
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

**DEFENDANT/APPELLANT CITY OF NEW PHILADELPHIA'S BRIEF IN
OPPOSITION TO PLAINTIFF/APPELLEE'S MOTION FOR RECONSIDERATION**

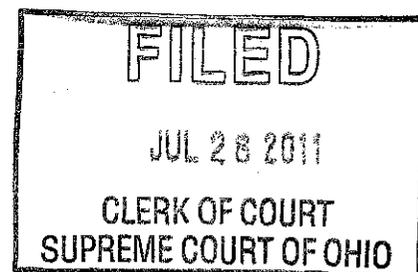
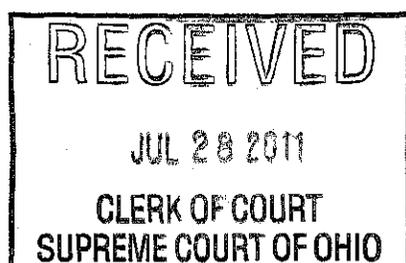
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TABLE OF CONTENTS

I. INTRODUCTION1

II. LAW AND ARGUMENT1

 A. The jury had overwhelming evidence that Rhodes did not want the records
 but only the forfeiture. 1

 B. Rhodes' additional arguments are based on issues never raised and that
 would require this Court to render an advisory opinion. 5

 C. This Court's decision was consistent with precedent. 6

 D. This Court's decision was consistent with Legislative intent. 7

III. CONCLUSION8

CERTIFICATE OF SERVICE9

I. INTRODUCTION

Ohio courts have consistently held that a motion for reconsideration is “a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law.” *State v. Owens* (1996), 112 Ohio App. 3d 334, 336. Consequently, Rhodes must demonstrate more than the fact that he “simply disagrees with the conclusions reached and the logic used by an appellate court.” *State v. Owens* (1996), 112 Ohio App. 3d 334, 336.

Stripped to its essence, Rhodes merely disagrees with this Court's unanimous decision. Far from a "miscarriage of justice," this Court made the eminently reasonable decision that a person claiming a forfeiture must actually want the records as opposed to the non-existence of the records. This Court held that "a party is not aggrieved by the destruction of a record when the party's objective in requesting the record is not to obtain the record but to seek a forfeiture for the wrongful destruction of the record." *Rhodes v. City of New Philadelphia*, -- N.E.2d ----, 2011-Ohio-3279 ¶1. Rhodes does not demonstrate that the Court failed to consider any clear error of law or fact. Rhodes mere disagreement with the decision is not enough to warrant reconsideration. This Court must deny Rhodes' request.

II. LAW AND ARGUMENT

A. **The jury had overwhelming evidence that Rhodes did not want the records but only the forfeiture.**

This Court explained that "When a party requests access to public records with the specific desire for access to be denied, it cannot be said that the party is using the request in order to access public records; he is only feigning that intent. Here, Rhodes feigned his intent to access public records when his actual intent was to seek forfeiture awards. Consequently, the jury

correctly concluded that Rhodes was not aggrieved by the destruction of the records he had requested." *Rhodes*, ¶ 27.

The record supports this conclusion. Nevertheless, Rhodes claims that the jury did not have sufficient facts to conclude that Rhodes did not really want to review the content of the records he requested. (Mot. for Reconsideration at 1.) Of course, this is wrong.

The jury simply did not believe he wanted to review the content of the reel-to-reel tapes. The evidence supporting the trial court's verdict is overwhelming. Rhodes told the jury that his "original contention" was to listen to the antiquated tapes. But, Rhodes made clear to the jury he did not have any way to listen to those tapes. (Tr. at 32.) He did not have a machine. He did not know of anyone that had a machine. (*Id.*)

Even if he had a reel-to-reel machine, Rhodes tried to obtain thousands of hours of un-indexed tape from numerous municipalities that he could not possibly ever review. Just narrowing Rhodes initial request to the City of New Philadelphia involved 20 years of reel-to-reel tapes. The reel-to-reel tapes Rhodes had requested were 24 hours in length. If Rhodes were to listen to one tape 8 hours a day, it would take him 3 days to finish reviewing a single tape. Accordingly, if Rhodes had received a reel-to-reel tape for every day the City had employed the use of such a tape to record dispatch calls during the time period designated in Rhodes' public records requests—which would cover approximately 7 years (1989 to 1995)—it would take Rhodes approximately 21 years to review each reel-to-reel tape, and approximately 42 years if Rhodes reviewed the backup tapes used on New Philadelphia Police Department's reel-to-reel tape recording system. Rhodes' claim becomes even more absurd if one imagines Rhodes having received 20 years (1975 to 1995) of reel-to-reel dispatch tapes from each of the seven political subdivisions Rhodes sent public records requests to.

