

IN THE SUPREME COURT OF OHIO

TIMOTHY T. RHODES

Plaintiff-Appellee,

vs.

CITY OF NEW PHIDELPHIA, et al.

Defendant-Appellant.

CASE NO. 2010-0963

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

**MERIT BRIEF OF AMICUS CURIAE
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I. STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION

The Ohio Association of Civil Trial Attorneys (herein “OACTA”) is an organization of attorneys and corporate executives who engage in the defense of civil lawsuits and the management of claims against individuals, corporations and governmental entities. The issues presented by this appeal are of significant concern to OACTA and its members who are involved in defending and managing claims made against governmental entities. In addition, the membership of OACTA and, for that matter, all members of the public, have a significant interest in the outcome of this case.

The Fifth District Court of Appeals’ interpretation of what proof is required to qualify as an “aggrieved” person under R.C. 149.351(B)(2), if left to stand, has the distinct potential to financially devastate any governmental entity in the State of Ohio that is subject to liability under the Public Records Act, even for unintentional violations. In this case, Plaintiff-Appellee, Timothy Rhodes, is a prime example of the absurd results of the Fifth District’s interpreted definition of “aggrieved” person. Absurd and financially devastating results should not be an issue when the State and many local public entities are fighting a current budget crisis.¹

In the trial court, the jury specifically found that Timothy Rhodes was not an “aggrieved” person because he had no interest in the content of and admittedly never intended to review the

¹Although the effects of the Fifth District’s decision are significantly grave given the current economy and the state of the budgets of many local governments, the budget crisis only emphasizes the impact that will likely be felt if the Fifth District’s decision is permitted to stand. However, even if there was a more positive outlook for the economic condition of Ohio, as demonstrated below, the Fifth District’s interpreted definition of “aggrieved” person under R.C. 149.351(B)(2) cuts directly against long-standing rules of statutory construction.

public records he requested from the City of New Philadelphia. Instead, the jury's answer to a jury interrogatory determined that Rhodes was on a search for destroyed records in an effort to take advantage of the one thousand dollar per violation provision of R.C. 149.351(B)(2). The Ohio legislature could not have intended such an absurd result—permitting a person with no admitted interest in the underlying records to use the public records statute as a sword for economic gain. It is precisely this potential absurd and financially devastating result that necessitates the participation of OACTA, as Amicus in favor of Appellant, the City of New Philadelphia.

II. STATEMENT OF FACTS AND CASE

Amicus, OACTA, hereby adopts, in its entirety, the Statement of Facts and Case of Appellant, the City of New Philadelphia.

III. LAW AND ARGUMENT

Proposition of Law No. 1: In order to be entitled to a forfeiture under R.C. 149.351(B)(2), a person must first establish that he or she has been individually “aggrieved” by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a public record.

This Honorable Court's determination of this significant and far-reaching issue depends wholly on the Court's determination of the intent of the Ohio Legislature when it included the term “aggrieved” in R.C. 149.351(B) of the Public Records Act, and whether a litigant, in order to be entitled to recover under the forfeiture provisions of R.C. 149.351(B)(2), should first be required to establish that he or she was individually “aggrieved.” Amicus, OACTA, submits that

since the Legislature specifically identified the individuals who may seek their rights under the Public Records Act as “any person who is aggrieved”, the plain language of the statute requires that a litigant must affirmatively show that he or she is “aggrieved.” Any other interpretation of Public Records Act would give virtually no effect to the specific language selected by the Legislature, and would essentially write the phrase “who is aggrieved” completely out of the statute. Further, the interpretation of the term “aggrieved” reached by the Fifth District Court of Appeals, and advanced by Plaintiff-Appellee, will lead to absurd results, which will be devastating to Ohio governmental entities. Such absurd and devastating results could not have been intended by the Legislature.

A. **The Plain Language of R.C. 149.351(B)(2) Requires that a Claimant Establish He or She is “Aggrieved”.**

R.C. 149.351(B)(2), provides, in pertinent part:

(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 record, may commence***:

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

(emphasis added).

“In Ohio, it is a settled principle of statutory construction that words used in a statute are to be given their plain and ordinary meaning, unless the legislative intent indicates otherwise.”

Ohio Ass’n of Pub. Sch. Employees, Chapter 672 v. Twin Valley Local School Dist. Bd. of Educ. (1983), 6 Ohio St.3d 178, 181 (citations omitted). R.C. 1.42 provides that words and phrases

used in a statute shall be “read in context and construed according to the rules of grammar and common usage.”

