ORIGINAL

IN THE SUPREME COURT OF OHIO

TIMOTHY T. RHODES Plaintiff/Appellee vs. THE CITY OF NEW PHILADELPHIA Defendant/Appellant.	Case No. 10-0963 (On Appeal from the Fifth District Court of Appeals for Tuscarawas County, Ohio No. 2009-AP-02-0013.)

MOTION FOR RECONSIDERATION ON BEHALF OF PLAINTIFF-APPELLEE TIMOTHY T. RHODES

JOHN T. MCLANDRICH (0021494)
FRANK H. SCIALDONE (0075179)
Mazanec, Raskin, Ryder & Keller Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
440.248.7906
440.248.8861 [Fax]
Email: jmclandrich@mrrklaw.com
fscialdone@mrrklaw.com

Counsel for Defendant/Appellant The City of New Philadelphia

ANTHONY E. BROWN (0070026)
Baker, Dublikar, Beck, Wiley & Matthews
400 South Main Street
North Canton, Ohio 44720
330.499.6000
330.499.6423 [Fax]

CRAIG T. CONLEY (0021585)
**Counsel of Record*
604 Huntington Plaza
220 Market Ave., South
Canton, Ohio 44702
330.453.1900
330.453.2170 [Fax]

WILLIAM E. WALKER, JR. (0038703)
P.O. Box 192
Massillon, Ohio 44648-0192
330.327.1437
Email: walker@wmwalkerlaw.com

Counsel for Plaintiff/Appellee Timothy T. Rhodes

STEPHEN L. BYRON (0055657)
Rebecca K. Schaltenbrand (0064817)
Schottenstein, Zox, & Dunn Co., LPA
4230 State Route 306 240
Willoughby, Ohio 44094
216.621.5107

FILED
JUL 18 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys

RICHARD A. CORDRAY (0038034)
Attorney General of Ohio

ALEXANDRA T. SCHIMMER (0075732)
Chief Deputy Solicitor General
Counsel of Record
LAURA EDDLEMAN HEIM (0084677)
Deputy Solicitor
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215
614.466.8980
614.466.5087 [Fax]

Counsel for Amicus Curiae State of Ohio

EDWIN DAVILA
15 Federal Avenue NE
Massillon, Ohio 44646
330.412.2605
Email: davilaed70@aol.com

Pro Se Amicus Curiae

JOHN GOTHERMAN (0000504)
Ohio Municipal League
175 South Third Street, #510
Columbus, Ohio 43215-7100
614.221.4349

STEPHEN J. SMITH
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, Ohio 43215
614.462.2308

Counsel for Amicus Curiae The Ohio Municipal League

TABLE OF CONTENTS

I. Introduction 1

II. Argument 1

A. Adjudications must not rely upon supposition and innuendo but must be based instead upon competent and credible evidence that is contained within the trial court's record. 1

B. A ceremonial request must not be a prerequisite to taking action that protects our records from unlawful destruction. 6

C. The term "aggrieved" cannot be construed to have different meanings within the same statute that deals with the same subject matter. 7

III. Conclusion 9

I. INTRODUCTION

Pursuant to S.Ct. Prac. R. 11.2, Plaintiff-Appellee, Timothy T. Rhodes ("Rhodes"), hereby respectfully requests this Court to reconsider its decision rendered in the above-referenced matter. Rhodes' reasons are more fully set forth below. However, briefly stated those reasons are that a court's decisions should be fair and should do justice.

First, to be fair a decision must be based upon evidence that is in the record. Here, the record is devoid of facts supporting the proposition that Rhodes did not want the records he requested.

Second, to be just a decision must be consistent with precedent. Although this Court referred to earlier rulings in the instant opinion, it appears to have overlooked *Keller v. Columbus*, 100 Ohio St.3d 192 (2003) where the court recognized the existence of a viable cause of action for injunctive relief – without requiring a ceremonial request for access.

Third, words in a statute do not exist in a vacuum. When interpreting a statute, Courts must seek to effectuate the legislative intent. The purpose of R.C. 149.351 is to protect our records so that they will be available to a citizen's request. Yet, the decision at issue has created two standards for the term "aggrieved" that impedes the protection of our records.

