

ORIGINAL

Case No. 2012-0131

**Supreme Court
of the State of Ohio**

STATE OF OHIO *ex rel.*
KENT LANHAM,

Relator,

v.

DANNY R. BUBP,
Putative State Representative,

Respondent.

Original Action in Mandamus

FILED
JUN 27 2012
CLERK OF COURT
SUPREME COURT OF OHIO

**RELATOR'S MOTION FOR RECONSIDERATION
OF THE GRANTING OF THE RESPONDENT'S MOTION TO DISMISS**

Curt C. Hartman (0064242)
The Law Firm of Curt C. Hartman
3749 Fox Point Court
Amelia, OH 45102
(513) 752-8800
hartmanlawfirm@fuse.net

R. Michael DeWine (0009181)
Jeannine Lesperance (085765)
Renata Y. Staff (0086922)
Ohio Attorney General
30 East Broad Street
Columbus, OH 43215

Counsel for Relator

Counsel for Respondent Danny R. Bubp

RECEIVED
JUN 27 2012
CLERK OF COURT
SUPREME COURT OF OHIO

**SUPREME COURT
OF THE STATE OF OHIO**

STATE OF OHIO <i>ex rel.</i> KENT LANHAM,	:	Case No. 2012-0131
	:	
Relator,	:	
	:	
v.	:	
	:	
DANNY R. BUBP,	:	RELATOR’S MOTION FOR
Putative State Representative,	:	RECONSIDERATION OF THE
	:	GRANTING OF THE RESPONDENT’S
Respondent.	:	MOTION TO DISMISS
	:	

Comes now the State of Ohio, by and through Kent Lanham (“Relator”), and hereby moves for this Court to reconsider its dismissal without opinion of this original action brought due to the failure of the Respondent to respond affirmatively or negatively to the Relator’s public records request and, even after the commencement of this action, Respondent’s continued failure to produce all public records which were undisputedly responsive to the Relator’s public records request.

MEMORANDUM IN SUPPORT

On June 20, 2012, this Court dismissed *without opinion* this original action brought pursuant to the Public Records Act. This action was commenced on January 24, 2012, but only after Danny R. Bubb, a putative state representative, had failed to respond affirmatively or negatively to a public records request for over 2 months. Thus, the complaint in this action sought (i) the issuance of a writ of mandamus to compel production of all public records responsive to Relator’s request; (ii) the award of statutory damages, as the request was tendered in writing and via hand delivery; and (iii) the award of attorney fees, which in this case were mandatory pursuant to the provision of R.C. § 149.43(C)(2)(b)(i).

Only *after the commencement of this mandamus action* did Mr. Bulp finally respond to the Relator's public records request. Initially, the public information officer for the Ohio House of Representatives responded to the public records request on behalf of Mr. Bulp, transmitting *some* responsive records. Then, nearly a month later on February 21, 2012, the assistant attorney general, who was then representing Mr. Bulp in this action, transmitted additional responsive records; in that second transmittal, the assistant attorney general indicated for the first time that 31 pages of responsive records were being withheld under a claim of attorney client-privilege. Because in a mandamus action, a court "should consider the facts and conditions at the time it determines whether to issue a peremptory writ," *State ex rel. Portage Lakes Ed. Ass'n, OEA/NEA v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, 769 N.E.2d 853 ¶54, one issue in this case became whether Mr. Bulp could meet his burden of clearly demonstrating, with evidence, that the documents which he is refusing to produce (in their entirety) are protected from disclosure pursuant to attorney-client privilege; and the other two issues, *i.e.*, the award of statutory damages and attorney fees, also remained.

