

**THE COURT OF COMMON PLEAS OF
DAUPHIN COUNTY, PENNSYLVANIA**

MILTON PURCELL et al,

Plaintiffs

CIVIL DIVISION

v.

NO. 2005-CV-0463-EQ

**MILTON HERSHEY SCHOOL
ALUMNI ASSOCIATION, JOHN RICE
AND JERRY WATERS,**

Defendants

**DEFENDANTS' MOTION TO VACATE, AMEND, OR STAY
THE COURT'S PRELIMINARY ORDER OF JUNE 6, 2005 PURSUANT
TO PA. R.A.P. 1732(A) AND FOR EXPEDITED CONSIDERATION**

I. Procedural Posture

This Court entered a preliminary injunction in the instant proceeding on June 6, 2005, ordering, *inter alia*, a new election of certain Officers of defendant the Milton Hershey School Alumni Association ("MHSAA"). The order is attached hereto as Exhibit A. It was preceded by an order of this Court dated May 25, 2005, which remains in effect and is attached hereto as Exhibit B. Defendants MHSAA, Jerry Waters, and John Rice filed a Notice of Appeal on June 13, 2005 and requested a stay of this Court's preliminary injunction order, which this Court

denied on June 20, 2005. Defendants thereupon sought a stay of the preliminary injunction order from the Commonwealth Court, which was denied in part and granted in part on June 24, 2005. The Commonwealth Court order is attached hereto as Exhibit C.

In light of the conduct of plaintiffs in the instant action throughout the course of this proceeding, including, in particular, (a) plaintiffs' misrepresentations to this Court, (b) plaintiffs' failure to abide by this Court's May 25, 2005 order, (c) plaintiffs' improperly taking advantage of this Court's June 6, 2005 preliminary injunction order, and (d) plaintiffs' failure to abide by the Commonwealth Court's June 24, 2005 order, defendants bring the instant motion seeking alternative relief.

II. Relief Requested

Pa. R.A.P. 1732(a) permits applications for approval of or modification of the terms of any supersedeas, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal. These applications must ordinarily be made in the first instance to the lower court.

Defendants ask this Court to vacate in its entirety the Court's June 6, 2005 preliminary injunction order. Defendants alternatively ask this Court to amend said order. Should the Court decline to vacate or amend said order, defendants respectfully renew their request that the Court stay said order in light of new developments, including new facts, as set forth more fully herein.

III. Moving Parties

The parties seeking relief herein are defendants MHSAA, Waters, and Rice.

IV. Grounds for Relief

On June 26, 2005, plaintiffs in this action flatly contradicted their verified representations before this court when they took actions completely inconsistent with those representations. The details of this include:

1. Plaintiff Harry Heath claimed irreparable harm in verified pleadings because he was allegedly being denied the opportunity to serve on the 2005 MHSAA Board of Directors as the elected Treasurer and to vote on Board matters because of the actions of defendants.

2. Seven other plaintiffs claimed irreparable harm in verified pleadings on the grounds that their vote as MHSAA Board members for Heath for Treasurer had been allegedly nullified by the actions of defendants, thereby denying them their rightful selection of Heath for Treasurer, instead of nonplaintiff James Behrens.

3. The remaining six plaintiffs claimed in verified pleadings that they suffered irreparable harm because their votes as rightful MHSAA Board members were not counted or allowed, and that if they had been so counted or allowed, they all did or would have voted for plaintiff Heath, who would thereby have been elected Treasurer of MHSAA, and that Heath should therefore be the 2005 Treasurer.

4. Plaintiff Gaughan claimed irreparable harm in verified pleadings because he was allegedly denied the opportunity to serve on the 2005 MHSAA Board of Directors as the elected Secretary because of the allegedly unlawful actions of defendants.

5. Six other plaintiffs claimed irreparable harm in verified pleadings from having their vote as MHSAA Board members for Gaughan as Secretary allegedly nullified by the actions of defendants, thereby allegedly denying them from their rightful selection of Gaughan as Secretary, instead of nonplaintiff Chris Ortiz.

