IN THE SUPREME COURT OF OHIO

RANDALL FIROR, *et al.*, Plaintiffs-Appellants v. DEBORAH LYDON, Defendant-Appellee	No.

MEMORANDUM IN SUPPORT OF JURISDICTION OF PERSON WHO IS THE SUBJECT OF INFORMATION IN A CASE DOCUMENT NANCY KIBBEE

APPEAL FROM THE HAMILTON COUNTY COURT OF APPEALS
FIRST APPELLATE DISTRICT, CASE NO. C-170137

HAMILTON COUNTY COMMON PLEAS COURT, CASE NO. A-1505916

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case involves an issue not previously addressed by this Court – the ability of a non-party to seek to restrict the publication of damaging information in court papers pursuant to Rule of Superintendence for the Courts of Ohio 45(E). The decision of the First District Court of Appeals in this case contains significant derogatory information about Nancy Kibbee. None of this information was ever proven in court; Kibbee was never a party to any of the proceedings before the Court of Appeals.

Court records are presumed open to public access. Under the common law, judicial records and documents have been presumptively open to the public. Overcoming the presumption presents an uphill battle. The Rules of Superintendence for the Courts of Ohio provide, "Court records are presumed open to public access." Supr, R. 45(A). However, while the presumption of public access afforded to these records is very strong, Ohio courts have recognized that it is not absolute. *Adams v. Metallica, Inc*., 143 Ohio App.3d 482, 489 (1st Dist.2001) ("the common-law right of inspection of judicial records and documents is not absolute"); *State ex rel. Cincinnati Enquirer v. Court of Common Pleas,* Clermont App. No. CA88-04-033, 1988 Ohio App. LEXIS 1672, at *9-10 (12th Dist. May 2, 1988) ("This common law right, however, is not absolute" and records may be sealed if "…the public's right of access is outweighed by competing interests").

Superintendence Rule 45(E) provides a procedure for restricting public access to a case document. This Court has, thus, adopted a rule permitting persons who are the subject of information in a case document to request that the court restrict public

access to information in a document if there is a risk of injury to persons, individual privacy rights, and interests. This Court should grant jurisdiction because there is a great public interest in assuring that judicial opinions do not inadvertently damage the reputations and interest on non-parties. This Court should also grant jurisdiction in order to establish clear guidelines for lower courts to determine when a nonparty's interests and right to privacy outweigh the public's right to access under Rule of Superintendence 45(E). In *Adams*, *supra.,* one court of appeals, when considering whether discovery materials filed with the court must be accessible to the public, observed, "we do not know how the Ohio Supreme Court would answer this question." 143 Ohio App.3d at 489.

Finally, in deciding whether the grant review, this Court should consider that the issue presented by this appeal does not concern traditional information in court records, such as discovery materials or depositions filed in a case. In Hamilton County, such materials are generally only available on-line to attorneys who have a password. Instead, the damaging information in this case is presented in a judicial opinion. This opinion is easily searchable and discoverable by the general public. The general public recognizes that court opinions have an *imprimatur* of authority not present in filing by lawyers. Accordingly, this Court should grant review to provide guidance to courts in responding to complaints by non-parties about damaging information contained in judicial opinions.

STATEMENT OF THE CASE

On April 27, 2018, the First District Court of Appeals issued a decision in *Firor v. Lydon*, 2018-Ohio-1662 (1st Dist.).

On August 22, 2018, Nancy Kibbee ("Kibbee"), a person who is the subject of information in the opinion, filed a *pro se* Motion to Remove the Case from the Internet. The Court of Appeals denied this Motion on September 25, 2018.

On September 2, 2020, Kibbee (now represented by counsel), filed a Motion pursuant to Rule of Superintendence 45(E) to Seal the Case from Internet for Redaction. The Court of Appeals denied this Motion on October 14, 2020.

On October 26, 2020, Kibbee filed a Motion for Reconsideration. The Court of Appeals denied this Motion for Reconsideration on November 18, 2020.

This appeal followed.

STATEMENT OF THE FACTS

This issue arises in the context of litigation between Randall and Thomas Firor and a friend they appointed as trustee of the estate of their father, Hugh V. Firor, M.D. (collectively, "the Firors") and attorney Deborah R. Lydon from Dinsmore & Shohl LLP.