II. ARGUMENT

A. Adjudications must not rely upon supposition and innuendo but must be based instead upon competent and credible evidence that is contained within the trial court's record.

Decisions must be based upon competent and credible evidence contained within the record, and not simply premised upon innuendo and supposition. During trial, Rhodes testified that he wanted the records he requested, and he even described the uses he intended for them. Respondents did not offer any evidence to rebut Rhodes' testimony; instead they made oblique allegations to some other request concerning a different type of record in another city.

Those allegations were not competent and credible evidence that rebutted Rhodes' testimony that he wanted the records he requested – but a red herring designed to provoke an emotional response. In light of this Court's decision, it is clear that Respondents had a duty to rebut the presumption that Rhodes wanted the records with competent and credible evidence.

Yet, the trial court's record is devoid of any such evidence as the following trial transcript excerpt beginning on page 37 at line 7 demonstrates concerning a different public records request Rhodes made to Dover, Ohio for a different type of record:

Question:	And in that sentence, you say, and I'll just read it, if you don't have the approved forms and instruction, I would like to request copies of the following public records, and then you delineate some records that you would like, correct?
Answer:	Yes.
Question:	All right. And so, you're only asking for the records if in fact you knew they didn't have the proper destruction status?
Answer:	No.
Question:	Well, that's what it says there, doesn't it?
Answer:	What I was doing, when I was originally, there was an article

in the paper that I happened, I was doing this other research that I saw they were talking about the employment records for the young people that were taking jobs and I wrote the letter asking about information about that and then I got these records back that weren't stamped so I asked them if they had the approved copies that were stamped.

Question: Those are the record retention schedules that we see on these records?

Answer: Yes, right.

Question: But then your sentence says if you don't have the approved forms, right, if you do not have the approved forms, I would like to request copies of the following public records, so you only really requested the records that they don't have the retention forms, correct?

Answer: No, that's –

Question: That's what it says.

Answer: I know what it says but it doesn't sound right to me. That's what it sounds like because then they sent me the records (inaudible).

Obviously, this line of questioning was not even remotely relevant to the request Rhodes' made to the city of New Philadelphia for 9-1-1 recordings. Yet, it was the only argument Respondents offered to rebut Rhodes' testimony wherein he described his reason for seeking the 9-1-1 recordings beginning on page 32 at line 6:

Question: What was it that you were looking to learn from these tapes?

Answer: Well, I was looking to see how the departments worked and how they handled dispatch calls.

Question: Au-hau. And so you were going to listen to the tapes, is that what you're contending?

Answer: That's what my original contention was, yes sir.

On page 34 at line 19 Rhodes further explained:

Question: All right. And so, is it your contention that you were just going to do some sample listening of the tapes?

Answer: Yes.

Question: And what was it that you were going to retrieve when you did that?

Answer: Well, two things I was going to look for, I was just going to go to the newspapers and look for specific incidents involved dispatches and then I was going to do the changeover at the time of the twelve o'clock hour where they change, changeover to see if there was any like missed calls or anything at that particular time.

Again, Respondents never presented any evidence to refute this testimony and the trial court record is completely devoid of any such evidence.

Evid. R. 101 states "[t]he purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined." Its clear, the purpose of this rule is to establish a spirit within which the rules should be applied and construed so that an orderly pursuit of justice is available to every person seeking a meaningful day in court.

Unfortunately, the trial court's record does not support this Court's finding because there is no evidence to rebut Rhodes' sworn testimony that he wanted the records. Thus, it is improper and manifestly unfair for this Court to accept Respondents' supposition and innuendo as adequate rebuttal. To do so would invite an excursion into chaos in Ohio courts, instead of an orderly pursuit of the truth.

It is well-settled that this Court is confined to the record made in a trial court. *Stanley v. Alsenas*, 2002-Ohio-5341 at fn. 15. Thus, since there was no evidence offered in the trial court to rebut Rhodes' testimony, this Court must ignore Respondents allegations to the contrary.

Along this same line, it is noteworthy that the jury did not find that Rhodes did not want the records – because they were not instructed to consider that fact. And, the jury was not instructed that a records requester must first be denied access to be eligible for the award of a statutory forfeiture pursuant to R.C. 149.351(B)(2). Accordingly, this matter should be remanded for a new trial with that question posed to a trier of fact.