Yet, without the submission of any evidence or any argument as to the merits of the undisputedly responsive records which Mr. Bulp continued to withhold and refuse to produce, this Court without explanation or reason dismissed this action, including the claims for statutory damages and attorney fees. In dismissing all the claims without any opinion or explanation, this Court failed to apply the basic legal standard by which motions to dismiss are assessed, as well as ignoring well-established precedent that claims for statutory damages and attorney fees in

public records mandamus action survive even if a case is mooted by the production of records after the commencement of litigation.¹

1. This Court failed to apply any legal standard to the allegations in the Complaint.

Without any explanation for this Court's dismissal of this action, the parties are provided no guidance as to the legal significance of such disposition. This is especially true when consideration is given that "Civ. R. 12(B)(6) motions attack the sufficiency of the complaint and may not be used to summarily review the merits of a cause of action in mandamus." *State ex rel. Horwitz v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 65 Ohio St.3d 323, 325, 603 N.E.2d 1005, 1007 (1992). "A complaint in mandamus states a claim if it alleges the existence of the legal duty and the want of an adequate remedy at law with sufficient particularity so that the respondent is given reasonable notice of the claim asserted." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378, 381 (1992)(quoting *State ex rel. Alford v. Willoughby*, 58 Ohio St.2d 221, 224, 12 O.O.3d 229, 230, 390 N.E.2d 782, 785 (1979)). And the Complaint in this action clearly met that standard. In fact, in the motion to dismiss, Mr. Bulp did not even challenge the sufficiency of the allegations in the complaint. Thus, this Court's dismissal of this mandamus action is dumbfounding.

In this case, the complaint clearly alleged a sufficient claim pursuant to the Public Records Act – a written public records request was tendered via hand delivery and Mr. Bulp failed to respond affirmatively or negatively to the request for over 2 months. It was only after the passage of over 2 months did Relator finally commence this action seeking, *inter alia*, the issuance of a writ of mandamus. Dismissal of a complaint for the issuance of a writ of

¹ Of course, Mr. Bulp's continual refusal to produce *all* public records responsive to the Relator's request does not moot the claim for the issuance of a writ of mandamus.

mandamus is warranted only when it appears beyond doubt, after presuming the truth of all material factual allegations of the complaint and making all reasonable inferences in the relator's favor, that he or she is not entitled to the requested extraordinary relief in mandamus. *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 786 N.E.2d 1289, 2003-Ohio-2074 ¶11. In this case, that standard has not been met, so dismissal was clearly unwarranted.

In fact, in a companion case, *State ex rel Lanham v. DeWine*, Case No. 2012-203, in which the Relator sought comparable public records from the Ohio Attorney General, when confronted with a nearly identical motion to dismiss, this Court issued an alternative writ. *06/20/2011 Case Announcements*, 2012-Ohio-2729. In the *DeWine* case, the Attorney General actually responded to the subject public records request (unlike Mr. Bubp who ignored the request for over 2 months). And ultimately, the defense raised by the Attorney General is comparable to that asserted by Mr. Bubp, *i.e.*, the public records not produced are subject to attorney-client privilege. Yet, in the present case, the Court summarily dismissed the entire action without any explanation. When contrasted to this Court's resolution of the motion to dismiss in *DeWine* case, the summary disposition of this entire case lacks any legal justification.

Furthermore, in dismissing this case without any explanation or reason therefor, the Court has simply left in limbo the status of the public records at issue and which Mr. Bubp is continuing to withhold. “[A] motion to dismiss for failure to state a claim . . . is a procedural tool testing the sufficiency of the complaint. . . . [A] dismissal for failure to state a claim is *without prejudice* except in those cases where the claim cannot be pleaded in any other way.” *Fletcher v. University Hosp. of Cleveland*, 120 Ohio St.3d 167, 897 N.E.2d 147, 2008-Ohio-5379 ¶17; *accord Plummer v. Hose*, 83 Ohio App3d. 392, 393, 614 N.E.2d 1145, 1146 (1993)(“[i]t is well settled that a Civ. R. 12(B)(6) dismissal is procedural in nature and not a

judgment on the merits of a case”); *Simpson v. Lakewood*, 2003-Ohio-4953 (“because no claim was stated, the dismissal obviously did not decide the merits of any claim. Accordingly, [plaintiff] is free to file an amended complaint and the trial court will then once again be confronted with the very lawsuit it so hastily dismissed”). Thus, instead of resolving this case on its merits based upon evidence, this Court’s summary dismissal simply invites the case being refilled.