6. The remaining six plaintiffs claimed in verified pleadings that they suffered irreparable harm because their votes as rightful MHSAA Board members were allegedly not counted or allowed, and that if they had been counted or allowed, they all did, or would have, voted for plaintiff Gaughan, who would thereby have been elected Secretary of MHSAA, and that he should thus be the 2005 Secretary.

7. Plaintiff Gaughan was a member of the 2005 MHSAA Board of Directors whether or not he was elected Secretary, but plaintiff Heath is a member of the 2005 MHSAA Board only if elected Treasurer.

8. In paragraphs 87, 95, 107 and 118 of their Complaint, for example, all plaintiffs represent that “Heath and Gaughan were deprived of their right to serve as duly-elected officers of the Association.”

9. In Paragraphs 55 and 72 of their Complaint, plaintiffs allege that if plaintiffs Purcell, Campbell, and McIntyre had been permitted to vote for 2005 officers, they all would have voted for Heath as Treasurer.

10. In paragraphs 54 and 72 of their Complaint, plaintiffs allege that if plaintiffs Purcell, Campbell, and McIntyre had been permitted to vote for 2005 officers, they all would have voted for Gaughan as Secretary.

11. In paragraph 74 of their Complaint, plaintiffs allege that if plaintiffs Dietrich and Deitrich had been permitted to vote for 2005 officers, they would have voted for Heath as Treasurer and Gaughan as Secretary.

12. In their Answer and New Matter, plaintiffs stated as follows:

(a) They deny that Heath is not a director, presumably because he is the elected Treasurer (¶172(b)), and

(b) They admit that Heath and Gaughan were elected MHSAA officers (¶181).

13. The Orphans' Court ordered a new election in consideration of plaintiffs' allegations of harm, thereby permitting a new election whereby plaintiffs' votes for or intentions to vote for plaintiffs Heath and Gaughan would be counted, instead of nullified, as they represented to this Court was their desire, their lost right, and the grounds for their irreparable harm.

14. During the course of this Proceeding, numerous public representations were made by plaintiffs along similar lines, including the mailing of certain alleged meeting notices signed by the purportedly "Duly-Elected Secretary" Jerry Gaughan. Gaughan, as the purported Secretary even mailed a notice to MHSAA Board members for the June 26, 2005 election.

15. Having made these representations to this Court and to the public, including to MHSAA members, having been given an opportunity by this Court at the June 26, 2005 Court-ordered meeting to make good on their representations and so obtain redress for their claimed irreparable harm, plaintiffs thereupon willfully violated their representations, reversed course, and took advantage of their newly-obtained majority *not* to elect Heath and Gaughan and alleviate the harm they alleged, as they represented they would do, but instead revealed their true intentions by electing two nonplaintiffs and non-Directors to the MHSAA Board. This was without warning or notice to this Court and without any leave of this Court.

16. This action exposes as baseless plaintiffs' numerous allegations of alleged harm so far as Officer selections are concerned, as contrary to their allegations, they no longer cared whether Heath and Gaughan were elected officers.

17. The newly nominated and elected Treasurer, Jack Swofford, is unknown to defendants and has never before been introduced to this proceeding. Defendants believe his selection is based upon the plaintiffs' belief of his willingness to aid them, the Milton Hershey

School, and Hershey Trust Company undermine MHSAA's structural reform efforts as described elsewhere in defendants' filings with this Court.

18. The newly nominated and elected Secretary, Bill Brill, is a notorious public antagonist of the MHSAA's leadership, who has sent scandalous and defamatory mass mailings and mass e-mailings to alumni, maligning MHSAA's leadership in a deplorable manner, inciting divisiveness, and bringing opprobrium, contempt, and malice down on MHSAA leaders. Please see Exhibit D attached hereto for a summary of Brill's public statements together with Annexes 1-4.

