

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
JAMES E. PIETRANGELO, II

Relator-Appellant,

v.

CITY OF AVON LAKE, OHIO, *et al.*

Respondents-Appellees.

No. 2015-0495

On Appeal From the
Lorain County
Court of Appeals,
Ninth Appellate District
Case No. 14CA010571

APPELLANT'S BRIEF

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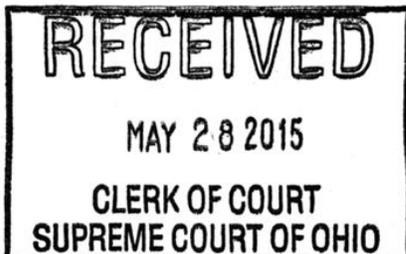
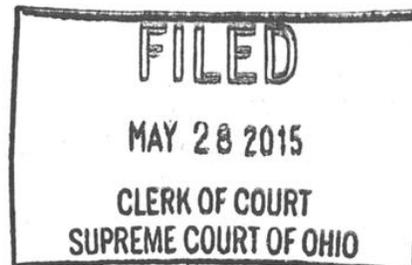


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Proposition of Law No. I:6

Dates, hours, and fee rates of legal services performed on attorney billing-statements are by themselves (*i.e.*, without any legal narratives) non-exempt public records/information which must be released to a requester. Therefore, the Ninth District erred in denying Pietrangelo summary judgment and a writ of mandamus requiring Director Lieberman/Avon Lake to release all of the dates of legal services performed on the Porter Wright billing statements, and the hours and rates of legal services performed outside of the Professional Fee Summary on the Porter Wright billing statements.

- A. The Ninth District erred as a matter of law in holding that all of the dates of legal services performed on the Porter Wright billing statements, and the hours and rates of legal services performed outside of the Professional Fee Summary on the Porter Wright billing statements, are attorney-client privileged and therefore exempt from production.

Proposition of Law No. II: 20-21

A requester is entitled to statutory damages if a well-informed public office(r) would not have reasonably believed their response to the requester’s records request did not constitute a failure to comply with an obligation in accordance with R.C. 149.43(B). Therefore, the Ninth District erred in denying Pietrangelo the maximum statutory damages of \$1,000.00 from Director Lieberman/Avon Lake.

- A. The Ninth District erred as a matter of fact and law in holding 1) that a large portion of the Porter Wright billing statements sought by Pietrangelo by mandamus are exempt, and 2) that, based on *Dawson*, Director Lieberman/Avon Lake could have reasonably believed that their response to Pietrangelo’s records request did not constitute a failure to comply with an obligation in accordance with R.C. 149.43(B).

Proposition of Law No. III:28

Sanctions are appropriate for frivolous conduct by a party and/or counsel. Therefore, the Ninth District abused its discretion in denying Pietrangelo’s motion for sanctions against Director Lieberman and Avon Lake (and Assistant Director David Graves).

- A. The Ninth District erred as a matter of law in holding that Director Lieberman’s and Avon Lake’s (and Assistant Director Graves’) specific assertions in the answer

were not frivolous and scandalous and did not entitle Pietrangelo to sanctions against them under Civ. R. 11, R.C. Section 2323.51, and/or the Ninth District’s own inherent powers.

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STATEMENT OF THE FACTS

This is an appeal concerning a decision of the Ninth District Court of Appeals (“the Ninth District”) granting in part and denying in part James E. Pietrangelo, II’s (“Pietrangelo”) petition for a writ of mandamus against the City of Avon Lake, Ohio (“Avon Lake”) and its Law Director Abraham Lieberman (“Director Lieberman”) over law-firm billing statements.

On March 13, 2014, Pietrangelo hand-delivered to Avon Lake officials, including Director Lieberman, a written public-records request seeking copies of all billing statements—specifically, dates, hours, fee rates, and amount billed of legal services performed, but excluding legal narratives—from law firm Porter Wright to Avon Lake in connection with Porter Wright’s defense of Avon Lake in a case, Lorain County Court of Common Pleas No. 13CV181561, *Pietrangelo v. City of Avon Lake, Ohio*, brought by Pietrangelo to enjoin Avon Lake’s skate park as a nuisance. (See 9th Dist. No. 14CA010571, 4/18/14 Verified Petition (hereinafter “Ver. Pet.”) at ¶¶ 6-7 and at Ex. 1 at 2; 5/2/14 Ans. (hereinafter “Ans.”) at ¶ 6.)

To quote Pietrangelo’s records request, Pietrangelo sought “any billing statements from Margaret Koesel and/or Tracey Turnbull and/or Porter Wright Morris & Arthur LLP, *only to the extent that said statements reflect dates, hours, rates, and amount billed for services rendered.*” (Ver. Pet. at Ex. 2 at 1 (emphasis added).) Pietrangelo sought the records to document a possible criminal conflict-of-interest of two of Avon Lake’s officials, Margaret Koesel and Tracey Turnbull, who are also Porter Wright attorneys, in representing Avon Lake in Pietrangelo’s skatepark suit. (See Ver. Pet. at ¶ 6.) In particular, among other things, Pietrangelo wanted the records to determine how much public money Porter Wright as a city vendor had received from Avon Lake for its defense of Avon Lake, and whether—as Pietrangelo suspected—the services of Koesel

and Turnbull were being billed at a higher-than-government rate.¹ (See Lorain Cty. C.P. No. 13CV181561, 4/19/14 Mot. to Disq.) Pietrangelo ultimately intended to use the information of the dates, hours, rates, and amount billed of legal services performed on the requested billing-statements to, among other things, support a motion in the skatepark suit to disqualify the two Avon Lake officials. (See *ibid.*)

However, on March 19, 2014, Director Lieberman, on behalf of himself and the other Avon Lake officials to whom Pietrangelo had submitted the records request, partially denied Pietrangelo's request, releasing to him copies of Porter Wright's billing statements but redacted of certain information, and in any case containing no dates, hours, and rates of legal services performed. (See Ver. Pet. at ¶ 8 and at Ex. 2.) Pietrangelo could not tell exactly what Director Lieberman had redacted on the released billing-statements, because Director Lieberman had engaged in "opaque" redaction. Director Lieberman had redacted information on the billing statements not by covering it with black marker as it appeared in the text or as text, but by digitally imposing the oversized word "REDACTED" several times on the page *in lieu* of any text. (See Ver. Pet. at ¶¶ 8-9 and at Ex. 2.) Moreover, Director Lieberman had not stated any specific (claimed) exemption or any (claimed) legal authority whatsoever for said (claimed) exemption anywhere on the released redacted billing-statements, nor in any separate memorandum (see Ver. Pet. at Ex. 2)—contrary to the Ohio Public Records Act, and Avon Lake's own Public Records Policy. See R.C. 149.43(B)(3), the Ohio Public Records Act ("If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record

¹ In fact, as Pietrangelo confirmed more than a year after his records request, after the Ninth District had finally granted Pietrangelo's petition for a writ of mandamus in part, see *infra*, Koesel's and Turnbull's services *were* being charged at an excessive rate—\$275.00 *per* hour each on the skatepark suit, as opposed to \$100.00 *per* hour for Director Lieberman on the same case. (See Appx. at 16-19.)

shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing.”); Avon Lake, OH Cod. Ord. § 288.04(b)(5), the Avon Lake Public Records Policy (“Any denial of public records requested must include an explanation, including legal authority. If portions of a record are public and portions are exempt, the exempt portions are to be redacted and the rest released. If there are redactions, each redaction must be accompanied by a supporting explanation, including legal authority.”). Instead, Director Lieberman had merely claimed in a separate memorandum accompanying the released redacted billing-statements that “privileged” information had been redacted on the billing statements. (See Ver. Pet. at ¶¶ 8-9 and at Ex. 2.) This did not even begin to apprise Pietrangelo of the claimed basis of the redaction, *i.e.*, any specific (claimed) exemption, because there are different privileges in law, such as the physician-patient privilege, the clergyman-parishioner privilege, the husband-wife privilege, the mediation privilege, and the attorney-client privilege. Certainly, the word “privileged” did not constitute any (claimed) legal authority.