The present case differs from most other cases involving issues of statutory construction. Here, a jury of eight individuals determined that a claimant who never intended to listen to police dispatch recordings that were public records was not an aggrieved party. Such a determination by a jury should certainly be instructive in determining the plain and ordinary meaning of the term “aggrieved.” This guidance as to the plain and ordinary meaning of a statutory term should not be ignored in favor of an unreasonable interpretation that gives no power to the trial courts to detect and deter sham, opportunistic uses of the Public Records Act.

Within the definition of “aggrieved party”, Black’s Law Dictionary (6th Ed. 1990), provides, “[t]he word ‘aggrieved’ refers to a substantial grievance, a denial of some personal, pecuniary or property right.” This definition, in particular, gives clear guidance as to the Legislature’s intent when it used the term “aggrieved.” The Legislature must have intended that a claimant filing suit under R.C. 149.351(B)(2) would be a person who has a substantial grievance or a denial of some personal, pecuniary or property right suffered as a result of the loss of the public records. To hold otherwise would mean that the Legislature intended that redress would be available to every person in Ohio, irrespective of whether the person suffered any individual harm. This would mean that the Legislature, by using the phrase “any person who is aggrieved”, simply meant “any person,” once a record is destroyed and that person requests to inspect or copy the record. “Any person” would not have a “substantial grievance” or been denied some “personal, pecuniary or property right.” Instead, the only right infringed upon would be the same right held by every other member of the general public. Thus, it is clear from the plain and

ordinary meaning of the term “aggrieved” and the Legislature’s express use of that term as a condition that a claimant in a public records forfeiture case must demonstrate some type of individual harm. A demonstration of individual harm is the necessary condition that changes the status of “any person” into an “aggrieved person.”

B. All Words Used by the Ohio Legislature in R.C. 149.351(B) Must Be Given Effect, Including the Term “Aggrieved”.

Another standard rule of statutory construction that leads to the conclusion that a public records forfeiture claimant must demonstrate he or she is individually “aggrieved” is the maxim that no words contained in a statute should be ignored. “A basic rule of statutory construction requires that ‘words in statutes should not be construed to be redundant, nor should any words be ignored.’ Statutory language ‘must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required***.’” *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health* (2002), 96 Ohio St. 3d 250, 2002-Ohio-4172, ¶ 26 (quoting, *Ohio Gas Co. v. Pub. Util. Comm.*(1988), 39 Ohio St.3d 295, 299, and *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*(1917), 95 Ohio St. 367, 372-73).

If this Court were to hold that a person is an “aggrieved” person under R.C. 149.351(B) merely by virtue of the person requesting public records that have been destroyed, the term’s use in the statute will be rendered meaningless and superfluous. If “aggrieved” is read out of the statute, to trigger liability under the Act, a claimant would merely need to demonstrate that public records were destroyed and that the claimant had made a request for the records. In other words,

under the theory advanced by Plaintiff-Appellee, the statute would read, “any person who requests a public record that has been removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of may commence *** a civil action to recover a forfeiture.” Such an interpretation cannot be permitted. The Legislature, by expressly using the term, “aggrieved” created a necessary condition that a claimant must prove to be entitled to gain rights under the forfeiture provisions of the statute.

Under this rule of statutory construction, the Legislature’s use of the specific phrase, “who is aggrieved,” is determinative that the Legislature meant that a claimant must show more than the fact that he or she is a member of the public who requested a destroyed public record. To hold otherwise would require that the phrase, “who is aggrieved,” be entirely ignored. Accordingly, to give meaning to the express condition created by the Legislature’s use of the term “aggrieved” a showing of identifiable, individual harm is required.

C. **If a Claimant is Not Required to Demonstrate that He or She is “Aggrieved” as a Necessary Condition to a Claim under R.C. 149.351(B), the Results will be Absurd and Unreasonable.**

In addition to the fact that the plain and ordinary use of the term “aggrieved,” as a modifying condition of “any person,” requires some showing of individual harm on the part of a claimant, and since such a showing is required to give effect to the Legislature’s use of the term, holding that R.C. 149.351(B)(2) requires a showing of individual harm is also consistent with the rule of statutory construction that statutes should be interpreted so as not to lead to absurd or unreasonable results. This rule is embodied in R.C. 1.47, which states, “[i]n enacting a statute,

it is presumed that: *** (C) [a] just and reasonable result is intended.” “The General Assembly is presumed not to intend any ridiculous or absurd results from the operation of a statute which it enacts, and, if reasonably possible to do so, statutes *must* be construed so as to prevent such results.” *State ex rel. Haines v. Rhodes* (1958), 168 Ohio St. 165, 151 N.E.2d 716, paragraph 2 of the syllabus (emphasis added). “It is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, so to construe the statute as to avoid such a result.” *Id.* at 171 (quoting, *State, ex rel. Cooper v. Savord, Judge* (1950), 153 Ohio St. 367, paragraph 1 of the syllabus). In this case, an unreasonable reading of R.C. 149.351(B)(2) is not required by the statute, itself. To the contrary, the very use of the word “aggrieved” shows the Legislature’s intent to place the condition on the claimant to demonstrate that he or she is individually aggrieved before the claimant is able to prevail on a claim under the statute.

