

ORIGINAL

IN THE SUPREME COURT OF OHIO

TIMOTHY T. RHODES

Plaintiff - Appellee,

v.

THE CITY OF NEW PHILADELPHIA

Defendant - Appellant.

Case No. 10-0963

On Appeal from the
Fifth District Court of Appeals
Tuscarawas County, Ohio

Court of Appeals
Case No. 2009AP020013

MEMORANDUM IN SUPPORT OF JURISDICTION
OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE

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**INTRODUCTION: THIS CASE INVOLVES A
MATTER OF PUBLIC AND GREAT GENERAL INTEREST**

The Ohio Municipal League (“League”), as amicus curiae on behalf of the City of New Philadelphia, urges this Court to accept jurisdiction over this case in order to reverse the decision of the Fifth District Court of Appeals (“Fifth District”) in *Rhodes v. New Philadelphia*, 2010-Ohio-1730. This court has an opportunity to clarify who is “aggrieved” when records of a public office are unlawfully removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of. Ohio law authorizes “any person who is aggrieved” to commence a civil action for injunctive relief and/or a civil action to recover a forfeiture in the amount of \$1,000 dollars for each violation. R.C. Section 149.351. The lower court has held, as a matter of law, that any person who merely requests records that have been destroyed has been “aggrieved” by that destruction. This erroneous interpretation of the statute will have disastrous financial consequences to public offices, as will be further discussed below.

Numerous cases have been filed around the State of Ohio seeking extraordinarily large damages from municipalities for alleged violations of R.C. Section 149.351.¹ The demands aggregate to tens of millions of dollars, and the payment of such forfeitures to private individuals will provide no benefit to the public whatsoever. In fact, the requesting party has no real interest in the requested documents, he merely wishes to profit from the fact that the documents were

¹ *State ex rel. Edwin Davila v. The City of East Liverpool*, Columbiana County Common Pleas Case No. 09-CV-238 (seeking \$2,191,000 forfeiture for alleged destruction of reel-to-reel tapes); *State ex rel. Edward Todd v. The City of Canfield*, Mahoning County Common Pleas Case No. 2009CV2107 (seeking multi-million dollar forfeiture for municipality’s alleged destruction of reel-to-reel tapes); *State ex rel. Edwin Davila v. The City of Bellefontaine*, Logan County Common Pleas Case No. CV09070361 (seeking forfeiture damages for the alleged destruction of reel-to-reel tapes from approximately 1991 until December 2007); *State ex rel. Edwin Davila v. The City of Willard*, Huron County Common Pleas Case No. CVH 2009 0565 (seeking approximately \$6.57 million for the alleged destruction of reel-to-reel recordings); *State ex rel. Edwin Davila v. The City of Bucyrus*, Crawford County Common Pleas Case No. 09CV0303 (seeking forfeiture damages in the amount of \$1,000 for each daily “911 style” reel-to-reel audio tape recordings, primary and backup, that were allegedly destroyed in violation of law); and *State ex rel. Edwin Davila v. The City of Martins Ferry*, Belmont County Common Pleas Case No. 09CV274 (seeking forfeiture damages of \$1,000 for each daily reel-to-reel tape recordation, primary and backup, that was allegedly destroyed in violation of law).

destroyed years ago. It is respectfully suggested that this is what the jury was thinking, in this case, when it found as fact that the plaintiff had not been “aggrieved” by the destruction of the documents. The Fifth District set this jury verdict aside.

R.C. Section 149.43(B) gives any person the right to make a public record request without stating a reason, and the person who is “allegedly aggrieved” by the failure to produce the record has the ability to enforce that right via a mandamus action. R.C. Section 149.43(C)

By contrast, R.C. Section 149.351 provides that the civil forfeiture penalty is available only to “[a]ny person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a [public] record ***.” The Fifth District concluded that “an aggrieved party is any member of the public who makes a lawful public records request and is denied those records.” *Id.* at ¶32. The flaw in this analysis is that it doesn’t require the party to be “aggrieved” by the unlawful destruction, etc., of the public record. It merely requires a party to prove that a request was made and the records were unlawfully destroyed. What should be required is proof that the destruction of the specific record actually harmed the party making the request, causing the party to be “aggrieved.” When a person is seeking a civil forfeiture for the unlawful destruction of a record, that person must demonstrate a loss or injury that resulted from the document’s destruction that is different than that harm that is suffered by the public, generally. A contrary ruling will be financially ruinous to any community that has improperly disposed of any public records, even if the destruction occurred accidentally.

