[Cite as *State ex rel. Johnson v. Oberlin City School Dist. Bd. of Edn.*, 2009-Ohio-3526.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO, ex rel.
SHIRLEY R. JOHNSON

Appellant

v.

OBERLIN CITY SCHOOL DISRICT
BOARD OF EDUCATION, et al.

Appellees

C. A. No. 08CA009517

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CV157648

DECISION AND JOURNAL ENTRY

Dated: July 20, 2009

WHITMORE, Judge.

{¶1} Relator-Appellant, Shirley Johnson, appeals from the judgment of the Lorain County Court of Common Pleas, denying her writ of mandamus. This Court affirms.

I

{¶2} This appeal stems from a denial of a public records request, in which Johnson sought access to written materials compiled by individual members of the Oberlin City School District Board of Education ("the Board"). The bylaws and policies of the Oberlin City School District ("the District") provide that each year, the Board must evaluate the Superintendent of Schools and provide the Superintendent with a written copy of that evaluation. The Board then relies upon the evaluation in determining whether or not to renew the Superintendent's annual contract. To facilitate the completion of the evaluation, individual members of the Board complete their own individual evaluations of the Superintendent. Those individual evaluations

are then given to the Board's president, who uses the evaluations to compile the Superintendent's composite evaluation. In her public records request, Johnson requested the evaluations submitted by the individual members of the Board. Johnson's request was denied on the basis that individual evaluations are not public records as defined by R.C. 149.43.

{¶3} On July 15, 2008, Johnson filed a writ of mandamus, naming the Board and the District as respondents. Johnson sought a writ ordering the Board and the District to allow her to inspect and copy the aforementioned documents pursuant to R.C. 149.43. The same day, the trial court issued a writ ordering the Board and the District to allow Johnson to inspect and be provided with copies of the individual evaluations. In the alternative, the trial court's order gave the Board and the District until August 18, 2008 to show cause as to why they should not have to comply with the order.

{¶4} Subsequently, the Board and the District answered Johnson's complaint, arguing that Johnson was not entitled to the individual evaluations because they were not public records. The Board and the District also requested an extension of the show cause deadline so that they could respond to the trial court's order. The trial court granted the request, and the Board and the District filed their response to the show cause order on September 3, 2008. Johnson filed a brief in opposition, and the Board and the District filed a reply. On November 24, 2008, the trial court issued a decision denying Johnson's writ.

{¶5} Johnson now appeals from the trial court's judgment and raises a single assignment of error for our review.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN DISMISSING RELATOR'S COMPLAINT FOR WRIT OF MANDAMUS."

{¶6} In her sole assignment of error, Johnson argues that the trial court erred in dismissing her writ of mandamus in contravention of the Ohio Rules of Civil Procedure. Specifically, Johnson argues that the trial court improperly dismissed her complaint without specifying which procedural mechanism it employed to do so. Johnson further avers that the trial court erred in failing to grant her writ because the individual evaluations she sought are public records, circulated to the Board's president and used "for the purpose of documenting and carrying out the functions, decisions, operations and activities of the Board."

{¶7} "Where a public entity refuses to disclose public records upon request under the Act, mandamus is the proper mechanism to compel disclosure." *Gilbert v. Summit*, 9th Dist. No. 21521, 2003-Ohio-6012, at ¶10, citing R.C. 149.43(C). To obtain a writ of mandamus, "a relator generally must establish 'a clear legal right to the relief prayed for, that respondent has a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law.'" *State ex rel. Jones v. Summit Cty. Child. Ser. Bd.* (Jan. 24, 2001), 9th Dist. No. 19915, at *1, quoting *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490. The Supreme Court has held, however, that "the requirement of the lack of an adequate legal remedy does not apply to public-records cases." *State ex rel. Gaydosh v. Twinsburg* (2001), 93 Ohio St.3d 576, 580. Accordingly, Johnson was entitled to a writ of mandamus if she proved that she had a clear legal right to the individual evaluations she sought and a clear legal duty on the part of the Board and the District to provide the evaluations. *State ex rel. Jones*, at *1.