On remand, an instruction should clearly set forth that Respondents bear the burden of rebutting the presumption of proper purpose. And, that they cannot rely on innuendo and supposition to defeat that presumption; but must present competent credible evidence.

A remand is also needed because the instant ruling has created an affirmative defense that is required by due process to be raised at the pleading stage of the proceedings. *Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 20 (1998).

The Ohio Constitution guarantees a meaningful day in court by its command that every person shall have justice administered by due course of law.[1] In this instance, this Court created a burden upon the municipality to present evidence that Rhodes did not want to see the records and Rhodes should then have been afforded the opportunity to bring forward evidence that he wanted to see the records. This activity did not occur in the trial court because the "rebuttable presumption" created by this Court did not exist at that time.

[1] Ohio Constitution, Article I, Section 16.

Rhodes therefore must be given an opportunity to refute that affirmative defense. Otherwise, Rhodes would be denied his meaningful day in court.

B. A ceremonial request must not be a prerequisite to taking action that protects our records from unlawful destruction.

R.C. 149.351 is the only statute that protects our records and ensures their availability to our citizens. Standing to invoke the "prevent and deter" provisions of that statute cannot be tied to the making of a ceremonial request without defeating the legislative intent. The reason is self-evident; citizens could never prevent unlawful destruction because by definition "threatened destruction" has not occurred. Thus, the making of a ceremonial request could not confer standing on anyone to prevent destruction – because the records still exist and can be made responsive to the request. As a matter of fact, it appears this Court has already recognized this circumstance in *Keller v. Columbus*, 100 Ohio St.3d 192 (2003).

Keller was a public defender who practiced in the Southern District of Ohio. He discovered that the bargaining unit for the Columbus police officers was using collective bargaining in an attempt to circumvent the public records act. Upon learning that a new bargained for procedure unlawfully threatened records, Keller brought a R.C. 149.351 action to thwart that threat.

It's fortunate that Keller was not required to make a ceremonial request for access as a prerequisite to seeking injunctive relief pursuant to R.C. 149.351(B)(1); because destruction had not yet occurred and it is unlikely that Keller could even identify which records would later be destroyed. All Keller knew was that the procedure threatened

unlawful destruction. Still, it appears the *Keller Court* recognized that a R.C. 149.351(B)(1) cause of action seeking injunctive relief is viable to protect records from unlawful destruction – even without the formality of making request.

This Court should likewise hold that the making of a formal request for access is not required to protect our records. Otherwise, Ohio courts will be left with little guidance. After all, this Court has long advocated that the public records act should be broadly read and loosely construed to effectuate the legislative intent of preserving citizen access to our public records.

Rhodes therefore respectfully requests this Court to reconsider the instant decision to prevent the ceremony of making of a formal request from becoming a prerequisite and an obstacle to the protection of our records.

C. The term "aggrieved" cannot be construed to have different meanings within the same statute that deals with the same subject matter.

This Court's interpretation of the term "aggrieved" has not only created an internal inconsistency within the public records act; but violates the R.C. 1.49(D) command that statutes relating to the same matter or subject are in *pari materia* and should be read together.

R.C. 149.351 prohibits the actual and threatened destruction of our records. Thus, in subsection 149.351(B) it both prevents and deters unlawful destruction by permitting any person who is aggrieved to commence a cause of action for injunctive relief, forfeiture, or both.

The R.C. 149.351(B) terms "aggrieved" and "threat" are not used in a vacuum but used to both prevent and deter unlawful destruction. The terms are used to punish violations that have occurred, and also to prevent violations that are threatened to occur. Accordingly to this Court's long-standing jurisprudence, these terms must be broadly read and loosely construed to effectuate the legislative intent of protecting our records from unlawful destruction. See, *D.A.B.E. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250; 2002-Ohio-4172 at ¶20; citing to R.C. 1.49(D).

Requiring the ceremony of making a formal request as a prerequisite to preventing unlawful destruction would defeat this legislative intent. Because, in practice the making of a request for threatened records could not convey standing to enjoin that destruction – because the records by definition still exist and could be made responsive to the request. However, the threatened destruction could then proceed as planned.

