

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO.: 2010-0963

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

REPLY BRIEF OF DEFENDANT/APPELLANT CITY OF NEW PHILADELPHIA

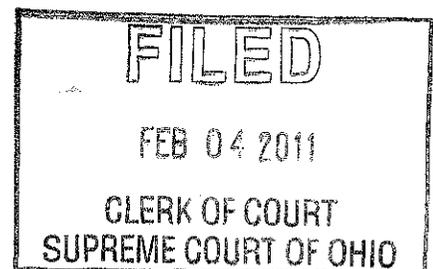
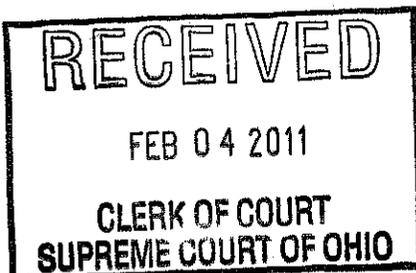
JOHN T. MCLANDRICH (0021494)
FRANK H. SCIALDONE (0075179)
Mazanec, Raskin & Ryder Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: jmclandrich@mrrlaw.com
fscialdone@mrrlaw.com

Counsel for Defendant/Appellant
City of New Philadelphia

WILLIAM WALKER, JR. (0038703)
P.O. Box 192
Massillon, OH 44648-0192
(330) 327-1437
(330) 832-7024 – Fax
Email: walker@wmwalkerlaw.com

CRAIG T. CONLEY (0021585)
604 Huntington Plaza
220 Market Ave., South
Canton, OH 44702
(330) 453-1900
(330) 453-2170 – Fax

Counsel for Plaintiff/Appellee
Timothy T. Rhodes



STEPHEN L. BYRON (0055657)
REBECCA K. SCHALTENBRAND
(0064817)
Schottenstein, Zox & Dunn Co., L.P.A.
4230 State Route 306, Suite 240
Willoughby, OH 44094
(440) 951-2303
(216) 621-5341 - Fax
Email: sbyron@szd.com

JOHN GOTHERMAN (0000504)
Ohio Municipal League
175 S. Third Street, #510
Columbus, OH 43215-7100
(614) 221-4349
(614) 221-4390 - Fax
Email: jgotherman@columbus.rr.com

STEPHEN J. SMITH (0001344)
Schottenstein, Zox & Dunn Co., L.P.A.
250 West Street
Columbus, OH 43215
(614) 462-2700
(614) 462-5135 - Fax
Email: ssmith@szd.com

Counsel for *Amicus Curiae*,
The Ohio Municipal League

EDWIN DAVILA
15 Federal Avenue NE
Massillon, OH 44646
(330) 412-2605
Email: davilaed70Waol.com

Pro Se Amicus Curiae

RICHARD A. CORDRAY (0038034)
Attorney General of Ohio
ALEXANDRA T. SCHIMMER (0075732)
Chief Deputy Solicitor General
LAURA EDDLEMAN HEIM (0084677)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-8980
(614) 466-5087 - Fax
Email:
alexandra.schimmer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*, State of Ohio

ANTHONY E. BROWN (0070026)
Baker, Dublikar, Beck, Wiley & Mathews
400 South Main Street
North Canton, OH 44720
(330) 499-6000
(330) 499-6423 - Fax
Email: tonyb@bakerfirm.com