The Public Records Act applies to public records of a public office. A public office is defined as “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). The Public Records Act, therefore, applies to all

offices and agencies of the State of Ohio, each of Ohio's 88 counties, and every city, village, and township in Ohio, along with school districts and all other public offices of other political subdivisions. Because of the potential impact on every public office in this state, this case is a matter of great public and general interest.

Public offices throughout Ohio have received requests for "reel-to-reel" tapes. These tapes were used by police departments in the 1970's, 1980's and part of the 1990's to respond to emergency calls. The equipment used during this time period provided for the continuous recycling and reuse of the tapes. The tapes, generally, were not retained. In some communities, however, the information on the tape is available in another format.

Certain individuals, including the plaintiff in this case, have chosen to capitalize on the past practice of police departments to recycle their "reel-to-reel" tapes; these parties are making requests for the "reel-to-reel" tapes, with the knowledge that the tapes are not available. These parties have no intent, if the tapes were available, to actually do anything with the tapes. When the public body admits the tapes have been destroyed, an action for the civil forfeiture penalties ensues. Plaintiff and other individuals engaging in this activity are unable to show that they are aggrieved, as their only reason for requesting the records is to cash-in on the civil penalties: possibly millions of dollars worth of penalties. It is, therefore, not surprising that plaintiff will be urging this court to accept the Fifth District's erroneous decision, ignoring the plain statutory language that a person must be aggrieved by the destruction of the public record.

Although this case is about "reel-to-reel" tapes, the analysis could be applied to any record for which a public office did not follow an approved public records retention schedule, no matter how obscure the information on the record might be. Pursuant to R.C. Section 149.351, a

person should only be permitted to recover if that person is aggrieved by the document's destruction.

This case provides an opportunity for this court to clarify the standard to be used when determining whether or not a person is "aggrieved" for purposes of R.C. Section 149.351. The standard established will impact each public office throughout the State. This case is worthy of the time and attention of this Court.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 750 Ohio cities and villages. The Ohio Municipal League and its members have an interest in ensuring that only persons who are found to be an aggrieved party are entitled to the civil forfeiture penalties set forth in R.C. 149.351(B)(2).

The League, by this memorandum, respectfully seeks to advise the Court of the urgency of and implications of the Fifth District's decision finding automatic aggrieved party status.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Memorandum in Support of Jurisdiction of the City of New Philadelphia. It is important to note that the jury found that Plaintiff was not aggrieved by the destruction of the records that were requested.

ARGUMENT

Proposition of Law No. 1: In order to pursue a claim for civil penalties under R.C. 149.351(B)(2) a person must establish that he or she has been “aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a (public) record” in some manner different than the general public.

R.C. 149.351(B)(2)

R.C. 149.351(B)(2) provides:

(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, *** may commence . . .

(2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, ***.

(Emphasis added.)

By the plain language of the statute, only a person who is “aggrieved” can recover the civil forfeiture.

Who Is “Aggrieved?”

The Public Records Act does not define “aggrieved.” This court, however, has concluded that in interpreting definitions within the Public Records Act, it “must be faithful to the language of and legislative intent behind the statute.” *Kish* at ¶19 (quoting *State v. S.R.*, 63 Ohio St.3d 590, 594, 589 N.E.2d 1319 (1992)). In determining legislative intent, this court has stated “we give effect to the ‘usual, normal and customary meaning’ of a statute’s words.” *Id.* (quoting *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173, 661 N.E.2d 1049 (1996)).

Black's Law Dictionary (8th ed. 2004) defines "aggrieved" as "having legal rights that are adversely affected; having been harmed by an infringement of legal rights." Merriam-Webster's

Dictionary provides one definition of "aggrieved" as "suffering from an infringement or denial of legal rights."

The First District and the Twelfth District have considered the definition of "aggrieved." In *State ex rel. The Cincinnati Enquirer v. Allen* (Sept. 16, 2005), 1st App. Dist., 2005 WL 2249110, 2005-Ohio-4865, the Cincinnati Enquirer filed a writ of mandamus seeking certain documents related to a potential sexual harassment lawsuit. In evaluating the writ, the Court opined on whether or not the Cincinnati Enquirer was "aggrieved" by the alleged violation of the Public Records Act. Citing an earlier case from the Twelfth District, the First District held that "a person is 'aggrieved' where the improper disposition of a record infringes upon a person's legal right to scrutinize and evaluate a governmental decision." *Id.* at *3 (citing *State ex rel. SENSEL v. Leone* (Feb. 9, 1998), 12th App. Dist., 1998 WL 54392 (*reversed on other grounds*)).