{¶8} "When reviewing a denial of a request for a writ of mandamus, this [C]ourt must decide whether the trial court exercised sound, legal and judicial discretion in deciding to deny the writ of mandamus." *State ex rel. Ohio Patrolmen's Benevolent Assn. v. Wadsworth*, 9th Dist. No. 06CA0038-M, 2006-Ohio-6968, at ¶7. An abuse of discretion is more than an error of

judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶9} The trial court's November 24, 2008 decision provides as follows:

> "This matter came on for consideration of [the Board and the District's] memorandum establishing cause for not producing the requested records, [Johnson's] brief in opposition and [the Board and the District's] reply brief.
>
> "Having carefully reviewed the arguments of counsel and the relevant case law, this court finds that the requested documents are not public documents pursuant to R.C. 149.43. See also *Vindicator Printing Co. v. Julian*, (July 26, 1994), Mahoning App. No. 93CA252. Therefore, [Johnson's] writ of mandamus is denied and [the Board and the District] [are] not required to produce the requested records.
>
> "Case is hereby dismissed at [Johnson's] costs. Case Closed."

Johnson concludes from the foregoing order that the trial court dismissed her complaint. We disagree. Despite the phrase "[c]ase is hereby dismissed," the remainder of the trial court's order addresses Johnson's underlying claim and substantively denies her writ on the merits because the documents she requested "are not public documents." Accordingly, the trial court did not dismiss Johnson's complaint, it denied her writ.

{¶10} In issuing an alternative writ on July 15, 2008, the trial court initially granted Johnson's writ, but also gave the Board and the District an opportunity to show cause as to why the writ should not be granted. Once the Board and the District filed their show cause memoranda, the trial court gave Johnson an opportunity to respond. Both parties were able to brief the issue of whether Johnson's writ should be granted and to support their arguments with evidentiary materials. The trial court considered the parties' arguments and evidence and denied Johnson's writ. To the extent that Johnson challenges the procedure that the trial court employed

in denying her writ, we note that the Supreme Court has employed the foregoing procedure numerous times in cases where alternative writs were issued. See, e.g., *State ex rel. Estate of Miles v. Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786, ¶15-38; *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶11-47; *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶19-52. Thus, the only issue is whether the trial court substantively erred in denying Johnson's writ.

{¶11} The Public Records Act reflects the state's policy that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, ¶20. Accordingly, this Court "construe[s] R.C. 149.43 liberally in favor of broad access and resolve[s] any doubt in favor of public records." *State ex rel. Toledo Blade Co.* at ¶17. "'Public record' means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units[.]" R.C. 149.43(A)(1). The term "record" includes "any document *** created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). "'Public office' includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 149.011(A).

{¶12} The trial court relied upon the Seventh District's decision in *Vindicator Printing Co. v. Julian* (July 26, 1994), 7th Dist. No. 93CA252, to conclude that the individual evaluations completed by the Board's members do not constitute public records. In *Vindicator Printing*, the individual evaluation forms of school board members were sought pursuant to a writ of mandamus. In denying the writ, the Seventh District reasoned that the individual evaluations of

the school board members were not public records because they were only made for the purpose of preparing for the board's meeting and were not required to be turned in or even completed. *Vindicator Printing*, at *2. The Seventh District concluded that only the Superintendent's composite evaluation was a public record that served to document the decision of the public office. *Vindicator Printing*, at *2.

{¶13} In reviewing the trial court's decision, Johnson urges us to adopt the Tenth District's reasoning in *State ex rel. District 1199, Health Care and Social Serv. Union, SEIU, AFL-CIO, et al. v. Gulyassy* (1995), 107 Ohio App.3d 729, rather than the Seventh District's reasoning in *Vindicator Printing*. We need not compare the two cases, however, as the Ohio Supreme Court's decision in *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Cincinnati Bd. of Edn.*, 99 Ohio St.3d 6, 2003-Ohio-2260, controls the result in this matter. See *In re Trust Estate of CNZ Trust*, 9th Dist. No. 06CA008940, 2007-Ohio-2265, at ¶23 (noting that an appellate court may affirm a legally correct judgment on other grounds).

{¶14} As previously noted, a "public record" is a record "*kept* by any public office, including, but not limited to, state, county, city, village, township, and school district units[.]" (Emphasis added.) R.C. 149.43(A)(1). "Kept is the past participle of keep, which in this context means preserve, maintain, hold, detain, or retain or continue to have in one's possession or power esp[ecially] by conscious or purposive policy." (Internal quotations omitted.) *State ex rel. Cincinnati Enquirer* at ¶11, quoting Webster's Third New international Dictionary (1986) 1235. When no law or policy requires a public office to retain certain materials, and neither the public office, nor its agents, keep the materials, those materials are not public records subject to disclosure under R.C. 149.43. Id. at ¶11-15 (concluding that application materials submitted to the board of education by applicants for a superintendent position were not public records when

the materials were returned to the applicants after their interviews and no law or policy required the board to retain the materials).