Counsel for *Amicus Curiae*,
Ohio Association of Civil Trial Attorneys

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	LAW AND ARGUMENT	2
	Proposition of Law I: A person who requests destroyed records is not automatically entitled to a forfeiture. A person must establish that he or she is an “aggrieved person” under the Public Records Act to be entitled to a forfeiture under R.C. 149.351(B)(2). To be an “aggrieved person” the person must actually want the requested records, not solely the forfeiture.	2
A.	To be an “aggrieved person,” Rhodes had to actually want to review the content of the requested records, not merely the forfeiture.	2
1.	Motive is irrelevant; Rhodes could want the records for any reason – good, bad, or otherwise.	2
2.	Rhodes’ argument that the City is trying to judicially “insert” additional language into R.C. 149.351(B) is unexplained and wrong.	4
3.	Rhodes’ claim that the City wants to condition a civil forfeiture on a governmental entity’s “undefined extraneous “test”” mischaracterizes the City’s argument and ignores what the trial court actually did.	5
a.	The trial court simply found that, in this circumstance, there were genuine issues of material fact in dispute about whether Rhodes was aggrieved – that is, whether he actually wanted to review the content of the records.	5
b.	This Court should hold that the Fifth District could not rule on the trial court’s summary judgment ruling because the jury trial rendered moot any purported error.	7
B.	Amicus Curiae Edwin Davila’s brief provides nothing substantial to the issues that must be decided in this case.	8
III.	CONCLUSION	10
	CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Cases

<i>Austin v. United States</i> (1993), 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed. 2d 488.....	9
<i>Bernardini v. Conneaut Area City School Dist. Bd. of Edn.</i> (1979), 58 Ohio St.2d 1, 387 N.E.2d 1222.....	5
<i>Continental Ins. Co. v. Whittington</i> , 71 Ohio St.3d 150, 1994-Ohio-362, 642 N.E.2d 615	6, 7
<i>Home Indemn. Co. v. Reynolds & Co.</i> (1962), 38 Ill.App.2d 187, 186 N.E. 2d 547.....	7
<i>Sarmiento v. Grange Mut. Cas. Co.</i> (2005), 106 Ohio St.3d 403, 2005-Ohio-5410, 835 N.E.2d 692	5
<i>State of Ohio v. Wilson</i> , (1997), 77 Ohio St.3d 334, 1997-Ohio-35, 673 N.E.2d 1347	5
<i>State v. S.R.</i> (1992), 63 Ohio St.3d 590, 589 N.E.2d 1319.....	9

Statutes

Ohio Revised Code § 149.351(B).....	1
Ohio Revised Code § 149.351(B)(2)	1, 2, 3, 8

I. INTRODUCTION

Rather than address the City's arguments, Rhodes misstates the City's position when he claims "[the City] argues that [Rhodes] was not a person 'aggrieved' under O.R.C. 149.351(B) because he did not have a 'proper' reason to request the subject records in the first place." (Appellee's Br. at 3.)

The City has never made that argument.

In fact, the City has made it clear that Rhodes' motive for wanting the records – whether it was virtuous or unquestionably bad – was not important at every level of litigation: at the trial level; at the intermediate appellate level; and before this Court.¹ To be clear, the City's position is that Rhodes must actually want to review the content of the records and not solely the forfeiture to be aggrieved under R.C. 149.351(B).

Reviewing the accepted proposition of law, this case presents the following question: Is a person automatically entitled to a civil forfeiture for merely requesting a destroyed public record, even if that person had no interest in the actual record or the content of the destroyed record and only wanted the \$1,000-per-record forfeiture under R.C. 149.351(B)(2)?²

The answer is no.

¹ See City's Merits Br. at 15 ("No one disputes that a person can request public records for any reason, even if there is, in the words of the fifth district, "blackness of motive." But, the person must *actually want to review the content* of the record. This case and cases like it have nothing to do with protecting public records or the requesting party's motive for wanting the records themselves.")

² Despite arguing that this appeal is only about the definition of "aggrieved," Rhodes argues for several pages about the New Philadelphia's "systematic" destruction of records. (Appellee's Br. at 1-3.) This tactic is curious, because there has never been any dispute that New Philadelphia recorded over the decades-old reel-to-reel tapes every 30 days, just like every other department did as a matter of routine.

II. LAW AND ARGUMENT

Proposition of Law I:³ A person who requests destroyed records is not automatically entitled to a forfeiture. A person must establish that he or she is an “aggrieved person” under the Public Records Act to be entitled to a forfeiture under R.C. 149.351(B)(2). To be an “aggrieved person” the person must actually want the requested records, not solely the forfeiture.

A. To be an “aggrieved person,” Rhodes had to actually want to review the content of the requested records, not merely the forfeiture.