In partially denying Pietrangelo’s request, Director Lieberman thus deprived Pietrangelo of putative key-evidence—including documentation of the excessive fee-rate charged for Koesel and Turnbull’s services—for his skatepark-suit motion to disqualify, which he thereafter ultimately had to make, without that crucial evidence, before three different courts—the trial court, the Ninth District, and this Court. (See Lorain C.P. No. 13CV181561, 4/19/14 Mot. to Disq.; 9th

Dist. No. 14CA010584, 6/6/14 Mot. to Disq.; 9th Dist. No. 14CA010644, 9/18/14 Mot. to Disq.; Supreme Court No. 2015-0110, 2/12/15 Mot. to Disq.²)

On April 18, 2014, Pietrangelo filed a petition for a writ of mandamus with the Ninth District, to compel Director Lieberman and Avon Lake to comply with the Ohio Public Records Act and the Avon Lake Public Records Policy, and separately to release to Pietrangelo the requested billing-statements with the dates, hours, and rates of legal services performed un-redacted. (See Ver. Pet. *passim* and at Prayer for Relief at ¶ 1 (“WHEREFORE, Plaintiff prays for: 1) A writ of mandamus from this Court to Respondents requiring Respondents to promptly comply with O.R.C. Section 149.43(B) and City of Avon Lake Ord. Section 288.04, and promptly produce to Relator (copies of) the un-redacted records (billing statements and documents) with the dates, hours, and (fee) rates intact. ***”).) Plaintiff also requested statutory damages of up to \$1,000.00. (See *id.* at ¶ 2.) Plaintiff also requested attorney’s fees, but *only if* he should retain counsel at any point thereafter in the mandamus case (see *id.* at ¶ 4)—which he never did, *and never indicated to the Ninth District that he had done*. To be clear on this last point, in the ensuing mandamus case, Pietrangelo never requested actual attorney’s fees. Nor did he ever request reimbursement for his own time spent litigating the case.

Also throughout the ensuing mandamus case—just as in his original records-request—Pietrangelo never sought any specific information on the Porter Wright billing statements other than the (withheld/redacted) dates, hours, and rates of legal services performed³; he did not, for example, seek legal narratives on the billing statements. (See, *e.g.*, 5/12/14 Pet’nr.’s MSJ at 10

² The three appellate-cases all stemmed from the trial court’s refusal in the skatepark suit to grant Pietrangelo a TRO/preliminary injunction. The motion to disqualify in those appellate cases was made *de novo*.

³ Additionally, in his original request, Pietrangelo sought “amount billed of legal services performed” on the billing statements.

“Therefore, Pietrangelo is entitled to a writ of mandamus requiring Avon Lake to release to Pietrangelo copies of the Porter Wright billing statements with the dates, hours, and (fee) rates un-redacted, as well as an award of statutory damages.”); 11/13/14 Pet’nr.’s Final Merits Br. at 7 fn 5 (“In the instant case, Pietrangelo did not seek, and Avon Lake did not provide, narratives on the Porter Wright billing statements.”), at 13 (“WHEREFORE, the Court should grant Pietrangelo summary judgment, and should issue a writ of mandamus requiring Avon Lake to release to Pietrangelo copies of the Porter Wright billing statements with the dates, hours, and (fee) rates (and all other non-exempt information) un-redacted.”).) Of course, Pietrangelo also simply could not have determined what other non-exempt information on the billing statements Director Lieberman might have withheld from him to begin with in order for him to have asked for it in the mandamus case, because Director Lieberman had, as discussed above, engaged in “opaque” redaction.

On May 2, 2014, Director Lieberman and Avon Lake filed their answer in the mandamus case. (See Ans. *passim*.) Director Lieberman’s and Avon Lake’s answer was as deliberately obstructive as Director Lieberman’s original denial of Pietrangelo’s request. First, Director Lieberman and Avon Lake failed to directly admit or deny Pietrangelo’s petition averments that Director Lieberman had failed to state a (claimed) specific exemption or any (claimed) legal authority whatsoever for that (claimed) exemption when he had originally partially denied Pietrangelo’s records request (*cf.*⁴ Ver. Pet. at ¶ 9; Ans. at ¶ 9)—contrary to Civ. R. 8(B) (“A

⁴Ver. Pet. at ¶ 9 (“In removing/redacting the withheld records/information, the official(s) doing the removal/redaction—including Law Director Lieberman—also failed to provide Relator with a written ‘explanation, including legal authority, setting forth why the request was denied.’ *** *No specific privilege, or legal authority for that privilege*, was stated in the memorandum, or physically next to the actual redactions themselves on the documents.”) (emphasis added); Ans. at ¶ 9 (“Respondents state that an explanation for the redactions in the form of a written memo-

party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. *** Denials shall fairly meet the substance of the averments denied.”). Pietrangelo's particular averments were material averments to which Director Lieberman and Avon Lake had to respond, because the averments alleged non-compliance with R.C. 149.43 and Avon Lake Section 288.04. Second, Director Lieberman and Avon Lake deceptively stated in their answer that they “admit[ted] that . . . the dates, hours and fees for specific legal services were redacted *because they were subject to the attorney-client privilege and attorney work product doctrine*” (Ans. at ¶ 8 (emphasis added))—*as if* Plaintiff himself had originally averred in his petition that the dates, hours, and fee rates were so subject (which he had not (see Ver. Pet. at ¶ 8)), or *as if* Director Lieberman himself had actually claimed said exemptions or specific privilege(s) when he had originally partially denied Pietrangelo's records request (which Director Lieberman had not (see Ver. Pet. at ¶ 9 and at Ex. 2))—again, contrary to Civ. R. 8(B).

Third, Director Lieberman and Avon Lake raised affirmative defenses against Pietrangelo, and/or re-raised their organic denials as affirmative defenses (see Ans. at pp. 4-6)—even though clearly there are no affirmative defenses in a public-records mandamus case. See *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 75 Ohio St.3d 31, 34, 661 N.E.2d 187, 1996 Ohio 379 (*Per Curiam*) (“exceptions to disclosure under R.C. 149.43 are not affirmative defenses”) (“Exceptions to disclosure under R.C. 149.43 are not in the nature of a confession and avoidance because the assertion of an exception does not admit the allegations of an R.C.

randum did accompany the redacted invoices . . . and that such memorandum fulfilled the obligation of Lieberman and the City to explain the reason for the redactions.”). Director Lieberman and Avon Lake failed to admit that Director Lieberman had not provided a specific (claimed) privilege or any (claimed) legal authority whatsoever for that specific (claimed) privilege when he had originally partially denied Pietrangelo's request.

149.43 mandamus action, *i.e.*, it does not concede that the requested records are ‘public records.’”).

Fourth, in one of their affirmative defenses, Director Lieberman and Avon Lake made a scandalous accusation of vexatious litigation against Pietrangelo regarding the *skatepark suit*:

Relator’s strategy in the Injunction case has been to harass the City with voluminous court filings to which the City is forced to respond, at no small expense to the City, as evidenced by the following filings of Relator to date, among others

(Ans. at pp. 5-6.) Fifth, and finally, Director Lieberman and Avon Lake did not submit the unredacted billing statements under seal with their answer to the Ninth District for review *in camera*—even though it was their burden to do so. See *State ex rel. Natl. Broadcasting Co. v. City of Cleveland*, 38 Ohio St.3d 79, 83, 85, 526 N.E.2d 786 (1988) (“[A] governmental body refusing to release records has the burden of proving that the records are excepted from disclosure by R.C. 149.43. *** When a governmental body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individualized scrutiny of the records in question.”).

On May 12, 2014, Plaintiff filed a motion to strike and for sanctions against Director Lieberman and Avon Lake (and Avon Lake Assistant Law Director David Graves, whose name appeared on the answer as well) in the mandamus case, based on their obstructive answer. (See 5/12/14 Mot. to Str. & for Sanct.) On that same date, Pietrangelo also filed a motion for summary judgment, in which he argued and demonstrated that the dates, hours, and rates of legal services performed on the Porter Wright billing statements are explicitly non-exempt under *State ex rel. Anderson v. City of Vermilion*, 134 Ohio St.3d 120, 2012 Ohio 5320 (*Per Curiam*), and should have been released by Director Lieberman to Pietrangelo but instead had been withheld by Director Lieberman. (See 5/12/14 Pet’nr.’s MSJ at 2-3 (“ . . . *State ex rel. Anderson v. City of*

Vermilion, 134 Ohio St.3d 120 (2012) (*Per Curiam*), clearly holds that dates, hours, and (fee) rates on any itemized attorney billing statements are non-exempt records/information which must be released to a requester under O.R.C. § 149.43. See *Anderson*, 134 Ohio St.3d at 124 (“Under the Public Records Act, insofar as these itemized attorney-billing statements contain nonexempt information, e.g., . . . the dates the services were performed, and the hours, rate, and money charged for the services, they should have been disclosed[.]’.”), at Ex. 1 (Pietrangelo Aff.); Ver. Pet. at ¶ 8 and at Ex. 2.) Pietrangelo also demonstrated in his motion for summary judgment that he is entitled to the maximum \$1,000.00 in statutory damages because ten business-days elapsed after Pietrangelo had filed his petition without Director Lieberman or Avon Lake complying with R.C. 149.43(B), *i.e.*, stating a specific (claimed) exemption and any (claimed) legal authority whatsoever for the redaction, and/or releasing the billing statements with the dates, hours, and rates un-redacted. (See 5/12/14 MSJ at 8 and at Ex. 1 at ¶ 3.)

