ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 10-0963

Appeal from the Court of Appeals
Fifth Appellate District
Tuscarawas County, Ohio
Case No. 2009 AP 02 0013

TIMOTHY T. RHODES

Plaintiff-Appellee

v.

CITY OF NEW PHILADELPHIA, et al.,

Defendant-Appellant

NOTICE OF APPEAL OF CITY OF NEW PHILADELPHIA

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FILED
JUN 01 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Pursuant to Supreme Court Rule II § 2(A)(3), Appellant/Defendant City of New Philadelphia hereby gives notice of appeal to the Supreme Court of Ohio from the Fifth District Court of Appeals' April 15, 2010 decision and judgment entry. A copy of the court of appeals decision is attached to this Notice. (*See* Ex. "A.")

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served June 1, 2010 by depositing same in first-class United States mail, postage prepaid, to the following:

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COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TIMOTHY T. RHODES

Plaintiff-Appellant

-vs-

THE CITY OF NEW PHILADELPHIA

Defendant-Appellee

JUDGES:
Hon. Julie A. Edwards, P.J.
Hon. W. Scott Gwin, J.
Hon. Sheila G. Farmer, J.

Case No. 2009AP020013

OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2007CV100806

JUDGMENT: Reversed and Remanded

FILED
5th District Court of Appeals
Tuscarawas Co., Ohio

DATE OF JUDGMENT ENTRY: APR 15 2010

ROCKNE W. CLARKE
Clerk of Courts

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EXHIBIT
A

Farmer, J.

{¶1} On July 6, 2007, appellant, Timothy Rhodes, requested from appellee, The City of New Philadelphia, all daily public recordings for each and every day of the year for the years 1975 through 1995. On July 9, 2007, appellee responded that it did not have the requested recordings.

{¶2} On October 23, 2007, appellant filed a civil forfeiture complaint against appellee and others not a part of this appeal, alleging it had unlawfully destroyed information that was subject to Ohio's Public Records Act. All parties filed motions for summary judgment. By judgment entry filed September 26, 2008, the trial court denied appellant's motions.

{¶3} On October 16, 2008, appellant filed a motion for reconsideration. By judgment entry filed November 6, 2008, the trial court denied the motion.

{¶4} A jury trial commenced on February 5, 2009. The jury found in favor of appellee.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED IN NOT GRANTING A SUMMARY JUDGMENT TO PLAINTIFF/APPELLANT AND/OR IN NOT GRANTING HIS SUBSEQUENT MOTION FOR RECONSIDERATION."

II

{¶7} "THE TRIAL COURT ERRED IN OVERRULING CERTAIN OF PLAINTIFF'S/APPELLANT'S OBJECTIONS AT TRIAL."

III

{¶8} "THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BEFORE IT."

I

{¶9} Appellant claims the trial court erred in denying his motions for summary judgment and subsequent motion for reconsideration. We agree in part.

{¶10} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶11} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶12} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶13} Although appellant argues the trial court erred in denying his motion for reconsideration, there is no provision in the Rules of Civil Procedure for such a motion. *Pitts v. Ohio Department of Transportation* (1981), 67 Ohio St.2d 378, paragraph one of the syllabus.

{¶14} We shall address the issues raised by appellant's motions for summary judgment. After an extensive analysis of all the motions for summary judgment, the trial court entered the following findings:

{¶15} "The Court **FINDS** that genuine issues of material fact remain as to the existence and number of violations committed by Defendants, including but not limited to, the following:

{¶16} "Whether Plaintiff is a person who was aggrieved by a violation of R.C. §149.351(A).

{¶17} "Whether the back-up tapes constituted separate records for purposes of R.C.§149.351, and

{¶18} "How many violations Defendants committed, if any.

{¶19} "The Court **FINDS** that the evidence shows that no tapes were created prior to 1989.

{¶20} "The Court **FINDS** that Plaintiff's Verified Complaint did not seek relief for any tapes erased after 1995, and Plaintiff's public records request did not include any tapes created after 1995, and, therefore, he has not been aggrieved by any violations that may have occurred between 1996 and 2003.