Prior to this case, the Firors retained Lydon to pursue claims against Kibbee. The Firors sued Kibbee in Hamilton County Common Pleas Court. *Firor et al. v. Kibbee et al.,* Hamilton County Common Pleas No. A 1304473. The Complaint in that case was filed on June 24, 2013 alleging, *inter alia*, that Kibbee breached her fiduciary duties to the estate. Kibbee denied the allegations and the case proceeded through discovery. On July 29, 2014 the Common Pleas Court stayed all further proceedings following a bankruptcy filing by Kibbee. The case never proceeded to final judgment.[1]

When the claims against Kibbee were generally unsuccessful, the Firors sued Lydon and Dinsmore & Shohl for legal malpractice, and the law firm counterclaimed for unpaid legal fees. The Firors alleged that Lydon and Dinsmore & Shohl had billed them for excess work and had been negligent in failing to warn them of the difficulty of collecting Kibbee's assets. Dinsmore & Shohl filed a counterclaim seeking over $160,000 in unpaid legal bills. On December 1, 2016, the trial court entered summary judgment in favor of Lydon and Dinsmore & Shohl on both Firors' claims and the counterclaim. An Appeal to the First District followed.

[1] On February 14, 2014, the trial court ordered Kibbee to pay costs related to a discovery dispute. This was not related to the merits of any claim.

The First District Affirmed. *Firor v. Lydon*, 2018-Ohio-1662. The First District concluded that the Firors claims against Lydon and Dinsmore & Shohl were barred by the statute of limitations. 2018-Ohio-1662 at ¶¶25-39, The First District also concluded that the Firors had not presented sufficient evidence to raise an issue of fact about the bills from Dinsmore & Shohl.

Significant for this Court's review of the issues presented here, the opinion of the First District contained significant background on the dispute between the Firors and Kibbee. None of this background on an intra-family dispute was necessary for the resolution of the claims. The Firors had alleged that Kibbee, their sister, had stolen money from Dr. Firor, their father, while he was alive, and then from his estate, following his passing. None of these claims were before the trial court or the court of appeals, and Kibbee, as a non-party, had no opportunity to present evidence to rebut those claims. Nonetheless, the Court of Appeals' decision includes conclusory language describing what "Lydon's investigation" allegedly "revealed" about Kibbee's actions. For example, the Court of Appeals decision asserts that Lydon discovered "proof of [Kibbee's] theft from and undue influence over Dr. Firor."[2]

In her Motion, Kibbee included evidence of the impact of the Court of Appeals decision on her rights and interests. Her attorney wrote:

> Nancy Kibbee has suffered real harm as a result of the access of the public to this written opinion. She has lost several employment opportunities due

[2] In reality, many of the allegations against Kibbee were exaggerated and unfounded. Kibbee would have vigorously contested the allegations against her if given the opportunity and recognizes that this appeal is not that forum (as much as she would like to rebut each and every allegation). It is enough for purposes of this appeal to recognize that the First District's opinions included allegations of misconduct by Kibbee in its opinion without providing any opportunity to respond.

> to this publication Any Internet search of her name… on any search engine, pulls up a reference and link to this case and opinion… [S]ome of the descriptions below the links state that Nancy Kibbee "fraudulently" took money, when there never was any such judgment in her case.

(Motion to Reconsider at 3.) Kibbee also attached examples of Internet search results to support her Motion. Kibbee had suggested that the entire opinion did not need to be sealed, but that portions not essential to the opinion could be redacted. The Court of Appeals denied the Motion and Motion for Reconsideration without a written opinion.

This appeal followed.