Rhodes respectfully suggests that it is the citizens' "right of access" that needs to be protected. In his view, a person becomes aggrieved when his "right of access" is unlawfully diminished or threatened to be diminished. Even though the person may not know which records he will want in the future.

Hence, a person such as Keller becomes aggrieved and has standing to preserve the his right of access even when he cannot pinpoint precisely which records are being threatened or which records he will want in the future. The fact remains, those records will not exist in the future if they cannot be protected today. And, the ceremonial formality of making a public records request does not advance the cause of protecting our "right of access".

Tellingly, members of this Court have likewise acknowledged that the theory of any public disclosure law is not that an individual is benefited but that the public as a whole is the beneficiary of the government's business being kept open to the public. When a public office unlawfully destroys or threatens the records entrusted to them, some individual must be the catalyst to enforce the law. If the obstacles are too high – then those who seek to enforce the law on behalf of all of us, then truly will be 'volunteers' in every sense of the word and will find themselves burdened with heavy expenses. In that event there will be little incentive to seek enforcement of the law which in effect defeats the very purpose of the law and allows government to slip back within the shadows. See generally, *State ex rel. The Warren Newspapers Inc., v. Hutson*, 70 Ohio St.3d 619, concurring opinion.

In sum, Rhodes argues that the language used in R.C. 149.351(B) was placed in the law so that a speedy remedy would be available to both prevent and deter unlawful destruction. Imposing a requirement that a requester must first make a ceremonious request for access before seeking relief would defeat the very purpose of the statute and serve to protect little.

III. CONCLUSION

It is for these reasons, that Rhodes respectfully requests this Court to reconsider the instant decision so that consistent authority is rendered to guide all Ohio courts in their quest to be fair and just.

Respectfully submitted,

By: _____

William E. Walker, Jr. (#0038703)
P.O. Box 192
Massillon, Ohio 44648-0192
330.327.1437
Email: william.walker@gmx.com

Counsel for Plaintiff-Appellee
Timothy T. Rhodes

CERTIFICATE OF SERVICE.

I hereby certify that a true and accurate copy of the foregoing was served this 18th day of July, 2011 upon the following:

JOHN T. MCLANDRICH (0021494)
FRANK H. SCIALDONE (0075179)
Mazanec, Raskin, Ryder & Keller Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
440.248.7906
440.248.8861 [Fax]
Email: jmclandrich@mrrklaw.com
fscialdone@mrrklaw.com

Counsel for Defendant/Appellant
The City of New Philadelphia

ANTHONY E. BROWN (0070026)
Baker, Dublikar, Beck, Wiley & Matthews
400 South Main Street
North Canton, Ohio 44720
330.499.6000
330.499.6423 [Fax]

Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys

STEPHEN L. BYRON (0055657)
Rebecca K. Schaltenbrand (0064817)
Schottenstein, Zox, & Dunn Co., LPA
4230 State Route 306 240
Willoughby, Ohio 44094
216.621.5107

JOHN GOTHERMAN (0000504)
Ohio Municipal League
175 South Third Street, #510
Columbus, Ohio 43215-7100
614.221.4349

STEPHEN J. SMITH
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, Ohio 43215
614.462.2308

Counsel for Amicus Curiae
The Ohio Municipal League

RICHARD A. CORDRAY (0038034)
Attorney General of Ohio

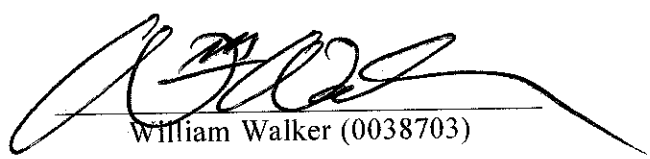
ALEXANDRA T. SCHIMMER (0075732)
Chief Deputy Solicitor General
Counsel of Record

LAURA EDDLEMAN HEIM (0084677)
Deputy Solicitor
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215
614.466.8980
614.466.5087 [Fax]

Counsel for Amicus Curiae
State of Ohio

EDWIN DAVILA
15 Federal Avenue NE
Massillon, Ohio 44646
330.412.2605
Email: davilaed70@aol.com

Pro Se Amicus Curiae



William Walker (0038703)