19. Defendants believe that if Brill's conduct had been brought to the Court's attention when plaintiffs were falsely representing that they were seeking to name Gaughan as Secretary, and that if plaintiffs had candidly informed the Court of their intention to place Brill in a key MHSAA officer position, this Court would have seen that plaintiffs' true motives in this action are wholly improper. Instead, neither Brill nor Swofford were ever even mentioned anywhere in plaintiffs' pleadings, only to be introduced as surprise officer appointments in what was supposed to be a preliminary injunction arrangement that purportedly restored the status quo.

20. This Court by Order dated May 25, 2005, directed that "no additional people be added to the MHSAA Board of Directors and no vacant MHSAA Board positions are to be filled by (i.e. Secretary/Council [sic] or Vice-President/Director of Research) until an election may be held pursuant to the MHSAA bylaws," which would not occur until November 2005, as the June 26, 2005 election was only held pursuant to a Court order.

21. Eight of the plaintiffs were already on the 2005 MHSAA Board, so that the only possible irreparable harm that they might allege was their purported inability to elect plaintiff

Heath as Treasurer and plaintiff Gaughan as Secretary, as they solemnly represented to this Court and to others.

22. The effect of the Orphans' Court Order on plaintiffs' Amended Motion for a Preliminary Injunction, as implemented by plaintiffs, was to permit plaintiffs to obtain relief far outside the relief they requested.

23. The selection by plaintiffs of Swofford and Brill as officers in lieu of plaintiffs Heath and Gaughan, as was represented to the Court would occur, has the effect of violating the Orphans' Court Order of May 25, 2005, by adding additional members aligned with the plaintiffs to the 2005 MHSAA Board beyond those identified to this Court. This is because neither Swofford nor Brill had been on the Board before the election, while Gaughan was on the Board, having been elected by the membership at large for a three-year term, and while Heath was a plaintiff seeking a Directorship by means of his action.

24. Plaintiffs were also able to influence one 2005 MHSAA Board member to change his vote for Vice-President/President-Elect away from Chuck Welsh, which should not have been permitted in a revote, where the sole purpose was to count votes that had not been counted.

25. Plaintiffs counted on at most 14 votes before the June 26, 2005 election and 15 if Heath and Gaughan were elected officers, but 16 if Swofford and Brill were elected.

26. Judge Morgan refused to allow 2004/2005 board members Chris Ortiz and Jim Behrens to vote at the June 26, 2005 officer election, even though they were serving on the Board as officers until their successors were named, and this was a specific holding of the Orphans' Court as to other Board seats.

27. Plaintiffs' misrepresentations and omissions before this Court are further examples of their unclean hands and should void the equitable relief granted them by this Court, i.e., the relief of new officer elections based on flatly misrepresented "harms."

28. This Court should thus vacate *in toto* its June 6, 2005 preliminary injunction order, deny plaintiffs any preliminary relief, and issue a scheduling order allowing the case to move forward on the merits.

29. Alternatively, this Court could address plaintiffs' glaring misrepresentations on officer-related alleged harms by modifying its June 6, 2005 order, without waiver of the issues raised by defendants on appeal, as follows: this Court could set aside the June 26, 2005 officer election while allowing the Homestead Chapter, the purported Honorary Chapter, the D.C. Chapter, and the two purported Emeritus Directors to vote on 2005 MHSAA Board matters, on a preliminary basis, and while declining to displace the November 2004 elected officers of Secretary Ortiz, Treasurer Behrens, and President-Elect Chuck Welsh.

30. Plaintiffs Amended Motion for a Preliminary Injunction did not even request a new election, so that reinstating the November 2004 elected officers would not set aside the grant of any relief requested by plaintiffs on a preliminary basis, and would not produce any harm to plaintiffs since they now make clear that they do not want Ortiz, Behrens, Heath, or Gaughan to serve as 2005 officers. Plaintiffs can elect new candidates in the next officer elections in four months, if they are successful in their ultimate substantive claims.