1. Motive is irrelevant; Rhodes could want the records for any reason – good, bad, or otherwise.

The City does not contest the basic law that motive is irrelevant – and it never has. Rhodes may inspect and copy a public record for any reason, whether a politically or socially unpopular reason, a patently bad reason, or an unquestionably good reason. But, while the reason is unimportant, Rhodes must still want to review the record to be “aggrieved” under R.C. 149.351(B)(2).

As explained in the City’s merits brief – but ignored by Rhodes – the Legislature expressly limited the recovery of a forfeiture to a “person who is aggrieved” by the destruction of records under R.C. 149.351(B)(2). (See City’s Merits’ Br. at 8-16.) The Legislature did not draft the Act with overly broad language providing that the “destruction of records entitles a person to a forfeiture.” Rather, the Legislature limited recovery to a “person who is aggrieved,” not merely “any person.” If “aggrieved” is to have any meaning – which it must under Ohio law – Rhodes must at least demonstrate that he wanted to review the content of the records and not merely the forfeiture. The Legislature limited the recovery to those persons who actually wanted to review the record, but could not do so because a public entity improperly destroyed the record.

³ Rather than address the only proposition of law accepted for review by this Court, Rhodes in his brief sets forth “Appellee’s Proposition of Law No. I.” The City is unaware of any rule of practice or of law that authorizes an appellee to assert a proposition of law that has never been accepted for review.

The usual and customary meaning of “aggrieved” and common sense demonstrate that one must experience some sort of loss to be aggrieved. Here, far from aggrieved, Rhodes got exactly what he wanted – a City that had destroyed the records. In fact he knew the records were destroyed when he asked for them. He did not want to review the records, he merely wanted the forfeiture. This does not demonstrate “aggrieved” under R.C. 149.351(B)(2). It is the inability to review the content of a record that makes a party aggrieved. The ability or inability to review the record only has meaning if you want to review the content and, therefore, want the record, not just the forfeiture. You must want the record content to be aggrieved.

While Rhodes does not discuss the express text of the statute and the case law, Rhodes offers ill-fitting analogies. Rhodes accuses the City of advocating for the “fox [to] guard[] the hen house.” (Appellee’s Br. at 5.) This analogy does not apply. The City or other public entity does not determine whether a person is “aggrieved” and entitled to a forfeiture. A court or a jury does. Further eschewing any discussion of the law or explaining how to avoid the absurd results that necessarily follow from his interpretation, Rhodes argues it is “simply ludicrous ... to permit the governmental entity/records custodian involved to unilaterally ... determine whether or not a person requesting public records has a ‘proper’ reason or purpose for doing so.” (Appellee’s Br. at 6.) But, no one has argued that a person needs a proper reason to be aggrieved. This argument is the fruit of counsel’s imagination, not an argument advanced by the City.

The City’s argument is that Rhodes must actually want to review the content of the records to be aggrieved. Here, the trial court recognized that there were genuine issues of material fact to be decided – not about whether Rhodes’ motive was good or bad – but about whether Rhodes actually wanted to review the content of these records. A jury unanimously believed that Rhodes did not want to review the content of decades-old reel-to-reel police

dispatch tapes. Rhodes knew these records were routinely destroyed by virtue of dispatch tapes being recycled every 30 days, as done by all departments. The jury heard that Rhodes only wanted the records if they did not exist; he did not bother to review tapes that did exist; and he had no way to review the records. He merely wanted a forfeiture. The evidence was overwhelming that Rhodes did not really want the records' content and was not an "aggrieved person."

Despite the jury's verdict, the fifth district reversed the trial court's denial of summary judgment on the issue of liability. The court held that a person is automatically entitled to a civil forfeiture for merely requesting a destroyed public record. Notwithstanding the jury finding that Rhodes was not aggrieved, the fifth district ruled that the trial court should have granted summary judgment as a matter of law on the issue of aggrieved in favor of Rhodes and vacated the jury verdict. (Op. at 9, Apx. 6.) In doing so, the court disregarded the express text of the forfeiture provision limiting it to a "person who is aggrieved" and overruled the wisdom of the unanimous jury that determined that Rhodes did not want to review the content of the records.