Director Lieberman and Avon Lake filed oppositions to Pietrangelo’s motions, as well as a motion for summary judgment of their own (which Pietrangelo opposed), in which they contrarily argued that the dates, hours, and rates on the Porter Wright billing statements are exempt as attorney-client privileged and work-product protected under *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011 Ohio 6009 (*Per Curiam*). (See, *e.g.*, Ans. at ¶ 10; 5/23/14 Opp. to Str. & for Sanc. at 5-6 (“Pietrangelo claims that the denials and defenses are insufficient because of the holding of the Ohio Supreme Court in *State ex rel. Anderson v. City of Vermilion*, However, contrary to Pietrangelo’s contention, *Dawson* is still viable precedent. Faced with a different fact situation, *Anderson* distinguished, but did not preempt, overrule, clarify, or limit *Dawson*. The situation at bar is more clearly analogous to the situation before the Supreme Court in *Dawson* than it is to the situation in *Anderson*”); 5/27/14

Respndts' MSJ at 7 ("Pietrangelo's reliance on . . . *Anderson* . . . is misplaced. Contrary to Pietrangelo's contention, *Dawson* is still viable precedent. Faced with a different fact situation, *Anderson* distinguished, but did not preempt, overrule, clarify, or limit *Dawson*. The situation at bar is more clearly analogous to the situation before the Supreme Court in *Dawson* than it is to the situation in *Anderson* . . .").)

At one point in their MSJ papers, Director Lieberman and Avon Lake, in a self-serving attempt to burnish Director Lieberman's conduct in originally partially denying Pietrangelo's records request, stated that Director Lieberman had even generously released to Pietrangelo *more* information on the Porter Wright billing statements than the public officer *in Dawson* had released on the billing statements to the requester. (See 6/9/14 Respndts' Reply at 7 ("The City has provided to Pietrangelo all of the billing information required by *Dawson*. In fact, the City has actually provided billing information beyond that included in the *Dawson* summaries, including . . .").) In response, Pietrangelo argued, in the alternative to his *Anderson* argument, that even if the dates, hours, and rates on the Porter Wright billing statements *were* attorney-client privileged, Director Lieberman on Avon Lake's behalf had thus admittedly deliberately released to Pietrangelo some attorney-client-privileged information on the billing statements, and thus Avon Lake had waived the privilege as to the billing statements in their entirety, including the withheld/redacted dates, hours, and rates of legal services performed. (See 6/11/14 Pet'nr's Surreply at 9-10.) Remarkably, Director Lieberman and Avon Lake even repeated their same admission in a later brief of theirs.

On August 8, 2014, a Ninth District magistrate summarily denied Pietrangelo's motion to strike and for sanctions, see 8/8/14 Mag. Order (Appx. at 15), and on October 20, 2014, a judge of the Ninth District panel hearing the case upheld that denial, see 10/20/14 J.E. (Appx. at 9).

On August 18, 2014, the same judge denied both parties' summary-judgment motions. See 8/18/14 J.E. (Appx. at 12). The judge ruled that the panel could not decide the case without first reviewing the un-redacted Porter Wright billing statements *in camera*. See *id.* at 3 (Appx. at 14) (“Without the ability to review this information—which has not been provided to this Court under seal—we cannot determine whether either party is entitled to judgment as a matter of law.”). However, inexplicably, the Ninth District did not then immediately order Director Lieberman or Avon Lake to submit the un-redacted billing statements under seal to the Ninth District. See *id. passim*. Nor did the Ninth District do so when promptly thereafter requested by Pietrangelo to. (See 8/22/14 Req.) It was not until October 27, 2014, more than two months later, that the Ninth District magistrate ordered Director Lieberman/Avon Lake to submit the un-redacted statements under seal to the Ninth District by November 10, 2014, see 10/27/14 Mag. Ord., which they did, (see 11/10/14 Not. of Filing). The magistrate also ordered the parties to file merits briefs by November 10, 2014. See 10/27/14 Mag. Ord.

In their merits brief, Director Lieberman and Avon Lake apparently abandoned their work-product-exemption claim. (See 11/10/14 Respdnts' Merits Br. *passim*.) However, they dug their heels in on their *Dawson* attorney-client-privilege-exemption claim, arguing that *Anderson* is not dispositive in Pietrangelo's favor because the billing statements in *Anderson* were for cases to which the requester was not a party, and in the instant case the Porter Wright billing statements are for a case, the skatepark suit, to which Pietrangelo is a party—which, Director Lieberman and Avon Lake further argued, makes the situation still within the ambit of *Dawson*. (See, e.g., 11/10/14 Respdnts' Merits Br. at 7 (“Although the litigation covered by the billing statements in *Anderson* involved the City of Vermilion, it did not involve the relator. The litigation covered by the billing statements in *Anderson* was not litigation to which relator Anderson

was a party. In contrast, all of the billing statements sought by Pietrangelo relate to the Injunction Case currently pending between the City and Pietrangelo.”.)

In his own merits brief, Pietrangelo again argued in chief that the dates, hours, and rates of legal services performed on the Porter Wright billing statements are explicitly non-exempt under *Anderson*. (See 11/13/14 Pet’nr.’s Merits Br. at 6-7 (“[T]he inexorable interpretation of the *Anderson* holding—“Under the Public Records Act, insofar as these itemized attorney-billing statements contain *nonexempt information, e.g., . . . the dates the services were performed, and the hours, rate, and money charged for the services,* they should have been disclosed[.]”—is that dates, hours, and rates on attorney or law-firm billing statements are always non-exempt no matter what. This interpretation makes perfect sense, because billing-statements dates, hours, and (fee) rates, *by themselves,* do *not* reveal privileged attorney-client communications or protected attorney-thoughts or strategies (work product).”) (emphasis original).)

Moreover, Pietrangelo disputed Director Lieberman’s and Avon Lake’s merits-brief arguments that because Pietrangelo is a party to the case on which the billing statements had been generated, *Dawson* and not *Anderson* is the applicable precedent and *Dawson* allowed Director Lieberman to withhold the dates, hours, and rates information to begin with. (See *id.* at 6-7.) Pietrangelo argued that *Anderson* itself clearly forecloses any argument that *Dawson* could ever be cited as precedent to withhold dates, hours, and rates, *i.e., nonexempt information,* on any billing statement, see *Anderson*, 134 Ohio St.3d at 124 (“Under the Public Records Act, insofar as these itemized attorney-billing statements contain *nonexempt information, e.g., . . . the dates the services were performed, and the hours, rate, and money charged for the services,* they should have been disclosed[.]”). (See 11/13/14 Pet’nr.’s Merits Br. at 7 fn 4 (“Avon Lake’s principal case, *Dawson*, simply is not to the contrary, either because *Anderson* clarified *Dawson* as

holding such, or because, in *Dawson*, the entity actually provided the dates, hours, and (fee) rates to the requester in alternate records—something that Avon Lake in this case did not do. See *Anderson*, 134 Ohio St.3d at 126 [(‘This is the crucial fact that distinguishes this case from *Dawson*. Vermilion did not provide Anderson with alternate records that contain the nonexempt information from the requested attorney-billing statements[.]’)].)

Pietrangelo also argued that two of this Court’s other precedents, *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 821 N.E.2d 564, 2004 Ohio 7108, and *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor’s Office*, 133 Ohio St.3d 139, 976 N.E.2d 877, 2012 Ohio 4246 (*Per Curiam*), clearly foreclose any argument that dates, hours, and rates on any billing statement could ever be withheld even when the billing statement is from a case to which the requester is a party. (See 11/13/14 Pet’nr.’s Merits Br. at 8-9 (“Despite the fact that the ultimately-released billing statements in *Anderson* concerned (pending) litigation as well, as already discussed, Avon Lake nonetheless argued in prior briefs in this case that it was still legally justified in withholding from Pietrangelo the Porter Wright billing-statements dates, hours, and (fee) rates because the billing statements—unlike in *Dawson* and *Anderson*—were for litigation in which *Pietrangelo* is involved against *Avon Lake*. However, Avon Lake’s distinction here is a thoroughly specious one—raised solely for Avon Lake to be able to ‘hang its hat on’ something rather than admit error. The Ohio Supreme Court has repeatedly held that an entity may not deny records/information—including attorney-billing dates, hours, and (fee) rates—to a requester simply because the records/information pertains to litigation in which the requester is involved against the entity: ‘We conclude that Gilbert made a public records request and agree with the court of appeals that Summit county ‘has failed to show that the requested records are exempt under the Act.’ *** That the public records Gilbert seeks are potentially useful to him in a lawsuit [be-

tween him and the agency holding the records] is fortuitous, not illegal. ***' *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 662-663 (2004) (emphasis added) (requested records of criminal case involving both parties still non-exempt); see, also, *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139 (2012) (*Per Curiam*) (dates, hours, and (fee) rates of criminal case involving both parties still non-exempt).")