2. This Court ignored the explicit language of the Public Records Act which, at a minimum, entitles Relator to an award of statutory damages and attorney fees.

The gist of the motion to dismiss was that this case had become moot, but only *after* the commencement of this action. While Mr. Bulp’s continued withholding of responsive records clearly does not moot the case, even if the case were somehow moot, case law clearly establishes that while the production of records *after* the production may moot the claim for a writ of mandamus, such a production does not moot a claim for statutory damages or attorney fees. *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St. 3d 165, 902 N.E.2d 976, 2009-Ohio-590 ¶18; *State ex rel. Pennington v. Gundler*, 75 Ohio St. 3d 171, 661 N.E.2d 1049 (1996); *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 918 N.E.2d 515, 2009-Ohio-5947. In this case, because Mr. Bulp “failed to respond affirmatively or negatively to the public records request,” the award of attorney is *mandatory* pursuant to the Public Records Act R.C. § 149.43(C)(2)(b)(i); *see State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 49-50, 914 N.E.2d 159, 166-67, 2009-Ohio-4149 ¶¶30 & 31 (with respect to the Public Records Act, referencing “the two instances requiring attorney-fee awards” one of which being “when there is no timely response to a public-records request”).

In fact, in *Ronan*, the First District dismissed the entire public records mandamus action after the requested records were produced but only after the commencement of the lawsuit. This

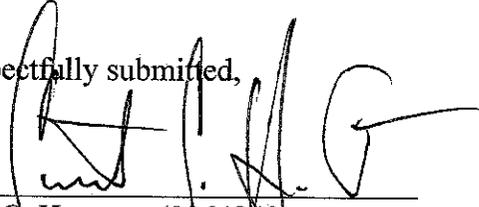
Court appropriately declared that the First District “erred in dismissing the [relator’s] request for attorney fees on the basis of mootness.” *Ronan*, 124 Ohio St.3d 17, 918 N.E.2d 515, 2009-Ohio-5947 ¶10. Even though the present case was not mooted because not all responsive records were produced, even if this Court’s basis for the dismissal was that a public official’s *ipse dixit* on a claimed exemption under the Public Records Act is somehow dispositive and not subject to judicial review, the dismissal of the claim for statutory damages and attorney fees was not mooted.

“[I]t is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.” *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 858 N.E.2d 324, 2006-Ohio-6498 ¶14 (quoting *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 780 N.E.2d 543, 2002-Ohio-6718 ¶14). As noted above, this action was commenced only after 2 months passed with Mr. Bubp failing to respond affirmatively or negatively to the public records request; thus, attorney fees are mandatory pursuant to the Public Records Act. R.C. § 149.43(C)(2)(b)(i). Additionally, the responsive records that were provided to the Relator were not produced until more than 10 business days after the filing of this action; thus, pursuant to the express language of the statute, Relator is entitled to an award of statutory damages of one thousand dollars. R.C. § 149.43(C)(1).

In summarily dismissing this action in its entirety and without any reason being provided for such disposition, this Court has failed to apply the proper legal standard, as well as ignoring the viable claims for attorney fees and statutory damages. Thus, this Court should reconsider its dismissal and, instead, should issue the alternative writ and order the submission of evidence; at a minimum, though, Relator is entitled to the award of statutory damages and attorney fees.

Conclusion

Based upon the foregoing, this Court's summary dismissal without opinion of this original action lacked any legal basis. Accordingly, the Court should reconsider the dismissal and, in so doing, issue an alternative writ and a schedule for the presentation of evidence.

Respectfully submitted,


Curt C. Hartman (0064242)
The Law Firm of Curt C. Hartman
3749 Fox Point Court
Amelia, Ohio 45102
(513) 752-8800
hartmanlawfirm@fuse.net

Attorneys for Relator Kent Lanham

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served, via regular mail, upon the following on the 26th day of June 2012:

Jeannine Lesperance
Renata Y. Staff
Office of the Ohio Attorney General
30 East Broad Street
Columbus, OH 43215