The jury knew that Rhodes had no interest in reviewing the reel-to-reel tapes. In fact, he only wanted to review the tapes from another municipality if the municipality did not have the tapes. The jury heard that Rhodes on November 13, 2007 wrote to the City of Dover to find out whether the Ohio Historical Society approved that city's record retention schedule. In his letter, Rhodes requests the public records only if the City of Dover did not have those records. (Tr. at 36-37.) He stated "if you **don't** have the approved forms and instruction, I would like to request copies of the following public records ... [emphasis added]" (*Id.* at 37.) The Ohio Historical Society did approve the City of Dover's record retention schedules. (*Id.* at 36.)

The City of Medina did, in fact, have some of the tapes Rhodes purportedly wanted. (Tr. at 39.) Notwithstanding their existence and availability, Rhodes had no interest in purchasing or listening to those tapes. (Tr. 39-40.) The jury heard testimony that Rhodes did not want to and never did review the content of those tapes:

Q: Okay. And so as we sit here today, you never listened to any dispatch tapes anywhere, correct?

A: No, sir.

Q: And you never retrieved any data from any dispatch tapes anywhere, correct?

A: Other than Medina, the information was written in boxes.

Q: But I'm talking about material that actually would be recorded on a tape itself?

A: No.

(Tr. at 39, 40; lines 25-8.)

The jury also heard that while he had no interest in reviewing the content of the tapes, Rhodes had an enthusiastic interest in determining whether the public entities that provided their records retention schedules were actually filed with the Ohio Historical Society. (Tr. at 42.) The jury heard that Rhodes double checked every one of the public entities' paperwork:

Q: So essentially for all the cities that you made a request to, you went down to the Ohio Historical Society to verify that their record retention schedules and destruction schedules had been filed and approved?

A: Yes

(Tr. at 42.) This is not surprising because if they did not have proper authorization from the Ohio Historical Society, he would be able to recover the forfeiture.

Rhodes targeted numerous smaller public entities throughout Ohio with numerous public records requests for these tapes. (Tr. 30.) His explanation for doing so was contradictory. Rhodes testimony seriously called into question whether he really wanted to review the records at all. While he first explained that he was “looking to see how the departments worked and how they handled dispatch calls” for public entities (Tr. at 32), Rhodes later testified that “he wanted to see” “hiring practices, [of] the part timers” working at public entities. (Tr. at 40.) The jury also heard Rhodes explanation contained in his letter to one of the entities that he was really researching records disposal, not how departments handled dispatch calls. (Tr. 41-42.) As to why he wanted the retention schedules, Rhodes’ explanation to the jury was confusing and unintelligible. (Tr. at 30-31.)

The jury saw through Rhodes' scheme and the evidence was quite overwhelming that Rhodes had no interest in reviewing the content of these tapes. Fundamental to our justice system is the collective wisdom of the jury that determines credibility. And, the law is well established that appellate courts “must be ‘guided by a presumption that the findings of the trier-of-fact were indeed correct.’” *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80. Here, the jury took on the task of determining whether Rhodes really wanted to review the tapes. After hearing testimony and determining Rhodes' credibility, the jury unanimously found that Rhodes did not want to review these records.

B. Rhodes' additional arguments are based on issues never raised and that would require this Court to render an advisory opinion.

Rhodes repeatedly states that he should not have to make a "ceremonial request" to take advantage of the section of R.C. 149.351(B)(1) that authorizes a party to request an injunction to prevent the destruction of records. (Mot. for Reconsideration at 6-9.)

But, this case has nothing to do with an injunction and it never has.

The parties never disputed that the reel-to-reel tapes were taped over many years ago. An injunction to protect those records from destruction was never at issue. Indeed, it could not be an issue because the records had not existed for 15-plus years. Even if an injunction was an issue, Rhodes would have waived that issue by failing to raise it. This Court has expressly held that it will not review an argument raised for the "first time in this court," finding it "well settled that [a] party who fails to raise an argument in the court below waives his or her right to raise it here." *Niskanen v. Giant Eagle, Inc.* (2009), 122 Ohio St.3d 486, 2009-Ohio-3626 at ¶34, citing *State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d 276, 278. The waiver rule is "deeply embedded" in notions of the "fair administration of justice" and is designed to "afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause" as well as to prevent a party from sitting "idly by until he or she loses on one ground only to avail himself or herself of another on appeal." *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 81. Rhodes waived this issue.

Furthermore, at best, Rhodes asks this Court to render an advisory decision about an issue that was not before the Court. But, established law prohibits courts from issuing advisory decisions. This Court "will not issue advisory opinions ..." *State ex rel. Barletta v. Fersch*, 99 Ohio St.3d 295, 2003-Ohio-3629, ¶ 22. The Court has explained that "declining to address a legal issue not squarely before us is consistent with our reluctance to issue advisory opinions,

[and] the principle of judicial restraint ..." *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, ¶ 26, fn. 2, quoting *State ex rel. Barletta v. Fersch*, 99 Ohio St.3d 295, 2003-Ohio-3629, ¶ 22 ("we will not issue advisory opinions, ..."); see *PDK Laboratories, Inc. v. United States Drug Enforcement Admin.* (C.A.D.C.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in judgment) (recognizing the "cardinal principle of judicial restraint-if it is not necessary to decide more, it is necessary not to decide more").