In the present case, and the many others pending before Ohio trial courts, if allowed to stand, the Fifth District’s interpretation of the term, “aggrieved,” will lead to absurd and unreasonable results. As set forth in Appellant, the City of New Philadelphia’s Statement of Facts, it is clear that Plaintiff-Appellee Rhodes did not contest at trial that he had no interest at all in the contents of the records he requested. Admittedly, he never planned to listen to the dispatch recordings. He was not interested in scrutinizing or evaluation the operation of the public entity he targeting by his public records request (the distinct purpose that the Public Records Act protects). Instead, it is clear Rhodes was on a fishing expedition to find destroyed public records for the sole reason that he may gain a financial windfall. This absurd and ridiculous outcome could not have been intended by any reasonable legislative body when enacting such a statute.

As noted in the City’s Memorandum in Support of Jurisdiction and in Amicus, the Ohio Municipal League’s Memorandum in Support of Jurisdiction, numerous public entities are now defending similar suits brought by litigants who are similarly situated to Appellee Rhodes, in that they have no interest in the content of requested public records. Instead, they are actively seeking out public entities who have destroyed records for the sole purpose of financial gain. Only an unreasonable reading of the Public Records Act could lead to such absurd results. The General Assembly could not have intended to create such a loophole open for abuse by financially self-serving litigants.

As a recent example of the perversion of this loophole, in *State ex rel. Edwin Davila v. City of Bucyrus*, the Crawford County Court of Common Pleas entered judgment against the City of Bucyrus in the amount of \$1,409,000.00 for the alleged destruction of 911 reel-to-reel recordings, similar to those at issue in this case. Crawford Cty. Common Pleas No. 09 CV 0303.² This judgment is a distinct example of the perversion of the purported loophole created by the Legislature by not statutorily defining the phrase “any person who is aggrieved.” A reading of the Act that allows a public records claimant, who is only arguably on a statewide quest for financial gain, to obtain a sizeable verdict against a municipality, could not have been a result intended by General Assembly when enacting the Public Records Act. In accordance with this rule of statutory interpretation, this Court very recently declined to adopt an absurd interpretation of the language of R.C. 149.43, and refused to interpret the definition of a public record to

²The judgment of the Crawford County Court of Common Pleas is currently on appeal before the Third Appellate District, App. Case No. 03-10-20.

include documents that were received by a public office but never used by the governmental agency to perform a public function. *State ex rel. Cincinnati Enquirer v. Ronan*, Slip Opinion No. 2010-Ohio-5680, ¶ 13.

It is also unreasonable to interpret the Public Records Act in such a manner as to divest Ohio trial courts of any ability to comply with their responsibility to be gatekeepers against sham litigation. When a public records claimant has no interest at all in requested public records, except to the extent that the records may result in a monetary windfall for the claimant, there is no question that such claimants are perverting the Public Records Act into a weapon that no reasonable legislative body could have intended. Ohio trial courts should be left with some ability to dispose of sham litigation that is not instituted for any of the historical purposes behind the statute, but which is only instituted for selfish financial gain. Interpreting R.C. 149.351(B) to require some showing that the claimant is individually “aggrieved” leaves the trial courts with some power to guard against sham litigation.

In addition, the potential results are rendered more absurd and are compounded by the fact that under the Fifth District’s interpretation of “aggrieved”, not only would one public records claimant who has no interest in the content of the requested records maintain a successful suit solely for his or her own financial gain, but once destroyed records are discovered, there is no provision of the Public Records Act that prevents other financially-driven claimants from making the very same public records requests and maintaining the very same forfeiture suits. Thus, an unreasonable interpretation of the statute will only lead to layers upon layers of public records requests and forfeiture suits filed against the same governmental entities for the same public records. If the public entities have insurance or are part of a risk pool, judgments granting awards

of forfeiture pursuant to the Public Records Act, since they are in the nature of a fine or penalty, will likely be excluded from coverage, thereby subjecting each governmental entity to direct liability out of public funds. It strains all reason and common sense to conclude that the Legislature would have intended such a result. Instead, the conclusion that the statutory phrase “a person who is aggrieved” requires a Public Records Act claimant to demonstrate that he or she is particularly aggrieved in accordance with the purposes behind the Act is both consistent with the rules of statutory construction discussed herein and with the legislative purpose underlying the Act.