{¶15} The record reflects that the Board only kept the Superintendent's composite evaluation, which it was required to compile and place in the Superintendent's personnel file pursuant to the District's bylaws and policies. The Board specified that after its president finished compiling the Superintendent's composite evaluation, the Board members' individual evaluations were not retained as part of the evaluation process. Johnson has not pointed to any law or policy that would have required the Board or the District to retain the Board members' individual evaluations. In response to the Board and the District's argument that the individual evaluations are not public records because they were not "kept," Johnson directs this Court to *State ex rel. Mazzaro v. Ferguson* (1990), 49 Ohio St.3d 37. In that case, however, the issue was not whether the records sought had been "kept." Indeed, *State ex rel. Mazzaro* involved a statute that specifically required the retention of "all the work papers, documents, and materials prepared during the course of the audit." *State ex rel. Mazzaro*, 49 Ohio St.3d at 38. Johnson has not demonstrated that any comparable law or policy exists with regard to the Board members' individual evaluations.

{¶16} Because Johnson has not demonstrated that the individual evaluations she sought were public records kept by the Board and the District, she has not demonstrated a clear legal right to the evaluations. *State ex rel. Jones*, at *1. The trial court did not abuse its discretion in denying Johnson's writ on the basis that the individual evaluations were not public records. Consequently, Johnson's sole assignment of error lacks merit.

III

{¶17} Johnson's sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
CONCURS

BELFANCE, J.
DISSENTS, SAYING:

{¶18} I respectfully dissent because the trial court rendered a decision on the merits relying upon factual assertions offered by the Board, under circumstances where it did not afford

Johnson the opportunity to engage in discovery which might have uncovered facts that not only would have supported her mandamus claim but might have also refuted the factual assertions of the Board.

{¶19} Mandamus is a special statutory proceeding in a court of common pleas. See *State ex rel. Millington v. Weir* (1978), 60 Ohio App.2d 348, 348. Civ.R. 1(A) provides that "[t]hese rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule." Subdivision (C)(7) states that the Civil Rules apply in special statutory proceedings except where by their nature they are clearly inapplicable. "Civ.R. 1 is clearly a rule of inclusion rather than exclusion. To the extent that the issue in question is procedural in nature, the Civil Rules should apply unless they are 'clearly inapplicable.'" (Internal citations omitted.) *Price v. Westinghouse Elec. Corp.* (1982), 70 Ohio St.2d 131, 132 (holding that Civ.R. 56 applied to special statutory proceedings in common pleas court brought pursuant to R.C. 4123.519). "The civil rules should be held to be clearly inapplicable only when their use will alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action." (Internal quotations omitted.) *Tower City Properties v. Cuyahoga Cty. Bd. of Revision* (1990), 49 Ohio St.3d 67, 69, quoting *State ex rel. Millington*, 60 Ohio App.2d at 349. See, also, *Werden v. Milford*, 91 Ohio Misc.2d 215, 218 ("The procedure for issuing writs of mandamus is governed by the Civil Rules."). Thus, the Civil Rules apply to the instant matter.

{¶20} Upon filing a complaint or petition for a writ of mandamus, the trial court may either issue a peremptory writ of mandamus or an alternative writ of mandamus. See R.C. 2731.06. Pursuant to R.C. 2731.06 "[w]hen the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance,

may allow a peremptory mandamus." Thus, "a peremptory writ of mandamus should issue in the first instance only when material facts are admitted disclosing that the relator is entitled to relief as a matter of both law and fact." *State ex rel. Temke v. Outcalt* (1977), 49 Ohio St.2d 189, 191.

{¶21} Where the right of the relator to the requested relief is not clear as a matter of fact, then the trial court may issue an alternative writ of mandamus requiring the respondent to do the act required, or show cause why the act should not be performed, and thereafter schedule the matter for briefing and evidence. See, e.g., *State ex rel. Rodak v. Betleski*, 104 Ohio St.3d 345, 2004-Ohio-6567, at ¶11 (If upon review of a complaint it appears that the claim may have merit, "an alternative writ should be granted and a schedule for evidence and briefs should be issued."). Where disputes of fact are central to the ultimate determination of the relator's entitlement to a writ of mandamus, the resolution of factual disputes will require the presentation of evidence. Pursuant to the Civil Rules, each party is entitled to engage in discovery prior to appearing before the trier of fact to present evidence. See Civ.R. 26. Although the majority points to precedent where the Supreme Court of Ohio granted an alternative writ and subsequently allowed the filing of evidence and briefing on the issues, none of the cases cited support the proposition that Johnson was not entitled to engage in discovery or that the trial court was not obligated to follow the Civil Rules when it elected to dispose of the matter on the merits. Further, none of the cases involved any dispute concerning the facts of the particular case nor any dispute as to the entitlement to engage in discovery.