Pietrangelo also argued that, in any case, Avon Lake had waived privilege as to the billing statements in their entirety when Director Lieberman on Avon Lake's behalf had deliberately released to Pietrangelo privileged parts of the billing statements. (See 11/13/14 Pet'nr.'s Merits Br. at 9.)

On March 11, 2015, two days shy of exactly one year to the day that Pietrangelo had submitted his records request to the Avon Lake officials, the Ninth District panel finally ruled on Pietrangelo's mandamus petition. The panel granted Pietrangelo a writ of mandamus, but only for the "portion of each invoice titled 'Professional Fee Summary' [that] describes the 'hours, rate, and money charged for the services[.]'" 3/11/15 J.E. at 4-5 (Appx. at 7-8). The panel thus refused to order release of any dates by themselves on the Porter Wright billing statements, or of any hours and rates by themselves on the billing statements other than in or under the Professional Fee Summary. See *ibid.* Moreover, the panel denied Pietrangelo any statutory damages, "concluding that, as the Ohio Supreme Court determined in *Anderson*, a large portion of the billing statements at issue in this case were exempt from disclosure and, given the interplay between *Dawson* and *Anderson*, a well-informed public office could reasonably have believed that the nonexempt portion of the billing statements could be withheld from disclosure." *Ibid.* Furthermore, even though, again, Pietrangelo had never requested any actual attorney's fees or his own time, the panel also affirmatively denied Pietrangelo attorney's fees. *Ibid.*

On March 18, 2015, more than a year after Pietrangelo had first needed the dates, hours, and rates information on the Porter Wright billing statements for his motion to disqualify and for other purposes, Director Lieberman/Avon Lake, pursuant to the Ninth District's writ of mandamus, released to Pietrangelo the Porter Wright billing statements with the hours and rates in the Professional Fee Summary un-redacted, but with all of the dates still redacted and with the hours and rates outside of the Professional Fee Summary still redacted. Director Lieberman/Avon Lake also finally stated (claimed) legal authority for the remaining redactions on the billing statements.

On March 27, 2015, Pietrangelo, believing that the Ninth District had erroneously denied him certain non-exempt records/information on the Porter Wright billing statements, as well as denied him statutory damages and sanctions, timely appealed to this Court. (See No. 2015-0495, 3/27/15 Not. App.; 4/9/15 Am. Not. of App.) (Appx. at 1.)

ARGUMENT

I. PROPOSITION OF LAW NO. 1: Dates, hours, and fee rates of legal services performed on attorney billing-statements are by themselves (*i.e.*, without any legal narratives) non-exempt public records/information which must be released to a requester. Therefore, the Ninth District erred in denying Pietrangelo summary judgment and a writ of mandamus⁵ requiring Director Lieberman/Avon Lake to release all of the dates of legal services performed on the Porter Wright billing statements, and the hours and rates of legal services performed outside of the Professional Fee Summary on the Porter Wright billing statements.

A. The Ninth District erred as a matter of law in holding that all of the dates of legal services performed on the Porter Wright billing statements, and the

⁵ It should be reiterated that the Ninth District panel denied both parties' motions for summary judgment, and ultimately never technically granted either party summary judgment or partial summary-judgment in the case. See 3/11/15 J.E. *passim* (Appx. at 12-14). The Ninth District panel just granted Pietrangelo a writ of mandamus as to only certain requested information on the billing statements. See *id.* at 5 ("A writ of mandamus is granted to compel the City to provide Pietrangelo with copies of the relevant attorney billing statements with the 'Professional Fee Summary' portion unredacted.").

hours and rates of legal services performed outside of the Professional Fee Summary on the Porter Wright billing statements, are attorney-client privileged and therefore exempt from production.

The Ninth District denied Pietrangelo's motion for summary judgment solely on the basis that it could not determine the motion since it did not have the un-redacted billing statements before it. See 8/18/14 J.E. at 3 (Appx. at 14) ("Without the ability to review this information—which has not been provided to this Court under seal—we cannot determine whether either party is entitled to judgment as a matter of law."). Ultimately, the Ninth District partially denied Pietrangelo a writ of mandamus, holding that all of the dates of legal services performed on the billing statements, and the hours and rates of legal services performed outside of the Professional Fee Summary on the billing statements, are attorney-client privileged and therefore exempt from production:

[W]e agree with the City's position that it has disclosed all of the nonexempt portions of the records with one exception: the portion of each invoice titled 'Professional Fee Summary' describes [sic] the 'hours, rate, and money charged for the services' and is not exempt under R.C. 149.43. The narrative descriptions of the work performed and the billing information that correlates to the narratives is summarized within the "Professional Fee Summary," so those items need not be disclosed apart from the "Professional Fee Summary." With respect to the information contained in the "Professional Fee Summary" only, Pietrangelo has established that he is entitled to a writ of mandamus to compel the City to provide unredacted copies of the attorney billing records.

3/11/15 J.E. at 3-4 (Appx. at 7-8). However, the Ninth District's holdings are contrary to this Court's precedents, including *Anderson*, and therefore the Ninth District separately erred both in denying Pietrangelo a writ on summary judgment for all of the records/information he sought by his petition for mandamus, and in denying him a writ on final judgment for those records/that information.

A court's denial of summary judgment is reviewed *de novo*. See *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241, 1996 Ohio 336 (*Per Curiam*). On review, "the appellate court follows the same standard as that employed by the trial court." *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist. Lorain 1989). The party moving for summary judgment bears the initial burden of apprising the trial court of the basis of its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on an essential element of the non-moving party's claim. See *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 1996 Ohio 107. Once the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact exists. See *id.* To satisfy this burden, the non-moving party must "submit or point to some evidentiary material showing that there is a genuine issue for trial." *PNC Bank, N.A. v. Bhandari*, 2013 Ohio 2477, ¶ 9 (6th Dist. Lucas). "[I]f the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher*, 75 Ohio St.3d at 293.

A court's denial of mandamus in a public-records case is also reviewed *de novo*. See *State ex rel. DiFranco v. City of South Euclid*, 138 Ohio St.3d 367, 370, 7 N.E.3d 1136, 2014 Ohio 538 (*Per Curiam*) ("The argument calls for a construction and application of those statutory amendments and therefore presents a question of law that we review *de novo* on appeal."). "Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 289, 843 N.E.2d 174, 2006 Ohio 903 (*Per Curiam*); see, also, R.C. 149.43(C)(1). To be entitled to a writ of mandamus, the relator must establish a clear legal right to the requested relief and a clear legal duty on the part of the respondent to provide the re-

rief. See *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 56, 2012 Ohio 69 (*Per Curiam*). The relator must prove that it is entitled to the writ by clear and convincing evidence. See *id.* at 58.

In his motion for summary judgment papers, Pietrangelo demonstrated the following facts: 1) that Director Lieberman had originally partially denied Pietrangelo's written public-records request for the Porter Wright billing statements, *i.e.*, had refused to release or had redacted certain information on the billing statements, which information presumably included the dates, hours, and rates of legal services performed sought by Pietrangelo, and 2) that Director Lieberman/Avon Lake still had not released to Pietrangelo the withheld/redacted information within ten business-days of the filing of Pietrangelo's petition for mandamus. (See 5/12/14 MSJ *passim* and at Ex. 1 *passim*.) In his MSJ papers, Pietrangelo also demonstrated as a matter of law that public records in general belong to the people, and thus that, in a public-records-mandamus case, the public records at issue are presumed non-exempt until and unless the public office(r) holding them *proves* that they fall squarely within a statutory exception (see 5/12/14 MSJ at 5). See *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 371, 171 N.E.2d 508, 14 Ohio Op.2d 116 (1960) ("The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people[.]") (internal quotation marks and citation omitted); *State ex rel. Rucker v. Guernsey Cty. Sheriff's Office*, 126 Ohio St.3d 224, 226, 2010 Ohio 3288 (*Per Curiam*) ("We construe the Public Records Act liberally in favor of broad access and resolve any doubt in favor of disclosure of public records."); *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 859 N.E.2d 948, 2006 Ohio 6714 (*Per Curiam*) ("Insofar as Akron asserts that some of the requested records fall within certain exceptions to disclosure under R.C. 149.43, we strictly construe exceptions against the public records custodian, and the custodian has the burden to establish the applicability of an exception.") (internal

quotation marks and citation omitted). Pietrangelo also demonstrated that, specifically, under *Anderson*, dates, hours, and rates of legal services performed on billing statements are non-exempt information. (See 5/12/14 MSJ at 2-3.)