PROPOSITION OF LAW:

> **An Ohio Court should restrict public access to a judicial opinion, using the least restrictive means available, when a non-party demonstrates the risk of injury to individual privacy rights and interests outweighs the presumption of allowing public access to court records.**

ARGUMENT

Rule 45(A) of the Rules of Superintendence for the Courts of Ohio provides, "Court records are presumed open to public access." *See State ex rel. Bey v. Byrd*, 160 Ohio St.3d 141, 2020-Ohio-2766, ¶ 17, n. 3 (noting the "extensive public input and time involved in developing the public-access provisions of the Superintendence Rules"); *State ex rel. Harris v. Pureval*, 155 Ohio St.3d 343, 2018-Ohio-4718, ¶11 ("[c]ourt records are presumed open to public access"); *City of Mayfield Hts. v. M.T.S.*, 2014-Ohio-4088, ¶8 n. 1 (8th Dist.) ("Under Sup.R. 45(A), court records are presumed open to public access."). This Court has also observed that "There is a historically based, 'common law right to inspect and copy judicial records and documents.'" *State ex rel. Harmon v. Bender*, 25 Ohio St. 3d 15, 22 (1986), *quoting United States v. Antar* 38 F.3d 1348, 1359-1361 (3d Cir. 1994); *Nixon v. Warner Communications, Inc.*,435 U.S. 589, 597 (1978).

Rule 45(E) of the Rules of Superintendence describe the circumstances in which a court is justified in restricting access to court records to the public. The Rule provides:

> A court shall restrict public access to information in a case document or, if necessary, the entire document, if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering each of the following:

> (a) Whether public policy is served by restricting public access;
>
> (b) Whether any state, federal, or common law exempts the document or information from public access;
>
> (c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

Sup.R. 45(E)(2).[3]

In this case, the court of appeals should have found that redactions of the portions of the opinion that mention Kibbee's unproven misconduct is supported by clear and convincing evidence that the presumption allowing public access to these court records is outweighed by at least one, if not more, higher interests. These interests include, the Kibbee's privacy rights and the damage to her reputation from the inclusion of these materials in the opinion. The records provided by Kibbee supported such a finding. While transparency and accountability are fundamental public interests, the First District should also have been cognizant that public disclosure of these sensitive records and conclusions could damage the interest of a person who was not part of the litigation and, therefore, never had an opportunity to

[3] This Court's opinion interpreting Rule 45(E) in *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, did not address the issues presented by this appeal. In Vindicator Printing Co. this Court addressed whether public access to documents would have a prejudicial effect on the ability to provide a criminal defendant with a fair trial. This Court concluded that public access in that case should have been permitted because "the constitutional right of the defendants to a fair trial can be protected by the traditional methods of voir dire, continuances, changes of venue, jury instructions, or sequestration of the jury." 2012-Ohio-3328 at ¶35.

defend herself against the allegations of misconduct.[4] Indeed, the potential for a negative impact on a person's reputation from the inclusion of information in a judicial opinion is especially high given the respect commonly provided to courts by the public.

While the presumption of public access afforded to these records is very strong, Ohio courts have recognized that it is not absolute. This Court, in *In re T.R.*, 52 Ohio St.3d 6 (1990), noted, for example, that the open courts provision of Section 16, Article I, of the Ohio Constitution is not "an absolute command applicable in all courts in all situations." 52 Ohio St.3d at 14. In similar contexts,[5] this Court has observed that "'No one has a right to any particular degree of openness or secrecy, except as provided by law.'" *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 2004-Ohio-1581 at ¶9, *quoting State ex rel. Beacon Journal Publishing Co. v. Waters*, 67 Ohio St.3d 321, 324, 1993-Ohio-77. And this Court has also observed that "not every iota of information is subject to public scrutiny." *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St.3d 431, 438, 2000-Ohio-213. *See also Adams*, 143 Ohio App.3d at 489 ("the common-law right of inspection of judicial records and

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[4] Some of the statements by the First District are inaccurate or misleading. For example, in ¶8 of the opinion, the First District states that there was "a contempt judgment against Kibbee for $6,300." In actuality, the trial court had granted a request for attorney's fees as part of a discovery dispute – there was no "contempt judgment." *See Firor v. Kibbee,* Feb. 14, 2014 Entry.