In *White v. Clinton County Bd. of Comm’rs* (1996), 76 Ohio St.3d 416, 667 N.E.2d 1223, this Court examined the legislative purpose of the Public Records Act. First, the Court noted that public records should be preserved in order to document the decision-making process of governmental bodies, so that the public may understand these decisions, especially if decisions are unpopular but may be necessary for the common good. *Id.* at 420. As a second purpose behind the Public Records Act, the *White* Court noted that public records should be preserved in order to subject the workings of government to public scrutiny, to hold the government accountable for its workings, and to prevent errors by public officials. *Id.* The third purpose behind the Public Records Act, as explained in *White*, is to allow members of the public to obtain “complete and accurate information about the decision-making processes of their government.” *Id.* The Court further noted that the government’s duty to maintain public records, and its obligation to make those records available, provides an otherwise busy citizenry with the ability to stay informed of the actions and workings of their government and public officials. *Id.* Accordingly, it can be said from these pronouncements that the Act was primarily intended to

preserve the citizens' ability to understand, review, and scrutinize the workings of government, as a protective measure against mistakes by government officials, to prevent inequity, and to guard against governmental malfeasance. Recently, in *Kish v. City of Akron* (2006), 109 Ohio St. 3d 162, 2006-Ohio-1244, ¶¶ 14-18, this Court, once again, cited the same declarations of the rationale behind the Public Records Act.

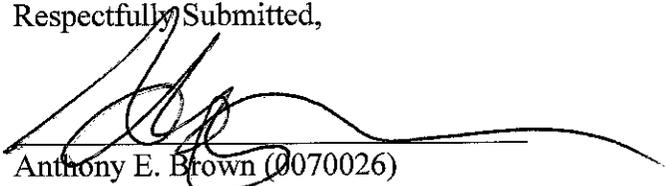
This stated and long-standing rationale is not served in any fashion by the Fifth District's interpretation of who constitutes an "aggrieved" person under the Act. If an "aggrieved" person is interpreted to mean any person who requests a destroyed public record, the interpretation is so broad as to permit self-serving, abusive conduct by claimants who only request public records for financial gain. Such a broad interpretation does nothing to further the historically recognized and honorable purposes for which the statute was enacted. If a claimant has no interest in reviewing the content of the records, he or she has no interest in informing himself or herself of the workings of government. Likewise, he or she has no interest in holding government officials under scrutiny or holding governmental actors accountable for their official decisions and acts. Such claimants are merely using the Public Records Act as a weapon to attack local governmental entities for the sole purpose of financial gain. This outcome does not fall within the stated purposes behind the Public Records Act as pronounced in *White* and as later restated in *Kish, supra*. In fact, the absurd outcomes, such as that advanced by Plaintiff-Appellee, cuts directly against the true and legitimate purpose of the Public Records Act. Plaintiff-Appellee Rhodes' purpose was not to investigate the workings of the government. Claimants who are only seeking a "pay day" should not be found to be appropriately "aggrieved" as anticipated by the Legislature's use of the term in light of the true purposes of the Act. Thus, interpreting the

construction. An interpretation of “person who is aggrieved” that requires some showing that the person is individually “aggrieved” in light of the purposes behind the Public Records Act does serve the purposes underlying the Act, as explained in *White* and *Kish*. It also appropriately avoids an interpretation of the statute that would serve only to tarnish the true and legitimate purpose of the Public Records Act, to be able to openly observe the workings of government. This interpretation is permitted and plainly contemplated by the words used by the Legislature in R.C. 149.351, since the Legislature saw fit to condition the term “any person” with the phrase “who is aggrieved.”

IV. CONCLUSION

For the reasons set forth herein, Amicus Curiae, the Ohio Association of Civil Trial Attorneys, supports Defendant-Appellant, the City of New Philadelphia, and respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeals.

Respectfully Submitted,



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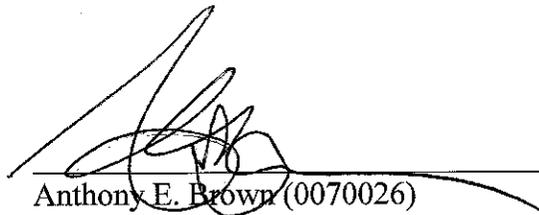
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