-Ohio-4459; *Wolff*, 2012-Ohio-3328.

Further, Gibson fundamentally misconstrues both the Motion and the presumption of openness by arguing that WEWS "lacks standing to challenge the parties' stipulated protective order, including the designations made thereunder, under the Ohio and federal constitutions." Br. at 8. WEWS does not seek to vacate or modify the parties' stipulated protective order;[3] nor has WEWS raised constitutional challenges to "confidential" designations made by the parties pursuant to that order. Rather, WEWS seeks to unseal Exhibit G to Defendants' combined summary judgment reply brief—a judicial document that, under well-

[3]Though not at issue here, nonparties (including members of the media) do have standing to challenge protective orders that restrict public access to court records. *See In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 930.

settled Ohio and federal law, cannot be sealed solely on the basis of a stipulated protective order.

In addition to its standing under Sup.R. 45(F), WEWS also has standing to request that Exhibit G be unsealed under the First Amendment and the Ohio Constitution.[4] "[U]nder traditional standing principles" a party has standing if it has suffered "(1) an injury that is (2) fairly traceable to the . . . allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶ 18. Here, WEWS has been denied its constitutional right of access to Exhibit G due to the trial court's ongoing sealing of that document. WEWS seeks an order unsealing Exhibit G to redress the injury it continues to suffer.

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[4]Contrary to Gibson's arguments, Br. at 14, the public's right of access applies in both civil and criminal cases. *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir.2016) (recognizing "a strong presumption in favor of openness regarding court records" in civil cases) (citing *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir.1983)).

III. A Summary Judgment Exhibit is Not Akin to "Discovery Material" Merely Exchanged Between Parties in Litigation; the Presumptive Right of Access Afforded by the First Amendment, Ohio Constitution, and Superintendence Rule 45 Applies to Exhibit G.

A. Gibson's claim that the presumptive right of access does not apply to Exhibit G is meritless.

Gibson's own cases do not support Gibson's claim that Exhibit G is "discovery material" that has "historically never been open to the public." Br. at 8–9. The lead case Gibson cites in support of this proposition, *Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 490–91, 758 N.E.2d 286, 292 (1st Dist.2001), clarifies that courts should not "feel free to seal [discovery materials] from inspection" and explains that "discovery documents *on file with the court* shall not be sealed from the public absent 'good cause shown,' *thus creating a presumption in favor of public access to such materials.*" *Id.* (emphasis added).

Gibson's reliance on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.E.2d 17 (1984) is similarly misplaced. The *Seattle Times* Court was not asked to consider the public's presumptive First Amendment right of access to court documents. Rather, the defendant newspaper—a party to the litigation—challenged the trial court's protective order prohibiting the newspaper from disseminating information it obtained through discovery as an impermissible prior restraint on expression. *Id.* at

30–31. Simply put, the public's presumptive right to access court documents was not at issue in *Seattle Times* and the case has no application here.

Likewise, Gibson's citation to *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1331 (D.C.Cir.1985) is unavailing. The passage quoted by Gibson is mere *dicta* and, in any event, the D.C. Circuit's discussion of a U.S. Supreme Court decision which "did not involve a claim by the public to *access*, but rather a claim by one of the parties of the right to *disseminate* information" acquired in discovery is not relevant to WEWS's Motion to unseal a summary judgment exhibit filed with the court. Gibson's attempts to mischaracterize Exhibit G as equivalent to unfiled discovery materials is both incorrect and unsupported by case law.

B. Exhibit G is a judicial document to which a presumption of public access applies.

Gibson's claim that Exhibit G's absence at trial eliminates the presumption of public access is wrong. Br. at 13.

The Ohio Supreme Court has expressly held that "[t]here is no requirement under the Superintendence Rules that a record or document must be used by the court in a decision to be entitled to the presumption of public access specified in Sup.R. 45(A)." *Wolff*, 974 N.E.2d at 98; *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir.2006)

(concluding that judicial documents should not be afforded "different weights of presumption based on the extent to which they were relied upon in resolving the motion."). Rather, to qualify for the presumption, a "document . . . must merely be 'submitted to a court or filed with a clerk of court in a judicial action or proceeding' and not be subject to the specified exclusions [in Sup.R. 44(C)(2)]." *Wolff*, 974 N.E.2d at 98. Here, Exhibit G was "filed with a clerk of the court in a judicial action or proceeding" as an exhibit to Defendants' combined summary judgment reply. It is not subject to any of the exceptions set forth in Sup.R. 44(C)(2). Thus, the presumption of openness applies to Exhibit G.

In addition, Defendants cited to Exhibit G in support of their argument that the court should find the Gibson family to be public figures, which was decided by the court on summary judgment. *See* R. 269 at 10–12; R. 281. Gibson's attempt to attach relevance to the fact that Defendants did not introduce Exhibit G at trial is meritless because the public figure question was no longer a live issue for consideration at trial. Moreover, resolution of this issue established the standard by which Defendants' liability was adjudged, thus making Exhibit G a potentially critical document for public understanding of the court's decision-making and the reasoning underlying the jury's verdict.

In sum, Gibson's argument that the presumptive right of access does not apply because Exhibit G was not introduced at trial is unavailing. Br. at 13, 19–20. The presumption of openness "is of the highest" order where, as here, a document is filed in connection with a summary judgment motion. *See Lugosch*, 435 F.3d at 123 ("documents used by parties moving for . . . summary judgment should not remain under seal absent the most compelling reasons."); *see also In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 939 ("[B]riefs . . . filed with the court, as well as any reports or exhibits that accompan[y] those filings, are the sort of records that would help the public assess for itself the merits of judicial decisions . . . [and] therefore subject to the strong presumption in favor of openness.").