At that point at the very least in the mandamus case, Director Lieberman and Avon Lake were required to submit evidentiary material showing a genuine dispute over material facts, see *PNC Bank, N.A., supra, i.e.*, were required to submit the un-redacted Porter Wright billing statements under seal to the Ninth District to dispute the presumption that the billing statements are non-exempt in their entireties. See *State ex rel. Natl. Broadcasting Co., supra* (“A governmental body refusing to release records has the burden of proving that the records are excepted from disclosure by R.C. 149.43. *** When a governmental body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individualized scrutiny of the records in question.”). However, Director Lieberman/Avon Lake did not⁶ so submit the billing statements under seal—opting instead to withhold them until ordered to submit them and to thereby unnecessarily prolong the case. Therefore, the Ninth District should have immediately granted Pietrangelo summary judgment as to all of Director Lieberman’s redaction on the Porter Wright billing statements, *cf. Celotex Corp. v. Catrett*, 477 U.S. 327, 328 (1986) (summary judgment designed “to secure the just, speedy and inexpensive determination of every action”) (internal quotation marks and citation omitted), and granted Pietrangelo a writ of mandamus requiring Director Lieberman/Avon Lake to release the Porter Wright statements in their un-redacted entireties to Pietrangelo.

⁶Director Lieberman/Avon Lake did eventually submit the un-redacted billing statements under seal to the Ninth District, but only more than five months later, long after the Ninth District had denied both parties’ motions for summary judgment.

Moreover, on final judgment, Pietrangelo was certainly entitled to a writ of mandamus for all of the dates, hours, and rates on the Porter Wright billing statements. Pietrangelo has a clear legal right to those records/that information, and Director Lieberman/Avon Lake has a clear legal duty to provide them to Pietrangelo. *Anderson* is unequivocal. It holds: “Under the Public Records Act, insofar as these itemized attorney-billing statements contain *nonexempt information, e.g., . . . the dates the services were performed, and the hours, rate, and money charged for the services*, they should have been disclosed[.]”. *Anderson*, 134 Ohio St.3d at 124. This clearly means that any dates, hours, and rates by themselves on itemized billing statements are non-exempt records/information and must be disclosed. See, also, *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor’s Office*, 133 Ohio St.3d 139, 976 N.E.2d 877, 2012 Ohio 4246 (*Per Curiam*). Thus, the remaining withheld dates, hours, and rates by themselves on the Porter Wright billing statements are non-exempt information and should have been ordered disclosed to Pietrangelo.

Moreover, even if the remaining withheld dates, hours, and rates were attorney-client privileged to begin with, Avon Lake clearly waived the privilege by releasing to Pietrangelo more billing information than was released in *Dawson*. See *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 131, 781 N.E.2d 163, 2002 Ohio 7041 (*Per Curiam*) (“Voluntarily disclosing the requested record can waive any right to claim an exemption from disclosure.”); *State ex rel. Zuern v. Leis*, 56 Ohio St.3d 20, 22, 564 N.E.2d 81 (1990) (*Per Curiam*) (any exceptions applicable to sheriff’s investigative material were waived by disclosure in civil litigation); *State v. Post*, 32 Ohio St.3d 380, 386, 513 N.E.2d 754 (1986) (“We hold that a client’s disclosure to a third party of communications made pursuant to the attorney-client privilege breaches the confidentiality underlying the privilege, and constitutes a waiver thereof.”); *Hollingsworth v.*

Time Warner Cable, 2004 Ohio 3130, ¶ 65 (1st Dist.) (“A client’s voluntary disclosure of privileged communications ‘is inconsistent with an assertion of the attorney-client privilege.’ ‘Such disclosure waives any subsequent claim of privilege with regard to communications on the same subject matter.[’]”) (citations omitted); *First Union Nat’l Bank of Delaware v. Maenle*, 2005 Ohio 4021, ¶ 38 (6th Dist. Huron 2005) (“partial, voluntary disclosure of privileged material constitutes a waiver of privilege for the remaining material which relates to the same subject matter[.]”) (internal quotation marks and citation omitted). In *Dawson*, everything that was withheld by the public officer was adjudged attorney-client privileged, so that if Director Lieberman released more billing information than was released in *Dawson*, he released attorney-client privileged information.

Thus, Pietrangelo is entitled to a writ of mandamus to require production of the remaining withheld dates, hours, and rates in the instant case. Pietrangelo was first entitled to such a writ as a matter of law upon his motion for summary judgment—because Director Lieberman and Avon Lake had failed to unilaterally submit the un-redacted billing statements in opposition thereto, see *Maust v. Meyers Products, Inc.*, 64 Ohio App.3d 310, 313, 581 N.E.2d 589 (8th Dist. 1989) (“When such a motion is made and supported with documentary evidence pursuant to the requirements of Civ.R. 56, the adverse party does have the responsibility of rebuttal and must supply evidentiary materials supporting his position.”)—and then second upon his merits brief.

II. PROPOSITION OF LAW NO. 2: A requester is entitled to statutory damages if a well-informed public office(r) would not have reasonably believed their response to the requester’s records request did not constitute a failure to comply with an obligation in accordance with R.C. 149.43(B). Therefore, the Ninth District erred in denying Pietrangelo the maximum statutory damages of \$1,000.00 from Director Lieberman/Avon Lake.

A. The Ninth District erred as a matter of fact and law in holding 1) that a large portion of the Porter Wright billing statements sought by Pietrangelo by mandamus are exempt, and 2) that, based on *Dawson*, Director Lieberman/Avon Lake could have reasonably believed that their response to Pietrangelo’s records request did

not constitute a failure to comply with an obligation in accordance with R.C. 149.43(B).

The Ninth District held that Pietrangelo was not entitled to any statutory damages because 1) a large portion of the Porter Wright billing statements sought by Pietrangelo by mandamus are exempt, and 2) based on *Dawson*, Director Lieberman/Avon Lake could have reasonably believed that their response to Pietrangelo's records request did not constitute a failure to comply with an obligation in accordance with R.C. 149.43(B):

[W]e conclude that, as the Ohio Supreme Court determined in *Anderson*, a large portion of the billing statements at issue in this case were exempt from disclosure and, given the interplay between *Dawson* and *Anderson*, a well-informed public office could reasonably have believed that the nonexempt portion of the billing statements could be withheld from disclosure. *Anderson* at ¶ 236. As in *Anderson*, therefore, we conclude that Pietrangelo is not entitled to statutory damages.

3/11/15 J.E. at 4-5. However, the Ninth District's holdings are contrary to the record and to this Court's decision in *Anderson* and other precedents, and therefore the Ninth District erred in denying Pietrangelo the maximum statutory damages of \$1,000.00.

A court's decision to deny statutory damages in a public-records case is reviewed *de novo*. See *State ex rel. DiFranco*, 138 Ohio St.3d at 370 ("This case presents an issue of damages and attorney fees authorized by specific statutory criteria; therefore, a determination of entitlement to damages and fees is not a discretionary decision of the court below, but rather a determination of how to apply legal standards.").

In his mandamus action, Pietrangelo indisputably *never* sought any exempt portions of the Porter Wright billing statements. (See Ver. Pet. at Prayer for Relief (at ¶ 1) ("WHEREFORE, Plaintiff prays for: 1) A writ of mandamus from this Court to Respondents requiring Respondents to promptly comply with O.R.C. Section 149.43(B) and City of Avon Lake Ord. Section

288.04, and promptly produce to Relator (copies of) the unredacted records (billing statements and documents) with the dates, hours, and (fee) rates intact.”); 5/12/14 Pet’nr.’s MSJ at 10 (“Therefore, Pietrangelo is entitled to a writ of mandamus requiring Avon Lake to release to Pietrangelo copies of the Porter Wright billing statements with the dates, hours, and (fee) rates un-redacted, as well as an award of statutory damages.”); 11/13/14 Pet’nr.’s Merits Br. at 7 fn 5 (“In the instant case, Pietrangelo did not seek, and Avon Lake did not provide, narratives on the Porter Wright billing statements.”), at 13 (“WHEREFORE, the Court should grant Pietrangelo summary judgment, and should issue a writ of mandamus requiring Avon Lake to release to Pietrangelo copies of the Porter Wright billing statements with the dates, hours, and (fee) rates (and all other non-exempt information) un-redacted.”.) Thus, contrary to the Ninth District’s finding, Pietrangelo only sought dates, hours, and rates by themselves, which, under *Anderson*, are clearly non-exempt. The Ninth District was thus mistaken—just as it was when it found that Pietrangelo had asked for attorney’s fees, which he had not.