2. Rhodes' argument that the City is trying to judicially "insert" additional language into R.C. 149.351(B) is unexplained and wrong.

While Rhodes argues that the City wants to insert language that does not exist in The Act, Rhodes does not mention what that language would be. (Appellee's Br. at 7.)

The exact opposite is true. Rhodes wants to remove the term "aggrieved" from the statute. The Legislature expressly limited recovery of a civil forfeiture to "any person who is aggrieved," not merely "any person." The Legislature knew how to expand the Act's forfeiture provision if it chose to do so. It did not draft the Act with overly broad language providing that the "destruction of records entitles a person to a forfeiture." Rather, the Legislature limited recovery to a "person who is aggrieved," not merely "any person." "Aggrieved" is a word that

requires the person to actually suffer a deprivation of a legal right; it has a qualitative component. That deprivation is the ability to review the record's content, which presupposes a desire to review the content, not just wanting money.

If the fifth district's interpretation is adopted, every citizen would be "aggrieved" by those acts, and therefore every member of the public would qualify to bring suit. The words "any person" would have the same meaning as "any person who is aggrieved," making the word "aggrieved" a redundancy. The Legislature's use of the term "aggrieved" was "inserted to accomplish some definite purpose," which means that "significance and effect should be accorded to every word, phrase, sentence and part thereof." *State of Ohio v. Wilson*, supra at 336-337.

Rhodes wants this Court to effectively delete the phrase "who is aggrieved" from the forfeiture provision. To do so enlarges the scope of the Act beyond that which the General Assembly enacted. The judicial branch of government "cannot extend the statute beyond that which is written, for '[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.'" *Sarmiento v. Grange Mut. Cas. Co.* (2005), 106 Ohio St.3d 403, 408-09, 2005-Ohio-5410, 835 N.E.2d 692 (citing *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4, 387 N.E.2d 1222.) There is no good public policy behind making R.C. 149.35(B)(2) a cash cow.

3. **Rhodes' claim that the City wants to condition a civil forfeiture on a governmental entity's "undefined extraneous 'test'" mischaracterizes the City's argument and ignores what the trial court actually did.**

Again, the City does not determine whether Rhodes may obtain a forfeiture. A court or jury determines whether Rhodes was a "person who was aggrieved."

- a. **The trial court simply found that, in this circumstance, there were genuine issues of material fact in dispute about whether**

Rhodes was aggrieved – that is, whether he actually wanted to review the content of the records.

The trial court could have done one of three things when faced with the parties' cross motions for summary judgment on the issue of whether Rhodes was "aggrieved" within the meaning of the Act:

1. The trial court could have held, as the City urged, that as a matter of law Rhodes was not aggrieved;
2. The trial court could have held, as Rhodes urged, that as a matter of law Rhodes was aggrieved (Admittedly, in the common situation, a citizen is really going to want to review a record and naturally will be aggrieved under the Act – it will hardly be an issue.); or
3. The trial court could have held – as it did – that there were genuine issues of material fact about whether Rhodes was actually aggrieved: That is, did he really want to review the content of the records or did he merely want the forfeiture.

The trial court determined that based on the facts before it that a jury should make the determination about whether Rhodes actually wanted to review the content of the records. The jury unanimously believed that Rhodes did not want the records at all.

This Court should find that a trial court can hold a jury trial in circumstances where there is a disputed question about whether a person seeking a forfeiture only wanted a forfeiture and did not want to review the content of the records. In this case, the trial court did just that. The court correctly held a jury trial and the fifth district erred by reversing the trial court's summary judgment determination.

Moreover, as this Court has expressly held in *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 1994-Ohio-362, 642 N.E.2d 615, the appellate court was not permitted to reverse the trial court's summary judgment ruling after a full trial on the merits.

- b. This Court should hold that the Fifth District could not rule on the trial court's summary judgment ruling because the jury trial rendered moot any purported error.**

This Court has expressly held that, “any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made.” *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 1994-Ohio-362, 642 N.E.2d 615 at syllabus.