{¶22} In the instant matter, Johnson's complaint set forth a claim in mandamus seeking production of individual evaluations of the Board's members which were used to create the ultimate evaluation of the superintendent. In her complaint, Johnson alleged that the records sought were kept by the Board and were not created for the Board member's convenience, but

instead were turned in to the Board president and retained. Attached to Johnson's complaint was correspondence in which the Board's counsel admitted that the evaluations were turned in to the Board president and were used to create the composite evaluation. However, it claimed that "there is no indication that the evaluations were retained, in any capacity, by the School District." The Board also claimed that the evaluation materials were merely an aid to the Board members for their personal use.

{¶23} Upon review of Johnson's complaint, the trial court issued an alternative writ, directing the Board to comply with Johnson's request or show cause why the Board should not be required to comply. Given that the material facts were not admitted, the trial court properly issued an alternative writ of mandamus and thus a schedule for evidence and briefing should have ensued. The need to take evidence was clearly apparent given that a final disposition of the mandamus claim would necessitate the resolution of disputes of fact.

{¶24} The Board responded to the trial court's order with a memorandum, to which the affidavit of the superintendent of the Oberlin schools was attached. The affidavit stated that the individual evaluations were not maintained in the superintendent's personnel file or within the school district. Johnson responded with a brief in opposition and specifically requested that the trial court set a discovery schedule and allow further briefing. The Board, in its reply argued that it did not believe that discovery was necessary.

{¶25} Without allowing discovery and without taking evidence, the trial court denied the writ and dismissed Johnson's complaint. The trial court never indicated which procedural device it was applying when denying the writ and dismissing the complaint. In its judgment entry the trial court stated that that it had considered the matter based upon the briefs of the parties. Because the memorandum of the Board contained an affidavit, denial of the writ could not have

been granted based upon review only of the pleadings as provided by Civ.R. 12. Because the trial court viewed materials outside the pleadings, it effectively granted summary judgment to the Board. See Civ.R. 12, 56. Yet, neither party moved for summary judgment and the trial court never informed either party that it would be converting the Board's memorandum in response to the show cause order into a motion for summary judgment. As there are numerous instances of courts of common pleas utilizing summary judgment in determining mandamus actions, it is clear that this is a procedural device the trial court could have employed. See, e.g., *State ex rel. Doe v. Register*, 12th Dist. No. CA2008-08-081, 2009-Ohio-2448; *State ex rel. Kramer v. Norwood*, 1st Dist. No. C-080466, 2009-Ohio-1803; *Lawrence Twp., Bd. of Trustees v. Canal Fulton*, 5th Dist. No. 2008 CA 00091, 2009-Ohio-1293; *Gilbert v. Cty. of Summit*, 9th Dist. No. 21521, 2003-Ohio-6012. However, even if the trial court could have ultimately resolved the matter by way of a motion for summary judgment, the resolution of the matter was premature given that Johnson was never given the opportunity to engage in discovery which may have ultimately refuted the factual claims set forth in the Board's affidavit and memorandum and which may have led to the discovery of additional facts that may have supported Johnson's mandamus claim. In essence, the deck was stacked against Johnson as she had no opportunity to engage in the discovery process whereby she could have discovered the details concerning the provision and use of the evaluation forms and what became of the forms once they were used. Because Johnson had no ability to explore these issues via discovery and present evidence, the trial court decided the matter based upon a one-sided assertion of facts presented in part via an affidavit of a person who had not engaged in the evaluation process at all. Clearly, Johnson should have had an opportunity to engage in discovery directed at the Board itself which might

have culminated in her ability to present material facts in support of her claim to the trial court and to refute the affidavit of the Board.

{¶26} The procedural error of the trial court necessarily taints the majority's resolution of the matter. The majority states that the "record reflects that the Board only kept the Superintendent's composite evaluation" and further that "[t]he Board specified that after its president finished compiling the Superintendent's composite evaluation, the Board members' individual evaluations were not retained as part of the evaluation process." However, the "record" was the product of the unchallenged statements contained in the Board's memorandum and an affidavit that could never be challenged or refuted by Johnson without permitting discovery. Further, the affidavit was provided not by any member of the Board, but by the superintendent, an employee of the Board who was the subject of the evaluation at issue in this case. Moreover, the superintendent's affidavit is ambiguous as to whether the individual evaluations were kept by the Board president or any other Board member or some other individual or entity acting as an agent of the Board or school district given that the affidavit merely states that the evaluations are not in the superintendent's employee file and that the superintendent does not believe that the individual evaluations were ever brought onto the school district property. Assuming that the superintendent's affidavit is accurate in stating the individual evaluations were not kept in the superintendent's file, the fact that the evaluations are not in the superintendent's file does not necessarily lead to the conclusion that the evaluations were not kept by the Board and no inquiry was permitted by Johnson to determine what in fact the Board or any of its members or agents actually did with the individual evaluations.