Moreover, based on the ordinary application of statutory law and case law as it existed at the time of Pietrangelo’s records request and in the ten business-days following filing of his petition, a well-informed public officer would *not* have reasonably believed that a response to Pietrangelo’s records request and petition such as Director Lieberman/Avon Lake gave does not constitute a failure to comply with an obligation in accordance with R.C. 149.43(B). First, R.C. 149.43(B)(3), as well as Avon Lake Section 288.04(b)(5)—both in effect at the time of Pietrangelo’s request and petition—unequivocally require a public office(r) denying a written records-request to state, in writing, a specific (claimed) exemption and (claimed) legal authority for the denial. See R.C. 149.43(B)(3) (“If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester

with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing.”); Avon Lake, OH Cod. Ord. § 288.04(b)(5) (“Any denial of public records requested must include an explanation, including legal authority. If portions of a record are public and portions are exempt, the exempt portions are to be redacted and the rest released. If there are redactions, each redaction must be accompanied by a supporting explanation, including legal authority.”).

Yet, Director Lieberman still did not state, in writing, any specific (claimed) exemption or any (claimed) legal authority whatsoever for his partial denial of Pietrangelo’s records request at the time of the denial; nor did Director Lieberman or Avon Lake do so within ten business-days following Pietrangelo’s filing of his petition. The first time⁷ that Director Lieberman/Avon

⁷Even if Director Lieberman’s and Avon Lake’s May 2, 2014 answer were considered a sufficient written-statement of specific (claimed) exemption and some (claimed) legal authority, Pietrangelo would still be entitled to the maximum \$1,000.00 in statutory damages. May 2, 2014 was the tenth day after April 18, 2014. See R.C. 149.43(C)(1) (“The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars.”). Moreover, Director Lieberman and Avon Lake mailed the answer to Pietrangelo first-class U.S. Mail. (See 5/2/14 Ans. at Cert. of Serv.) Pietrangelo would not have received and did not actually receive the answer in the normal course of mail until after May 2, 2014—meaning a full ten-days elapsed after Pietrangelo had filed his petition without compliance by Director Lieberman/Avon Lake occurring. Director Lieberman’s/Avon Lake’s May 2, 2014 deposit itself of the answer into the mail did not, for purposes of statutory damages, constitute delivery or constructive delivery to Pietrangelo of the answer on May 2, 2014, because Pietrangelo had requested in his original written records-request to pick up the requested records in person, and for them not to be mailed to him (see Ver. Pet. at Ex. 2 at 2 (“I will pick the copies up in person. Do not mail them to me. Please inform me when the copies are available.”)). Therefore, mail service of the answer on May 2, 2014, was not the equivalent of pick-up by Pietrangelo of a written statement of specific (claimed) exemption and some (claimed) legal authority on May 2, 2014. See R.C. 149.43(B)(7) (“Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall

Lake stated, in writing, any specific (claimed) exemption and any (claimed) legal authority whatsoever for Director Lieberman's redaction was in their May 27, 2014 motion for summary judgment, which was more than ten business-days after Pietrangelo had filed his petition.

Pietrangelo is therefore entitled to the maximum \$1,000.00 in statutory damages on that count alone. See *State ex rel. Doe v. Smith*, 123 Ohio St. 3d 44, 2009 Ohio 4149 (*Per Curiam*) (“The court of appeals did not err in awarding appellant \$1,000 in statutory damages for Smith’s failure to provide a sufficient explanation for his denial of the records request until he and the board filed their summary-judgment motion referencing the juvenile court’s letter to the police department. R.C. 149.43(C)(1) provides for statutory damages of \$100 for each business day during which the public office failed to comply with the public-records law, up to a maximum of \$1,000. Over ten business days elapsed from the date the mandamus case was filed before appellant received a statutorily sufficient explanation, and the \$1,000 maximum award represented ‘compensation for injury arising from lost use of the requested information,’ with the ‘existence of this injury * * * conclusively presumed.’ R.C. 149.43(C)(1).”); *State ex rel. Cincinnati Enquirer v. Sage*, 2015 Ohio 974, ¶ 46 (“Here, the court of appeals correctly found that Gmoser withheld the recording ‘without a proper legal justification.’ 2013-Ohio-2270, 992 N.E.2d 1178, at ¶ 57. Gmoser had a duty to release the public record, and he did not comply with this obligation. Statutory damages were appropriate, and the court of appeals did not abuse its discretion in awarding them.”).

transmit a copy of a public record to any person by United States mail or by *any other means of delivery* or transmission”); Ohio Atty. Gen.’s *Ohio Sunshine Laws, An Open Govt. Resource Manual* (Mar. 20, 2014 ed.) at 15 (“*Requester Can Choose Pick-up, Delivery, or Transmission of Copies; Public Office May Charge Delivery Costs* A requester may personally pick up requested copies of public records, or may send a designee.¹²⁸ Upon request, a public office must transmit copies of public records via the U.S. mail “or by any other means of delivery or transmission,” at the choice of the requester.”).

Second, as demonstrated above, *Anderson* and its progeny like *McCaffrey*, which had already long been decided by the time of Pietrangelo's records request and later petition, unequivocally require disclosure of dates, hours, and rates on billing statements. Yet, Director Lieberman still initially withheld that information on the Porter Wright billing statements from Pietrangelo—and in fact Director Lieberman/Avon Lake did not release any part of that information until March 18, 2015. Also, after Director Lieberman's wrongful initial-denial, Director Lieberman and Avon Lake went on to argue in the mandamus case that the dates, hours, and rates on the Porter Wright billing statements are exempt as attorney-client privileged under *Dawson*. Director Lieberman and Avon Lake thus took the very same legal position of the defendant in *Anderson* that had been explicitly *rejected* by this Court in *Anderson*:

Under the Public Records Act, insofar as these itemized attorney-billing statements contain nonexempt information, e.g., the general title of the matter being handled, the dates the services were performed, and the hours, rate, and money charged for the services, they should have been disclosed to Anderson. **** The city nevertheless makes three separate arguments to support the court of appeals' conclusion. *** Finally, the city contends that the statements were either exempt from disclosure under the attorney-client privilege or so inextricably intertwined so as to also be privileged. The court of appeals agreed with that assertion based on our decision in *Dawson*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, where we noted that attorney-billing statements withheld by a school district were 'either covered by the attorney-client privilege or so inextricably intertwined with the privileged materials as to also be exempt from disclosure.' *Id.* at ¶ 29. Nevertheless, in the very same paragraph cited by the city and relied on by the court of appeals, we emphasized that the school district did not have to provide the nonexempt portions of the statements to the requester in that case because the district had already provided summaries containing the nonexempt information *** In essence, the relator in *Dawson* was not entitled to the nonexempt portions of the requested itemized attorney-billing statements, because she had already been provided that information by the school district in the summaries. This rendered the relator's claim for that part of the records moot. *** This is the crucial fact that distinguishes this case from *Dawson*. Vermilion did not provide Anderson with al-

ternate records that contain the nonexempt information from the requested attorney-billing statements for January 2010 through April 2010. Therefore, her claim for these records is not moot, and she is entitled to that portion of the statements after they have been redacted to prevent disclosure of the narrative portions that are covered by the attorney-client privilege.

134 Ohio St.3d at 124-126.

Thus, contrary to the Ninth District's holding, there is no "interplay between *Dawson* and *Anderson*" on which Director Lieberman/Avon Lake could have reasonably relied; rather, *Anderson* explicitly clarifies *Dawson* as requiring exactly what *Anderson* requires.

Moreover, a well-informed public officer would have known that Director Lieberman's and Avon Lake's mandamus-case argument—that Pietrangelo's status as a party to the case involving the billing statements changed or affected the legal analysis—is specious. As shown above, both *Gilbert* and *McCaffrey*, which had already been decided by the time of Director Lieberman's and Avon Lake's argument, explicitly preclude a requester's party-status from making otherwise non-exempt information exempt. Likewise, it was well-established by then that the attorney-client privilege does not rise against a third party depending on their party-status, but rises against the entire world based on a communication being a protectable communication between an attorney and client. See, e.g., 44 *Ohio Jur.3d*, Evidence and Witnesses, §§ 763, 764, pp. 160-161 (Thomson Reuters 2012) (whether "the client is or is not a party to [an] action in which the question arises" "is immaterial" to whether a communication is attorney-client privileged).