The jury determined Rhodes was not aggrieved. Rhodes' assignment of error in the fifth district was moot or otherwise harmless. In *Whittington*, the Court reasoned even if there was an error at the summary judgment stage, the greater injustice would be to the party deprived of the jury verdict because “[o]therwise, a decision based on less evidence would prevail over a verdict reached on more evidence and judgment would be taken away from the victor and given to the loser despite the victor having the greater weight of evidence.” *Id.* at 157. The Court further explained that “if a motion for summary judgment is improperly denied the error is not reversible for the result becomes merged in the subsequent trial.” *Id.* at 157 citing *Home Indemn. Co. v. Reynolds & Co.* (1962), 38 Ill.App.2d 187, 186 N.E.2d 547. The Court concluded that “even if an examination of the affidavits, counter-affidavits, deposition and exhibits were to lead to the conclusion that either one or both of [the summary judgment] motions should have been granted it would avail nothing, for the error cannot be reviewed.” *Id.*

The fifth district erred because Rhodes' assignment of error challenged the denial of summary judgment after a jury trial on the same issue. The trial court's order denying summary judgment merged with the jury's ultimate verdict. Rhodes' appeal of that order was moot. Consequently, this Court could reverse on that ground.

B. Amicus Curiae Edwin Davila's brief provides nothing substantial to the issues that must be decided in this case.

Like Rhodes, Davila focuses on the issue of motive. But, again, the City does not contest the basic law that motive is irrelevant. No one disputes that a person can request public records for any reason, even if someone believes that person's motive is bad, good, serious or frivolous. But, the person must *actually want to review the content* of the record to be aggrieved and entitled to the forfeiture. Also like Rhodes, Davila argues for pages that the reel-to-reel tapes were recorded over. (Davila's Br. at 7-9.) But, the City has never contested that the records no longer exist and that the City did, in fact, overwrite the tapes to make room for new recordings, just like every other department did as a matter of course. This, of course, as the jury found, is how the machines were designed to work. Rhodes knew this when he sent his request. That is precisely why he requested these specific records.

While Davila argues that the forfeiture provision is ambiguous (Davila's Br. at 10) the express text of that provision simply requires Rhodes to establish that he is an "aggrieved person," a requirement that Davila wants to ignore. The City in its merits brief establishes that the plain meaning of the term aggrieved requires the reversal of the fifth district. (See City's Merits Br. at 8-16.) Davila argues that the policy of protecting public records somehow means that "aggrieved" should be stripped of all meaning to allow every person to be automatically entitled to a civil forfeiture for merely requesting a destroyed public record, even if that person had no interest in the content of the destroyed record and only wanted the \$1,000-per-record forfeiture under R.C. 149.351(B)(2). (Davila's Br. at 15-18.)

If Davila's position is adopted, every citizen would be "aggrieved," and therefore every citizen would qualify for the \$1,000-per-record forfeiture, despite none of them having any interest in the content of the record. So, every person could – and many would – file suits against

municipalities for massive forfeitures. The Legislature's statutory intent is not served by allowing any person to collect multi-million-dollar forfeitures for records that person never wanted. Davila's interpretation of the forfeiture provision and the term aggrieved does not advance the intent or spirit of public records law. "In construing a statute, a court's paramount concern is the legislative intent in enacting the statute." *State v. S.R.* (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319. This get-rich-quick scheme is not the public policy behind the public records act and should be rejected by this Court.