{¶21} "The Court **FINDS,** therefore, that the issues for the jury should be limited to determining whether any violations occurred between 1989 and 1995 and, if so, how

many violations occurred during that time period only." Judgment Entry filed September 26, 2008.

{¶22} Appellant argues the trial court erred in not determining that appellant was an "aggrieved party" under R.C. 149.351(B). Appellant further argues the trial court erred in failing to determine that back-up tapes constituted "separate records" for R.C.149.351 purposes. Lastly, appellant argues the trial court should have determined there were 4,968 violations of R.C.149.351 and should have rendered judgment in the amount of $4,968,000.00.

{¶23} We note appellant does not challenge the trial court's dismissal of the claims against Mayor Brodzinski and Chief Urban, and does not challenge the trial court's determination that the issue was limited to violations occurring between 1989 and 1995.

{¶24} Appellee did not challenge appellant's assertion that R.C. 149.351 was violated, and concurred with appellant's Statement of Facts contained in his March 25, 2008 motion for summary Judgment at pages 1 through 2, save for the inflammatory argumentative language. See, Defendants' Response in Opposition filed April 11, 2008 at page 3. The sole issue argued contra to appellant's motion for summary judgment that is germane to the matter sub judice is whether or not appellant was an "aggrieved" party as defined by statute. Id. at pages 5-6.

{¶25} It is appellant's position that he is an aggrieved party under R.C. 149.351(B) which states the following:

{¶26} "(B) Any person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record in violation of division (A)

of this section, or by threat of such removal, destruction, mutilation, transfer, or other damage to or disposition of such a record, may commence either or both of the following in the court of common pleas of the county in which division (A) of this section allegedly was violated or is threatened to be violated:

{¶27} "(1) A civil action for injunctive relief to compel compliance with division (A) of this section, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action;

{¶28} "(2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action."

{¶29} Appellant argues the denial of access to the requested public records under the statute entitled him to the award provided for in subsection (B) regardless of his purpose or motive in making the request. Appellant did not explain in his motions for summary judgment the reason for the records request or argue that he was aggrieved by the denial. It is appellant's position because he asked for the records, regardless of purpose, and can establish that R.C. 149.351 was violated, he was entitled to $1,000.00 for each record destroyed.

{¶30} As we review the motions for summary judgment, the trial court's decision, and the arguments within this assignment of error, we find two issues need to be resolved. First, whether appellant was "aggrieved" and secondly, what records and how many were destroyed.

{¶31} Whether a person is aggrieved is viewed in light of the statute and its plain and unambiguous meaning. The trial court found the issue of being aggrieved was a factual issue to be determined by a jury.

{¶32} We find an aggrieved party is any member of the public who makes a lawful public records request and is denied those records. This decision is based on the interpretation of the statute as discussed in *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶14-16:

{¶33} "In answering these questions related to statutory definitions within Ohio's records laws,***we first 'must look at the purpose and meaning behind keeping records.' *White v. Clinton Cty. Bd. of Commrs.* (1996), 76 Ohio St.3d 416, 419, 667 N.E.2d 1223.

{¶34} " 'In a democratic nation***it is not difficult to understand the societal interest in keeping governmental records open.' *State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 81, 526 N.E.2d 786. A fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government's work and decisions. See, e.g., *Barr v. Matteo* (1959), 360 U.S. 564, 577, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (Black, J., concurring); Moyer, Interpreting Ohio's Sunshine Laws: A Judicial Perspective (2003), 59 N.Y.U.Ann.Surv.Am.L. 247, fn.1, citing letter to W.T. Barry (Aug. 4, 1822), in 9 The Writings of James Madison (Hunt Ed.1910) 103. As Thomas Jefferson wrote, ' "The way to prevent [errors of] the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our

governments being the opinion of the people, the very first object should be to keep that right***." ' Id., quoting letter to Edward Carrington (Jan. 16, 1787), in 11 The Papers of Thomas Jefferson (Boyd Ed.1955) 49.