IV. The Court Failed to Make Specific Findings that Restricting Access to Exhibit G is Necessitated by a Higher Interest or Narrowly Tailored; the Presumptive Right of Access is Not Overcome.

Gibson devotes much of its brief to positing self-serving, speculative explanations for the trial court's denial of the Motion. In reality, the court offered only one partial sentence explaining its denial, specifically: "[o]f particular importance is Sup.R. 45[E](2)(c), which includes the risk of injury to persons, individual privacy rights and interests and fairness of the adjudicatory process." R. 527 at 2. But recitations of generalized, non-

specific interests alone cannot justify the continued wholesale sealing of Exhibit G.

Where the presumption of openness applies to a judicial document under Sup.R. 45, it can be overcome only if the court finds "by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest." Sup.R. 45(E)(2). The constitutional standard requires specific, "on the record findings" demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 13–14. When such an overriding or higher interest is found to apply, it "is to be articulated along with *findings specific enough that a reviewing court can determine whether the closure order was properly entered.*" *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (emphasis added); *Application of Nat'l Broad. Co., Inc.*, 828 F.2d 340, 346 (6th Cir.1987) (vacating order denying news media's request for access to judicial records where the court did not make "*specific findings . . . demonstrating that* there was substantial probability that the defendants' right[s] . . . would be prejudiced by [granting access to the records at issue].") (emphasis in original) (citations omitted).

Here, the court made no such findings. Indeed, the court did not even mention the constitutional right of access, let alone articulate specific findings of an "overriding interest" sufficient to overcome the presumption of access. *Id.* Nor did the court explain how continued sealing was narrowly tailored to serve such interests, *Press-Enterprise II*, 478 U.S. at 13–14, or why it could not consider less restrictive available means such as "[r]edacting the information rather than limiting public access to the entire document." Sup.R. 45(E)(3).

Gibson attempts to paper over the court's reversible error by presenting as fact its own self-serving speculation as to the reasoning behind the court's perfunctory ruling. *See* Br. at 22, 24. But, in fact, the court made no such findings; nor, indeed, could it.

First, Gibson's baseless allegations that WEWS is a "stalking horse" for Defendants seeking to "bully and destroy the Gibsons' family, reputation, and brand" are absurd and irrelevant. Br. at 3–4. That an Ohio news organization would seek to unseal a judicial document in a high profile and newsworthy lawsuit in Ohio is hardly unusual. Moreover, the "sole concern" of the court is to weigh the interests of the parties seeking sealing against the public's presumptive right of access; it has "no duty to assure that the news media [will] do its job properly . . . [t]o the contrary,

assuming such a duty would greatly exceed the function of the judiciary." *United States v. Guzzino*, 766 F.2d 302, 304 (7th Cir.1985).

Second, although the Sixth Circuit has acknowledged that "certain privacy rights of participants or third parties" may be sufficiently compelling to warrant redaction or sealing, the court went on to caution that "the natural desire of parties to shield prejudicial information contained in judicial records . . . cannot be accommodated by courts without seriously undermining the tradition of an open judicial system." *Brown & Williamson*, 710 F.2d at 1179. Here, the trial court did not identify what, if any, specific privacy interests or risks of injury might be affected by unsealing Exhibit G, nor did it identify why or how continued sealing of Exhibit G is "essential to preserve" such "higher values." The purported "potential" for "violence or danger" raised by Gibson is similarly generalized and does not address the interests specifically implicated by unsealing Exhibit G.[5] Br. at 22–23.

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[5]It is well established that the common law right of privacy terminates upon death. *See Estate of Leach v. Shapiro*, 13 Ohio App.3d 393, 398, 469 N.E.2d 1047 (9th Dist.1984) (holding that the individual right of privacy "lapses with the death of the person who enjoys it."). Thus, if Gibson argues that unsealing Exhibit G may implicate the privacy interests of the estate of David R. Gibson, such arguments fail as a matter of law. Br. at 24.

Finally, Gibson's continued reliance on the stipulated protective order as a justification for the sealing of Exhibit G is misplaced. Br. at 24–25. Because Exhibit G was filed under seal pursuant to the protective order, the parties did not present arguments to the court to justify sealing. Nor does the fact that the court signed the protective order transform it into a court order finding "by clear and convincing evidence that the presumption of allowing public access" to Exhibit G "is outweighed by a higher interest," as required by Sup.R. 45(E)(2). *See* Br. at 25. To the contrary, the protective order expressly states that party-level determinations of confidentiality are not to "be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL by counsel or the parties is subject to protection . . . until such time as the Court may rule upon a specific document or issue." R. 64 at ¶ 16.

CONCLUSION

For these reasons, the Court should vacate the Order and remand with instructions to grant Appellant's Motion.

Dated: November 5, 2020

Respectfully submitted,

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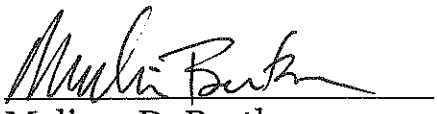
CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the word-count provision set forth in Ninth District Local Rule 7(E)(2). This Brief is printed using Georgia 14-point typeface using Microsoft word processing software and contains 2,984 words.



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I hereby certify that a copy of the foregoing was served on November 5, 2020, via email, pursuant to App.R. 13(C)(6) of the Appellate Rules of Civil Procedure, upon the following:

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