Director Lieberman's and Avon Lake's other litigation conduct in the mandamus case, including their obstructive answer and their failure to unilaterally provide the un-redacted billing statements under seal, also indicates a lack of good faith on their part. They intentionally multiplied the proceeding to further delay release to Pietrangelo of the non-exempt records. *Cf. Cincinnati Enquirer*, 2015 Ohio 974, ¶ 43 ("The prosecutor's office lacked legal authority for with-

holding the records, it drove up the Enquirer's burdens and costs by dragging the Enquirer into Ray's criminal case, and it stymied a significant public benefit in the process.").

Pietrangelo is thus entitled to the maximum \$1,000.00 in statutory damages on this count as well. Indeed, R.C. 149.43 is a dead letter if Pietrangelo is not awarded maximum damages in the instant, egregious case. Director Lieberman and Avon Lake deliberately wrongly denied Pietrangelo the requested records-information for more than a year (and counting with regard to the still-withheld information) for the purpose of and/or with the effect of depriving him of the information for its use to expose the possible criminal conflict-of-interest of Koesel and Turnbull. *Cf. Payne Entpr. Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("stale information is of little value" to an informed citizenry). Unless Pietrangelo is compensated for the loss of his records/information, see *Patterson*, 171 Ohio St. at 371 ("The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people[.]") (internal quotation marks and citation omitted), as explicitly provided for by statute, see R.C. 149.43(C)(1) ("The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information."), public officers, including Director Lieberman, will have every incentive to continue to wrongfully deny requesters records/information—particularly when the records/information expose(s) government wrongdoing, *cf. 9 Writings of James Madison*, p. 103 (G. Hunt ed. 1910) ("A popular Government, without popular information, . . . is but a Prologue to a Farce or a Tragedy, or perhaps both."). Moreover, requesters will have every *dis*-incentive to file suit to obtain wrongfully withheld records—even when there is clear precedent entitling them to the records—if they know that, after all of the expense and effort of litigation, they will not be awarded damages for loss of the records even if they obtain release of the records.

III. PROPOSITION OF LAW NO. 3: Sanctions are appropriate for frivolous conduct by a party and/or counsel. Therefore, the Ninth District abused its discretion in denying Pietrangelo's motion for sanctions against Director Lieberman and Avon Lake (and Assistant Director David Graves).

A. The Ninth District erred as a matter of law in holding that Director Lieberman's and Avon Lake's (and Assistant Director Graves') specific assertions in the answer were not frivolous and scandalous and did not entitle Pietrangelo to sanctions against them under Civ. R. 11, R.C. Section 2323.51, and/or the Ninth District's own inherent powers.

On May 12, 2014, Pietrangelo filed a motion to strike and for sanctions against Director Lieberman and Avon Lake (and Assistant Director David Graves). (See 5/12/14 Mot.) In that motion, Pietrangelo asked for the following specific relief:

Pursuant to Ninth District Local Rule 10(A), Ohio Rules of Civil Procedure 1(A), 8(B), 11, and 12(F), O.R.C. Section 2323.51, and the Court's inherent powers, Relator hereby moves the Court to strike initial Paragraphs 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, and 16, and "AFFIRMATIVE DEFENSES" Paragraphs 1-6, of the Answer, and to impose sanctions—including Relator's expenses, if any, in making this Motion; court costs apportionable to this Motion; and a Court fine in an amount to be determined by the Court—against Respondent City of Avon Lake, Ohio, Respondent Avon Lake Law Director Abraham Lieberman, and attorney Avon Lake Assistant Law Director David M. Graves, as explained in the accompanying Memorandum which is fully incorporated herein. The grounds for such relief are that the respective Paragraphs are improper and violate the Ohio Rules of Civil Procedure as explained in the accompanying Memorandum.

(*Id.* (emphasis added).) Importantly, in his motion, Pietrangelo never asked for attorney's fees or reimbursement for his own time in preparing the motion. On August 8, 2014, the Ninth District magistrate entered an order denying Pietrangelo's motion "to strike portions of Respondents' answer and for attorney fees in connection with that motion." 8/8/14 Mag. Order at 1 (Appx. at 15). The magistrate's order gave no explanation for the denial, and did not directly address monetary sanctions at all, at least not monetary sanctions other than attorney's fees which, again, Pietrangelo had not asked for to begin with. See *ibid.*

On August 14, 2014, Pietrangelo filed a motion to set aside the magistrate's order as erroneously denying Pietrangelo's motion to strike *and* for sanctions. (See 8/14/14 Mot. & Memo. ("Pursuant to Ninth District Local Rule 10(A) and Ohio Rule of Civil Procedure 53(D)(2)(b), Relator hereby moves the Court to set aside the August 8, 2014 Magistrate's Order and journal entry denying Relator's May 12, 2014 motion to strike *and for sanctions.*") (emphasis added).) On October 20, 2014, a Ninth District panel-judge, erroneously treating Pietrangelo's original May 12, 2014 motion to strike and for sanctions as only a motion to strike, and Pietrangelo's August 14, 2014 motion to set aside the magistrate's denial of Pietrangelo's motion to strike and for sanctions as only a motion to set aside the magistrate's denial of Pietrangelo's motion to strike, upheld the magistrate's denial. See 10/20/14 J.E. at 1, 3 (Appx. at 9, 11) ("Relator moved to strike portions of Respondents' answer. This Court's Magistrate denied the motion. Relator has moved to set aside the magistrate's order Relator asserts . . . that he was 'entitled as a matter of law' to have portions of Respondent's answer stricken. *** Under these circumstances, the motion to strike portions of Respondents' answer was properly denied. The motion to set aside the magistrate's order dated August 8, 2014, is denied."). To be clear, the Ninth District thus never really addressed Pietrangelo's motion for sanctions, and just denied it by default.

In upholding the magistrate's order, the judge held that 1) Director Lieberman's and Avon Lake's main denials were not frivolous because Pietrangelo's complaint averments "consist of lengthy paragraphs setting forth multiple factual and legal propositions, sometimes with citations to legal authority[]"; 2) Director Lieberman's and Avon Lake's affirmative defenses should not be stricken because "the validity of an alleged affirmative defense is an issue that can be determined upon consideration of the merits without prejudice to Relator"; and, 3) Director Lieberman's and Avon Lake's accusation against Pietrangelo of vexatious conduct in the

skatepark suit was not scandalous because “[v]iewing the language at issue in its context, however, the motion was properly denied in that respect as well.” *Id.* at 2-3 (Appx. at 10-11).

However, the Ninth District’s holdings here are clearly erroneous, and the Ninth District abused its discretion in denying Pietrangelo sanctions against Director Lieberman and Avon Lake (and Assistant Director Graves) under Civ. R. 11, R.C. Section 2323.51, and/or the Ninth District’s own inherent powers.

A denial of sanctions is reviewed for abuse of discretion. See *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 874 N.E.2d 510, 2007 Ohio 4789 (*Per Curiam*).

Under Civ. R. 11, “[t]he signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney’s or party’s knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. *** For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court’s own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule.” Civ. R. 11(A). “Similar action may be taken if scandalous or indecent matter is inserted.” *Ibid.* See, also, *In re Estate of Call*, 2005 Ohio 1466 (9th Dist. Lorain). “‘Scandalous’ matter consists of unnecessary matter or facts discriminatory of a party referred to in the pleading or matter which casts a derogatory light on such a party.” Klein Darling, *Civil Practice*, § 12:12, p. 786 (West 2004). “Even if the pleadings do not go to the jury, they are matters of public record, and if the allegations have no bearing on the case, the party against whom they are made is entitled to judicial protection.” *Ibid.*

Under R.C. 2323.51, “any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney’s fees, and other reasonable expenses in-

curred in connection with the civil action or appeal.” R.C. 2323.51(B)(1). See, also, *Lable & Co. v. Flowers*, 104 Ohio App.3d 227, 233, 661 N.E.2d 782 (9th Dist. Lorain 1995). “‘Frivolous conduct’ means either of the following: [] Conduct of an . . . other party to a civil action . . . or of the . . . other party’s counsel of record that satisfies either of the following: [] It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or needless increase in the cost of litigation. [] It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.” R.C. 2323.51(A)(2)(a)(i) and (ii). “An award made pursuant to division (B)(1) of this section may be made against a party, the party’s counsel of record, or both.” R.C. 2323.51(B)(4).