{¶35} "Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance. See, e.g., *State ex rel. Gannett Satellite Information Network, Inc. v. Petro* (1997), 80 Ohio St.3d 261, 264, 685 N.E.2d 1223; *State ex rel. Strothers v. Wertheim* (1997), 80 Ohio St.3d 155, 157, 684 N.E.2d 1239. Public records afford an array of other utilitarian purposes necessary to a sophisticated democracy: they illuminate and foster understanding of the rationale underlying state decisions, *White*, 76 Ohio St.3d at 420, 667 N.E.2d 1223, promote cherished rights such as freedom of speech and press, *State ex rel. Dayton Newspapers, Inc. v. Phillips* (1976), 46 Ohio St.2d 457, 467, 75 O.O.2d 511, 351 N.E.2d 127, and 'foster openness and***encourage the free flow of information where it is not prohibited by law.' *State ex rel. The Miami Student v. Miami Univ.* (1997), 79 Ohio St.3d 168, 172, 680 N.E.2d 956."

{¶36} As further explained by our brethren from the Tenth District in *Walker vs. Ohio State Univ. Bd. of Trustees,* Franklin App. No. 09AP-748, 2010-Ohio-373, ¶25:

{¶37} "In *Kish,* the Ohio Supreme Court addressed the purpose of R.C. 149.351, concluding R.C. 149.351 'proscribes the destruction, mutilation, removal, transfer, or disposal of or damage to *public records*' and concluded the legislature's intent in promulgating the statute was to protect and preserve 'public records.' (Emphasis added.) *Kish* at ¶18, 36. Under its normal and customary meaning, an 'aggrieved'

person is defined as one 'having legal rights that are adversely affected; having been harmed by an infringement of legal rights.' Black's Law Dictionary (9 ed.2009) 77."

{¶38} The public records law gives access to any member of the "public" regardless of the lack of purpose or "blackness" of motive.

{¶39} In his motion for summary judgment, appellant does not give a reason for his request and under the theory adopted by the Supreme Court of Ohio, as a member of the public, he does not have to give a reason. Once denied, John Q. Public becomes aggrieved because he/she cannot exercise a statutorily defined right.

{¶40} As to whether appellant was an aggrieved party, we find there was no genuine issue of material fact and that portion of the motion should have been granted.

{¶41} The second issue is whether the trial court was correct in not determining the exact number of documents destroyed. We find all of the motions for summary judgment do not advocate that the trial court should determine an exact number as a matter of law. In fact, the motions are devoid of any explanation as to how the calls are recorded and in what sequence the calls are erased.

{¶42} Appellant's Exhibit A, attached to his October 23, 2007 verified complaint, stated his public records request included the following:

{¶43} "Reel-to-Reel Tapes. I understand the reel-to-reel tapes recorded the events at your department in 24 hour increments. That is, that they were usually changed once a day (probably around midnight each day). Accordingly, there should be at least one tape for each day of the year. In that regard, I am hereby requesting access to review the individual tapes for each and every day of the year for the years 1975 through 1995 inclusive."

{¶44} Also attached as Exhibit B and admitted by appellee is the police chief's response to the request:

{¶45} "I have received your letter and request for recordings. The machine that you are inquiring about was not in existence in 1975 and later those tapes would have been reused every thirty days. At the present time, the machine that ran them has been out of use for the last five years and was donated to the county mental health agency along with the left over tapes (31 or 32 tapes). The police department does not have any of the tapes requested or information that you are requesting."

{¶46} From a reading of the verified complaint, we do not find 4,968 missing records. As the chief's letter demonstrated, as relied upon by appellant, the reel-to-reel tapes were destroyed every thirty days.