According to these courts, and the Fifth District, an aggrieved person is someone who has had the right to scrutinize and evaluate a governmental decision infringed by the destruction of the public record. This is every person. If a document has been destroyed (in the absence of other evidence, see below), no one can review the decision making that might be represented by that document. The concept of "aggrieved" has been made meaningless by the breadth of its interpretation.

The League proposes there is more to being "aggrieved" than discovering that a public record has been destroyed. Whether or not a person is an "aggrieved person" is a question of fact, evaluating the relationship between the person and the record.

In *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, the plaintiffs were aggrieved by the fact that employment records, the plaintiffs' time sheets for work performed on behalf of the City of Akron, were destroyed. These records were evidence in a

Fair Labor Standards Act case that the plaintiffs had brought. The plaintiffs in *Kish* were directly harmed by the destruction of compensatory time records, which were necessary to establish violations of the Fair Labor Standards Act.

One could envision a newspaper reporter investigating misconduct of a governmental official, the evidence of which (contained in a public record) has been destroyed. In such an instance, the reporter may be “aggrieved” by the destruction of the record.

Another example might be a record that has been destroyed that documented a defect in a roadway that resulted in an automobile crash. In such an instance, the person (a victim in the crash) who needed that record may have been aggrieved by the destruction of the record.

The League proposes that whether a person is “aggrieved” by the removal, destruction, mutilation, etc., of a public record is a question to be determined by the trier of fact.² There must be some harm to the person other than the unlawful destruction of the record. In this instance, the jury concluded that Plaintiff was not an aggrieved person and, therefore, not entitled to the civil forfeiture penalty.

**A Person Is Not Aggrieved If the Requested Records
Are Available in Another Form**

As indicated above, numerous cases are pending throughout the State of Ohio seeking multimillion dollar forfeiture damages for the alleged destruction of “reel-to-reel” tapes. In some instances, the information contained on the “reel-to-reel” tapes is available in another format. For example, a police department may maintain a simultaneous radio log that contains the information recorded on the “reel-to-reel” tapes.

² It is also possible, on a properly presented and supported motion for summary judgment, that there is no evidence in a case that would create a genuine issue of material fact to be decided by a jury. In such a case, summary judgment would be appropriate under Civ. R. 56.

Under these circumstances, a party would not be “aggrieved” as the requestor has access to the requested information. See *State ex rel. The Cincinnati Enquirer v. Allen*, 2005 WL 2249110 (Ohio App. 1 Dist.), 2005-Ohio-4856. (Finding that the Enquirer was not aggrieved by the public office’s inability to provide a copy of an internal sexual harassment complaint when it received a copy of the complaint from another source as the Enquirer’s right to scrutinize the governmental response was not infringed upon.)

Unreasonable or Absurd Results

Ohio statutes should be construed in a manner to avoid unreasonable or absurd results. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543 (1996), citing R.C. 1.47(C). This Court recently applied this rule to the Public Records Act, in *State ex rel. Perrea v. Cincinnati Public Schools*, 123 Ohio St.3d 410, 916 N.E. 2d 1049, and held that ordering disclosure of student exams undermines the ability of a school system to evaluate students and “[s]uch a result is not in line with the policy behind the Public Records Act.”

Requiring a public office to pay millions of dollars civil forfeiture damages to a person that is really not harmed by the destruction of a public record is absurd. Equally important, it is inconsistent with the policy behind the Public Records Act, which requires payment only if a person is “aggrieved” by the destruction of the record. Furthermore, as there is no statutory prohibition against a public office paying civil forfeitures for the same request made by several different persons. A finding that the plaintiff in this case, a person who is not aggrieved as a matter of fact (as found by a jury), is entitled to the civil forfeiture penalties in R.C. 149.351(B)(2) will invite others to file identical requests. A public office, therefore, can be liable for an indefinite amount of money to an indefinite number of plaintiffs for destruction of the same records without such persons having to prove anything other than that a document was

unlawfully destroyed. Never-ending liability is an unreasonable and absurd result that should not be countenanced by this court.

CONCLUSION

This case presents a matter of great public and general interest to all public offices, at all levels of government, throughout Ohio. The exercise of jurisdiction over this case is warranted and respectfully requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction of Amicus Curiae the Ohio Municipal League*, _____ has been sent via regular U.S. mail, postage pre-paid this ____ day of June, 2010 to:

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