[5] For example, in *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, this Court examined the public right of access to *voir dire*. This Court observed that "The right of access" to those proceedings and records "is not absolute" and that the "presumption of openness that may be overcome 'by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" 202-Ohio-7117 ¶17, *quoting Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

documents is not absolute"); *State ex rel. Cincinnati Enquirer*, 1988 Ohio App. LEXIS 1672, at *9-10 (12th Dist. May 2, 1988) ("This common law right, however, is not absolute" and records may be sealed if "…the public's right of access is outweighed by competing interests").[6]

Ohio Courts have approved of restrictions on access to judicial records. In *Adams*, *supra.,* a court of appeals considered whether depositions filed with the court must be accessible to the public. The court noted that "access" to judicial records "has been denied where court files might have become a vehicle for improper purposes." 143 Ohio App. 3d at 489. In *State ex rel. Cincinnati Enquirer*, a court observed that transcripts of hearings could be sealed if "the public's right of access is outweighed by competing interests." The court noted the necessity of something missing in this case – a statement of reasons from the judge, including whether the court considered alternatives such as redacting portions of the record. The court said:

> In determining whether to seal a court document, the trial court must state the reasons for its decision to seal supported by specific findings and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review.
>
> A review of the record of the hearing on the sealing of the transcript reveals that the trial court did not explain its reasons for sealing the transcript other than to state it was not at liberty to discuss its reasons. Furthermore, the record does not contain evidence that the trial court considered less

[6] In *Gabbard v. Madison Local School Dist. Bd. of Edn*., 2020-Ohio-1180 (12th Dist.), a court of appeals affirmed an order under Rule 45(E) restricting access to mental health evaluations that were provided to the trial court under seal, excluding names and any other identifying information, of school district employees who were authorized to carry concealed firearms. The court concluded that "the presumption allowing public access to these court records is outweighed by at least one, if not more, higher interests. These interests include, the individual privacy rights and interests of [school] employees." 2020-Ohio-1180, ¶30.

> restrictive alternatives to sealing the transcript such as redaction of portions of the transcript.

1988 Ohio App. LEXIS 1672, at *9-11 (May 2, 1988)

Kibbee acknowledges that "The open courtroom is a bedrock principle of the American judicial system." *Woyt v. Woyt*, 2019-Ohio-3758, ¶59 (8th Dist.), *citing Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n. 15 (1979) ("For many centuries, both civil and criminal trials have traditionally been open to the public.").[7] Kibbee also acknowledges that in Ohio there is a constitutional requirement that "[a]ll courts shall be open…" Article I, Section 16, Ohio Constitution. The proposition of law in this case does not unduly impact those principles or constitutional provisions. Instead, Kibbee seeks only that portions of a judicial opinion that are not essential to the outcome but that negatively impact third parties should be redacted. *See State ex rel. Cincinnati Enquirer v. Hunter*, 2013-Ohio-4459, ¶10 (1st Dist.) (observing that a court could comply with 45(E by "using initials for the parties' proper names"). In balancing the Rule 45(E) factors, the Court of Appeals should have considered that the information about Kibbee *was not even necessary* in a decision that turned on statute of limitations and attorney conduct issues.

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[7] The decision in *Woyt* illustrates the difference between requests to seal records by parties and third parties. The *Woyt* court observed

> It should only be in the rarest of circumstances that a court seals a case from public scrutiny. When a litigant brings his or her grievance before a court, that person must recognize that our system generally demands the record of its resolution be available for review.

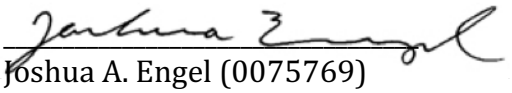
2019-Ohio-3758, ¶67. Unlike the litigants in *Woyt*, Kibbee never chose to bring her claims before the court; in fact, she was not even fully aware of the proceedings and was never served with briefs or other court papers.

Justice requires that when the damaging information about a nonparty is not essential to a court's decision and the nonparty was never provided an opportunity in the litigation to contest the damaging allegations, the records should be sealed. In that situation, the public interest in understanding the judicial process is outweighed by the damage that could result from the improper use of the material for scandalous or libelous purposes.

CONCLUSION

This Court should accept the appeal and decide this case on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Counsel for all parties on December 17, 2020.

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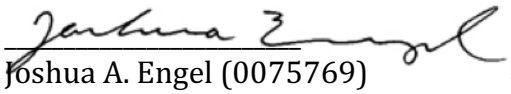

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