Furthermore, even though the superintendent had a belief that the evaluations were not brought onto school district property that does not mean that they were not.[1]

{¶27} Thus, the majority's reliance on a "record" consisting of alleged facts that were not explored or challenged in the discovery process leads it to incorrectly conclude that the evaluations at issue were not "kept" by the Board and thus were not public documents. It also relies on *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network, Inc. v. Cincinnati Bd. of Edn.*, 99 Ohio St.3d 6, 2003-Ohio-2260, to affirm the trial court's denial of the writ. However, I believe the facts of *State ex rel. Cincinnati Enquirer* are distinguishable from the undeveloped and limited facts as alleged in Johnson's complaint and as alleged by the Board. *State ex rel. Cincinnati Enquirer* involved a records request for materials used in the Cincinnati Board's search for an individual to fill the superintendent position. Id. at ¶2. The Cincinnati Board informed all of the finalists that if they chose to leave materials with the Board, those materials would be public. Id. at ¶4. Thereafter, the Cincinnati Board opposed a mandamus action seeking the materials provided by three of the finalists, as those materials were returned to the finalists. Id. at ¶6. However, the Cincinnati Board did produce the materials provided by the new superintendent and a finalist who left materials with the Board. Id. In holding that the records sought were not public records, the Court noted that "the applicants who kept their materials [were] not agents of the school board" and therefore the records were not in effect kept by the Board. Id. at ¶13. Further, because the facts revealed that neither the Board nor the

---

[1] And even if it were possible to conclude that the evaluations were not brought onto school district property, it is also still possible that the evaluations were kept by the Board or an agent of the Board. See *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network, Inc. v. Cincinnati Bd. of Edn.*, 99 Ohio St.3d 6, 2003-Ohio-2260, at ¶13, citing *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.* (1997), 80 Ohio St.3d 134, 137-38.

company employed to assist in the selection process actually had the materials, it would be improper to issue a writ of mandamus "to compel what would be tantamount to an impossible act." Id. at ¶15.

{¶28} In the instant case, what we can glean without the benefit of discovery, is that the individual Board members were given evaluation forms and directed to complete the forms and turn them in. The evaluations were completed by each member and turned in to the Board president who used them to create the final evaluation. This fact scenario significantly differs from *State ex rel. Cincinnati Enquirer*. Notably, the *State ex rel. Cincinnati Enquirer* court based its decision largely on the fact that neither the Board nor the company hired to assist the Board in its selection process actually kept the materials submitted during the interviews of three of the five finalists. Id. at ¶12. Further, the court had specific facts concerning the intent of the Board, namely "their express policy during the interviews was that those materials remain in the possession of the finalists and not be integrated into the respondents' records. Thus, the documents were not kept in the ordinary course of business for the school district." Id. Accordingly, in *State ex rel. Cincinnati Enquirer* there was evidence offered concerning the intention of the Board relative to the retention of the materials and an express decision that if the materials were retained by the Board for any finalist, those materials would be public records. Id. at ¶¶12-15. In the instant matter, in light of the lack of discovery, there was no opportunity to discover evidence concerning the intention of the Board regarding the use or retention of the individual evaluation forms, nor was there the opportunity to engage in discovery to determine whether the Board or an agent of the Board or school district kept the records. Thus, I believe that the majority's conclusion that the evaluation forms were not kept by the Board is not supported by reliance upon *State ex rel. Cincinnati Enquirer*. Its determination is also premature

given the failure of the trial court to allow the parties to engage in the discovery process provided for under the Civil Rules which would have then culminated in either the filing of dispositive motions or an evidentiary hearing to resolve any disputed facts.

{¶29} In light of the foregoing, I would reverse and remand this matter in order to allow Johnson an opportunity to engage in discovery prior to the submission of dispositive motions or the scheduling of an evidentiary hearing.

APPEARANCES:

JOHN L. KEYSE-WALKER, Attorney at Law, for Appellant.

DAVID KANE SMITH, and KATHRYN I. PERRICO, Attorneys at law, for Appellees.