The statutory, practical, and constitutional problems of Davila's position have been presented to this Court in the City's merits brief. Davila ignores the difficult issues posed by his strained interpretation of "aggrieved" from a statutory interpretation standpoint. He also ignores the absurdity that necessarily follows in the form of the limitless liability that raises serious constitutional concerns. Although courts are required to avoid interpretations that create absurd results or unconstitutional results, Davila only offers why he believes he is entitled to the forfeiture as rationale and casually disregards the problems associated with his novel claims.⁴

All agree that protecting access to public records is critically important. No one disputes that a person can request public records for any reason, even if there is, in the words of the fifth district, "blackness of motive" and that those records would be produced. But, the person must *actually want to review the content* of the record to be aggrieved if they were destroyed without proper scheduling approval. In fact the Ohio Historical Society only recommends a 30 day

⁴ For instance, Davila does not explain how or why absurd results would not necessarily follow his interpretation of aggrieved. For further instance, Davila casually tries to avoid the constitutional problems observed by Justice Lanzinger in *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811 at ¶¶52-53 (J. Lanzinger, dissenting), by simply stating that the "Eighth Amendment applies only to criminal cases." (Davila Br. at 20.) But, the United States Supreme Court has expressly held that the Eighth Amendment "excessive fines" clause applies to civil forfeitures. *Austin v. United States*, (1993) 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed. 2d 488.

retention for these records. See Ohio Municipal Records Manual at <http://www.ohiohistory.org/resource/lgr/Munimanual2.2001.pdf>, last visited February 3, 2011. This case and cases like it have nothing to do with protecting public records or the requesting party's motive for wanting the records themselves. The case has to do with whether the requesting party wanted the records at all. A jury determined that Rhodes did not want those records. The evidence was quite overwhelming that Rhodes had no interest in reviewing the content of these tapes.

III. CONCLUSION

This Court should reverse the fifth district court of appeals and re-instate the jury's verdict in favor of the City of New Philadelphia.

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.

JOHN T. MCCLANDRICH (0021494)

FRANK H. SCIALDONE (0075179)

100 Franklin's Row

34305 Solon Road

Cleveland, OH 44139

(440) 248-7906

(440) 248-8861 Fax

Email: jmclandrich@mrrlaw.com

fscialdone@mrrlaw.com

Counsel for Defendant/Appellant
City of New Philadelphia

CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of City of New Philadelphia has been sent by regular

U.S. Mail, postage prepaid, on February 3, 2011 to the following:

William Walker, Jr., Esq.
P.O. Box 192
Massillon, OH 44648-0192

Counsel for Plaintiff/Appellee

Craig T. Conley, Esq.
604 Huntington Plaza
220 Market Ave., South
Canton, OH 44702

Counsel for Plaintiff/Appellee

Edwin Davila
15 Federal Avenue, NE
Massillon, OH 44646

Pro Se Amicus Curiae

Anthony E. Brown, Esq.
Baker, Dublikar, Beck, Wiley & Mathews
400 South Main Street
North Canton, OH 44720

Counsel for *Amicus Curiae*
Ohio Association of Civil Trial Attorneys

Stephen L. Byron, Esq.
Rebecca K. Schaltenbrand, Esq.
Schottenstein, Zox & Dunn Co., L.P.A.
4230 State Route 306, Suite 240
Willoughby, OH 44094

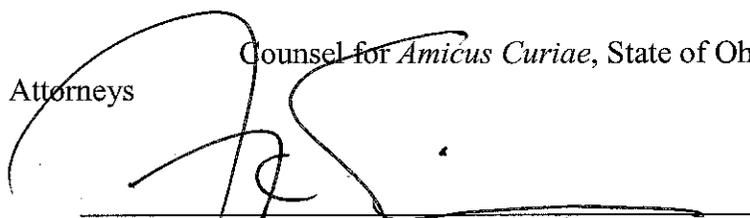
John Gotherman, Esq.
Ohio Municipal League
175 S. Third Street, #510
Columbus, OH 43215-7100

Stephen J. Smith, Esq.
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215

Counsel for Amicus Curiae
The Ohio Municipal League

Richard A. Cordray, Attorney General
Alexandra T. Schimmer, Esq.
Laura Eddleman Heim, Esq.
30 East Broad Street, 17th Floor
Columbus, OH 43215

Counsel for *Amicus Curiae*, State of Ohio



JOHN T. MCLANDRICH (0021494)
FRANK H. SCIALDONE (0075179)

Counsel for Defendant/Appellant
City of New Philadelphia