31. Defendants also respectfully draw this Court's attention to the conduct of plaintiffs, and newly-introduced interim Secretary Brill, in violation of the Commonwealth Court's June 24, 2005 order.

32. Although the Commonwealth Court made explicitly clear that the interim elected “officers shall not interfere with, discontinue, or seek to control” the MHSAA reform litigation now pending at the State Supreme Court on the request for review filed by the Office of the Attorney General and the Milton Hershey School/Hershey Trust Company, plaintiffs have nonetheless immediately sought to craft an artful means of in fact starting the prohibited interference and control, working in tandem with the Milton Hershey School/Hershey Trust Company.

33. Specifically, the Milton Hershey School has announced that it will “dialog” (sic) with the “fairly elected” MHSAA leadership, with the proviso that this is “not contingent on any change in [MHSAA’s] position relative to *the standing litigation*.” (Emphasis added.) This looks to be an attempt by the Milton Hershey School to start the process of styling the current *structural reform litigation* as one centered on “MHSAA standing,” rather than as one concerning restoration of a historic *structural reform agreement* that was rescinded by the OAG and the Milton Hershey School/Hershey Trust Company. This gratuitous description of the current structural reform litigation is on par with describing the tobacco litigation lawsuit as, for instance, a jurisdiction lawsuit. It is clear that the Milton Hershey School continues to try to impose its wishes on MHSAA, and seeks to take advantage of the June 26, 2005 interim officer election to start this process.

34. This is underscored by the conduct of interim secretary Brill, who lost no time in proposing that MHSAA’s structural reform agreement litigation counsel be muzzled and prevented from any public commentary on the reform agreement litigation, in violation of the Commonwealth Court order proscribing such actions by the interim officers. Interim Secretary Brill’s proposal followed counsel’s attempt to caution MHSAA members on the “standing

litigation” language pitfalls and to otherwise continue disseminating information on the reform agreement litigation. Interim Secretary Brill’s attempts to silence MHSAA counsel is nothing short of shocking, and is being pursued by Brill behind the scenes, with MHSAA members not even aware of the attempt to chill discussion.

35. Interim officers Brill, Swofford, and Robert Heist have also announced an intention to go beyond silencing counsel, by shutting down *in its entirety* the MHSAA Internet message forum. This forum is the single most cost-effective and important means of discussing MHSAA matters such as the reform agreement litigation. It has been targeted by the MHS Administration for over two years due to its vital role in apprising MHSAA members of key issues, with the MHS Administration going so far as to block all MHS employees and students from any access to the site. Interim officers Brill, Swofford, and Heist, seeking to take advantage of their Board majority, have proposed shutting down the forum by Board vote at the upcoming July 31, 2005 MHSAA Board meeting. This would have a devastating impact on MHSAA’s reform efforts and play right into the hands of the anti-reform MHS Administration, in violation of the Commonwealth Court’s June 24, 2005 order.

36. Interim officers Brill, Swofford, and Heist have also lost no time in seeking to add additional Board members favorable to their anti-reform goals, in the guise of new MHSAA Chapters who have been organized at the direct solicitation of the MHS Administration. This conduct violates this Court’s May 25, 2005 order prohibiting the addition of new people to the MHSAA Board while also violating the Commonwealth Court’s June 24, 2005 order not to seek control of the reform litigation.

37. Interim officers Brill, Swofford, and Heist also seek to amend the MHSAA bylaws at issue in this case, in violation of the Commonwealth Court's June 24, 2005 direct proscription on such action pending appellate review.

38. Interim officers Brill, Swofford, and Heist have also informed defendants that they reject any suggestion that they are interim officers and reject their current status as serving subject to appellate review.