{¶47} As explained by the *Kish* court in ¶18 and 27, a record may be a single sheet of paper or a compilation of documents:

{¶48} " 'Records' is defined in R.C. 149.011(G) as 'any document, device, or item, regardless of physical form or characteristic,***created or received by or coming under the jurisdiction of any public office of the state***which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.' The penalty portion of the Public Records Act builds upon that definition. See R.C. 149.43(A)(1).

{¶49} "We advise the federal appeals court that 'record,' as used in R.C. 149.351 and defined in R.C. 149.011, may be a single document within a larger file of documents as well as a compilation of documents and can be any document, regardless of physical form or characteristic, whether in draft, compiled, raw, or refined

form, that is created or received or used by a public office or official in the organization, functions, policies, decisions, procedures, operations, or other activities of the office. In this case, each comp-time form at issue is a record pursuant to Ohio law."

{¶50} Specifically, the *Kish* court at ¶42 explained what constitutes a "violation" of the public records law:

{¶51} "Rather than agreeing with the strained and illogical definition posed by petitioner, we agree with amici curiae and respondents that the General Assembly intended the definition of 'violation' to be simple and direct. We conclude, and advise the federal appeals court, that 'violation,' as used in R.C. 149.351(B), means 'any attempted or actual removal, mutilation, destruction, or transfer of or damage to a public record that is not permitted by law.' "

{¶52} Using this definition and the chief's letter, the requested records were the actual reel-to-reel tape recordings of the calls within a thirty day period. By admission, these tapes were recycled and the public records were destroyed every thirty days. By multiplication, there were twelve records destroyed each year times the number of years, seven, (1989-1995), which equals 84 acts in violation of the public records law or a penalty of $84,000.00.

{¶53} We find the "public records" in this case to be the reel-to-reel tapes and not each voice entry or calendar day entry on the tapes.

{¶54} Appellant also argues back-up tapes constitute part of the record. We find such argument to be without merit. It would be similar to stating that a carbon copy of an original document is the same as an original or in modern day parlance, a computer back-up is a separate record from the actual computer file.

{¶55} We are aware that appellant and/or appellee may take exception to our counting of the months and years. We agree there is room for a factual dispute. We therefore find the trial court was correct in determining the factual issue of the number of records destroyed was within the province of the trier of fact. As to the number of records destroyed using the definitions cited supra, we find there exists triable facts.

{¶56} Assignment of Error I is granted.

II, III

{¶57} Appellant claims the trial court erred in ruling on objections made during the trial and the jury's verdict was against the manifest weight of the evidence.

{¶58} Based upon our decision in Assignment of Error I and the fact that the jury's verdict only addressed the issue of appellant being an aggrieved party, we find these assignments to be moot.

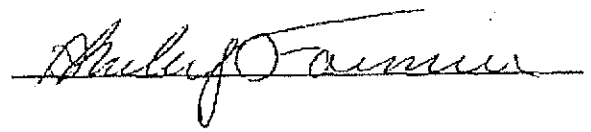
{¶59} This matter is hereby remanded to the trial court for a jury trial on the factual issue of how many records were destroyed per our definition in Assignment of Error I.

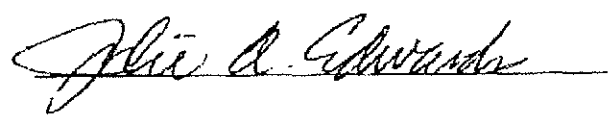
{¶60} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby reversed.

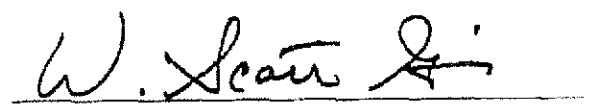
By Farmer, J.

Edwards, P.J. and

Gwin, J. concur.







JUDGES

SGF/sg 0302

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
5th District Court of Appeals
Tuscarawas Co., Ohio
APR 15 2010
ROCKNE W. CLARKE
Clerk of Courts

TIMOTHY T. RHODES	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
THE CITY OF NEW PHILADELPHIA	:	
Defendant-Appellee	:	CASE NO. 2009AP020013

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is reversed, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellee.

JUDGES