C. This Court's decision was consistent with precedent.

Rhodes also argues that this Court issued a decision that is not "consistent with precedent." But, with regard to the relevant issue in this case, this Court decided the case in accord with relevant prior precedent. Specifically, as demonstrated in the passage cited below, this Court expressly considered the *relevant* precedent of *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244 and *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365:

The presumption, however, is that a request for public records is made in order to access the records. This presumption is evident in other cases in which this court has construed associated terms of the public-records act. See, e.g., *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811; *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208.

{¶ 25} In *Morgan*, this court held that the relator was entitled to access public records that related to her discharge from employment with the city of New Lexington due to her alleged falsification of official records and misappropriation of funds. Interpreting the phrase "any person," as used in R.C. 149.43, we held that neither the moral quality nor the purpose of the requester is relevant to the validity of her public-records request. *Id.* at ¶ 54. Even though the records related to her alleged malfeasance, and even though she may very well have wanted to use the records for a bad purpose, it is clear that the relator actually wanted the records. Likewise, in *Kish*, it is clear that the respondents actually wanted the requested records, which documented their unused compensatory time, so they could use them in their suit against their previous employer, the city of Akron. *Kish* at ¶ 6-8.

{¶ 26} Like the relator in Morgan, Rhodes was under no obligation to explain his reason for wanting the public records in order for his request to be valid. What distinguishes Rhodes's case from cases such as Morgan and Kish is the simple fact that Rhodes did not actually want the records.

Rhodes' claim that this Court ignored previous precedent is simply wrong.

D. This Court's decision was consistent with Legislative intent.

In a similar vein, Rhodes argues that this Court failed to "effectuate the legislative intent." (Mot. for Reconsideration at 1.) This is wrong. This Court carefully analyzed the Legislature's intent:

{¶ 21} The broad language used in R.C. 149.43 manifests the General Assembly's intent to jealously protect the right of the people to access public records. We are acutely aware of the importance of the right provided by the act and the vulnerability of that right when the records are in the hands of public officials who are reluctant to release them. For this reason, we stress that public offices are obligated to honor public-record requests regardless of the requester's reasons for or objectives in requesting the records. Allowing the genuineness of a person's request to be within the purview of the public office would invite recalcitrance and would not promote the purpose of the act.

{¶ 22} The duty imposed on public offices by R.C. 149.43(B) may sometimes result in wasted public funds because it obligates public offices to promptly reply to all requests, even frivolous requests. However, the General Assembly has balanced the public offices' interest in efficiency and fiscal integrity against the people's right to monitor their government, Kish, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811 at ¶ 44, and has chosen to allow the risk of wasted funds. That choice is reflected in the expansiveness of the phrase "any person" in R.C. 149.43(B).

(Rhodes at ¶¶ 21-22.)

It is impossible to say that this Court did not carefully consider the Legislature's intent on the relevant issues presented in this case:

{¶ 23} The same choice is not reflected in R.C. 149.351, as the General Assembly did not make the enforcement mechanism of forfeiture available to "any person." Forfeiture is available only to a person who has been "aggrieved" by the public office's violation. R.C. 149.351(B). We must give effect to every term in a statute and avoid a construction that would render any provision meaningless, inoperative, or superfluous. Boley v. Goodyear Tire & Rubber Co., 125 Ohio

St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, at ¶ 21. We cannot ignore the General Assembly's use of the term "aggrieved," and we conclude that the General Assembly did not intend to impose a forfeiture when it can be proved that the requester's legal rights were not infringed, because the requester's only intent was to prove the nonexistence of the records.

Indeed, if there could be any dispute regarding Legislative intent, that dispute would have to end with the Legislature's recent amendments that sharply limit the abusive litigation that Rhodes was involved in by creating penalties for those who make public records requests that are merely pretext to create liability. See Am. Sub. H.B. 53. This Court properly considered the Legislative intent and issued a well-reasoned decision based on statutory law and precedent. Rhodes' effort to seek reconsideration is not based on any clear error of law or fact. Rather, Rhodes merely disagrees with this Court's unanimous decision. That is not enough to warrant reconsideration.

III. CONCLUSION

This Court must deny Rhodes' request for reconsideration.

Respectfully submitted,

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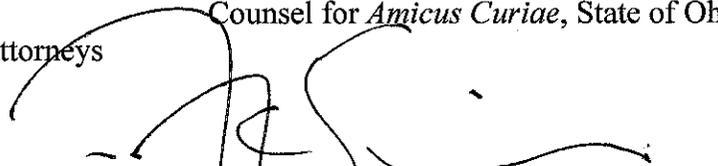
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