39. These actions by interim officers Brill, Swofford, and Heist, with the support of the plaintiff Directors, make clear that willful attempts are being made now to change the composition of the MHSAA Board, to change the number of Directors on the Board, to harm the reform agreement litigation, to silence public discussion about these matters, to add anti-reform Directors to the Board, to alter the bylaws, and otherwise to take advantage of their current Board majority so as to grossly alter the status quo and gain improper advantage for the anti-reform elements during the time it takes the Commonwealth Court to review defendants' arguments. This is all in flagrant disregard of the Commonwealth Court's June 24, 2005 order and this Court's May 25, 2005 order.

40. For these additional reasons and the ones stated above, should this Court decline to vacate or modify its June 6, 2005 preliminary injunction order, defendants respectfully request that this Court alternatively stay the June 6, 2005 preliminary injunction order in its entirety pending appellate review of said order, or in the alternative void the June 26, 2005 election and reinstate the MHSAA officers serving before said election. As the conduct of plaintiffs, the interim officers, and the Milton Hershey School make clear, including conduct in concert, anything else will lead to a violation of the Commonwealth Court proscription on action by the interim officers that will interfere with or compromise the structural reform litigation.

V. Request For Expedited Consideration

Plaintiffs' actions as above described have already violated this Court's and the Commonwealth Court's orders. The actions expressly intended to be taken by plaintiffs at the July 31, 2005 Board meeting will continue and further violate these court orders. The plaintiffs actions and those actions intended to be taken at the July 31, 2005 Board meeting will harm and continue to harm the status quo as it existed prior to the preliminary injunction that was granted and serve only to further harm the defendants. Expedited consideration of the instant motion is therefore requested to remedy the harm caused to date and to prevent further harm as is expected if the plaintiffs are allowed to proceed as intended at the July 31, 2005 Board meeting.

VI. Conclusion

Plaintiffs have made glaring misrepresentations to this Court on their alleged harms, which formed the basis for plaintiffs' preliminary injunction relief request. This Court granted this relief unaware of these misrepresentations, and may not have granted the relief of a new election if it had known that plaintiffs' claims of irreparable harm in not having been able to elect Heath and Gaughan were totally contrived and a mere smokescreen for naming others as officers.

Plaintiffs' actions at the June 26, 2005 Court-ordered MHSAA officer elections did not restore the status quo, as plaintiffs solemnly represented to this Court they would do. Rather, plaintiffs breached their representations to name Gaughan/Heath as Secretary/Treasurer, violated this Court's order that no new Directors be added to the Board, named one unknown person as an officer (Swofford) having never even introduced his name to the Court or to MHSAA members following this matter, and compounded all this by naming a notorious anti-reform militant as an Officer, in flagrant disregard of all norms of candor before a tribunal.

Plaintiffs, and interim officers Brill, Swofford, and Heist have also announced immediate intentions to violate the Commonwealth Court's June 24, 2005 order where they are not already violating this Court's May 25, 2005 order, by *inter alia*, attempting to silence MHSAA's reform agreement litigation counsel, shutting down the MHSAA Internet message forum, adding new Directors to the Board, amending bylaws, and refusing to even recognize the Commonwealth Court's explicit designation of Brill, Swofford, and Heist as *interim officers* pending appellate review.

Plaintiffs' conduct, their "bait-and-switch" on the naming of officers, and their further unclean hands should lead this Court to vacate its June 6, 2005 order in its entirety, or at least the part of it that allowed the naming of any new officers. In the alternative, because plaintiffs' actions and planned actions constitute a violation of the Commonwealth Court order of June 24, 2005 and this Court's own May 25, 2005 order, this Court should stay its June 6, 2005 order pending review by the Commonwealth Court of the issues presented on appeal. Anything else would reward plaintiffs' misrepresentations and allow plaintiffs to improperly take advantage of their current Board majority to grossly alter the status quo.

Respectfully submitted,

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Dated: July 20, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of July, 2005, served a true and correct copy of the foregoing upon the following via first class mail:

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