Under a court’s own inherent powers, a party and/or its counsel may also be punished for frivolous conduct, at least when it obstructs justice, as contempt of court. See *Lable & Co.*, 104 Ohio App.3d at 232 (“This court has held that there are at least three possible rationales for awarding attorney fees for frivolous conduct: (1) a court’s inherent power to do all things necessary to the administration of justice and to protect [its] own powers and processes, (2) Civ.R. 11, and (3) R.C. 2323.51.”) (internal quotation marks and citation omitted); *State ex rel. Adkins v. Sobb*, 39 Ohio St.3d 34, 36, 528 N.E.2d 1247 (1988) (“The court of appeals did not abuse its discretion in finding the city of Sylvania in contempt of court.”); *In re McGinty*, 30 Ohio App.3d 219, 225, 507 N.E.2d 441 (8th Dist. 1986) (contempt finding against county prosecutor upheld for, among other things, falsely accusing opposing counsel). Contempt includes “conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.” *Denovchek v. Bd. of Trumbull Cty. Commrs.*,

36 Ohio St. 3d 14, 15, 520 N.E.2d 1362 (1988). An example of contempt is where an attorney in a case filed a memorandum on which he had made a handwritten notation at the end accusing the judge of fraud. See *Fed. Land Bank Assn. of Fostoria v. Walton*, 99 Ohio App.3d 729, 734, 651 N.E.2d 1048 (3rd Dist. Wyandot 1993) (“The appellant’s actions were tantamount to calling the trial court judge a fraud in open court and were designed to disrupt the court proceedings set for the August 9 hearing on the plaintiff’s motion for summary judgment.”). Contempt sanctions may include a fine to be paid to the court. See *In re McGinty, supra* (contempt sanctions, including fine, affirmed); *Citicasters Co. v. Stop 26-Riverbend, Inc.*, 147 Ohio App.3d 531, 547, 771 N.E.2d 317, 2002 Ohio 2286 (7th Dist. Mahoning) (contempt fine affirmed).

These sanction provisions are fully available in public-records mandamus cases as well. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 127 Ohio St.3d 202, 2010 Ohio 5073 (Civ. R. 11); *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011 Ohio 5350 (R.C. 2323.51); *State ex rel. Verhovec v. Marietta*, 2013 Ohio 5414 (4th Dist. Washington) (Civ. R. 11 and R.C. 2323.51).

Director Lieberman’s and Avon Lake’s answer’s main denials and affirmative defenses were clearly frivolous. It was “absolutely clear under the existing law that no reasonable lawyer could argue the” defenses/denials. See *Burchett v. Larkin*, 192 Ohio App.3d 418, 423, 2011 Ohio 684 (4th Dist. Scioto) (*Per Curiam*) This Court’s precedent, *State ex rel. Anderson v. City of Vermilion*, 134 Ohio St.3d 120 (2012) (*Per Curiam*), explicitly holds that dates, hours, and rates on billing statements are non-exempt and must be disclosed. Another of this Court’s precedents, *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 75 Ohio St.3d 31, 34 (1996), explicitly holds that there are no affirmative defenses in public-records cases. Had Director Lieberman and Avon Lake (and Assistant Director Graves) done the simplest of research, they

would have discovered these precedents, and conceded Pietrangelo's cause. See *State ex rel. Verhovec*, 2013 Ohio 5414, ¶ 51 (“[T]he specter of Rule 11 sanctions encourages civil litigants to stop, think and investigate more carefully before serving and filing papers.”) (internal quotation marks and citations omitted). Pietrangelo even apprised Director Lieberman and Avon Lake (and Assistant Director Graves) of *Anderson* in his petition. (See Ver. Pet. at ¶ 10.) Yet Director Lieberman and Avon Lake (and Assistant Director Graves) made their denials/defenses anyway, in order to vexatiously prolong Pietrangelo's mandamus case for what would be a complete year of litigation.

Director Lieberman's and Avon Lake's (and Assistant Director Graves') answer's accusation—that “Relator's strategy in the Injunction case has been to harass the City with voluminous court filings to which the City is forced to respond, at no small expense to the City”—was also clearly scandalous. It was the very definition of scandalous. It “cast a derogatory light” on Pietrangelo, but “had no bearing on” the mandamus case itself so that Pietrangelo could not defend himself from it in the mandamus case. Director Lieberman and Avon Lake (and Assistant Director Graves) simply made it to harass Pietrangelo in his quest for the dates, hours, and rates. Indeed, Director Lieberman and Avon Lake (and Assistant Director Graves) did not even believe their own false accusation. In the skatepark suit, in which Avon Lake is a party and Director Lieberman and Assistant Director Graves are Avon Lake's counsel, they never even made a motion for sanctions against Pietrangelo based on alleged vexatious conduct. See Dkt., Case No. 13CV181561. They could not—because there was no factual/legal basis for such an allegation.

Furthermore, the Ninth District's reasoning for nonetheless not sanctioning Avon Lake and Director Lieberman (and Assistant Director Graves) has no basis in law. First, Plaintiff's mandamus petition did not “consist of lengthy paragraphs setting forth multiple factual and legal

propositions, sometimes with citations to legal authority.” From start to finish (including introduction, jurisdiction, venue, parties, and general allegations paragraphs), Pietrangelo’s petition only had fifteen allegation-paragraphs (see 4/18/14 Ver. Pet.), eight of which only had a single sentence (*id.* at ¶¶ 1, 4, 5, 7, 11, 13, 14, 15). The other seven allegation-paragraphs, though they had more than one sentence, were still within the letter of the Rules. See Civ. R. 8(A) (the complaint shall contain “a short and plain statement of the claim showing that the party is entitled to relief”); 10(B) (“All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances”). Also, Pietrangelo only sparsely cited legal authority as necessary to establish jurisdiction or venue or an element of mandamus. Thus, Pietrangelo’s petition was entirely proper, and did not invite impropriety on Avon Lake’s and Director Lieberman’s (and Assistant Director Graves’) part in stating their answer. Moreover, even if Pietrangelo’s petition had been improper in some way, that did not allow Avon Lake and Director Lieberman (and Assistant Director Graves) to respond by making frivolous denials and affirmative defenses. There is no such thing as a “reciprocity” defense under Rule 11 or the other sanctioning authorities.

Second, whether Avon Lake’s and Director Lieberman’s affirmative defenses could be resolved on consideration of the merits of the case did not make the affirmative defenses any less sanctionable. They were something frivolous which Pietrangelo was forced to address in the case, if not by way of his motion to strike, then by way of his later briefs. Third, and finally, even viewed in context, there was absolutely no basis in the mandamus case for Avon Lake’s and Director Lieberman’s (and Assistant Director Graves’) scandalous accusation against Pietrangelo. Avon Lake and Director Lieberman (and Assistant Director Graves) were at best suggesting that Pietrangelo’s records request was yet another attempt to harass Avon Lake in the

skatepark suit. However, such a suggestion—besides being false—was clearly still frivolous because a requester’s purpose in making a request is simply irrelevant in a mandamus case. See *State ex rel. Consumer News Serv. v. Worthington*, 97 Ohio St.3d 58, 66, 2002 Ohio 5311 (*Per Curiam*) (purpose behind request to “inspect and copy public records is irrelevant”). Indeed, to allow a public office(r) to deny a request simply on the office(r)’s say-so that the requester made the request to harass the office(r) would eviscerate R.C. 149.43, as an office(r) could make that accusation about every request.

Pietrangelo is thus entitled to sanctions against Director Lieberman and Avon Lake (and Assistant Director Graves).

CONCLUSION

WHEREFORE, the Court should 1) reverse the Ninth District’s denial to Pietrangelo of a) a writ of mandamus requiring Director Lieberman/Avon Lake to release to Pietrangelo copies of the Porter Wright billing statements with all of the dates, hours, and rates un-redacted, b) statutory damages of \$1,000.00, and c) sanctions against Director Lieberman and Avon Lake; 2) remand the case for a determination of the amount of sanctions and other action consistent with the Court’s reversal; and 3) enter any other relief to which Pietrangelo is entitled.

Respectfully submitted,


JAMES E. PIETRANGELO, II
33317 Fairport Drive
Avon Lake, OH 44012
(802) 338-0501

CERTIFICATE OF SERVICE

On ^{May 26}~~April~~ 29, 2015, a copy of the foregoing Brief was served by Relator upon Respondents by first-class U.S. Mail to (the office of) Abraham Lieberman, City of Avon Lake Law Director, 150 Avon Belden Road, Avon Lake, OH 44012, attorney for Respondents.

James E. Pietrangelo, II
JAMES E. PIETRANGELO, II

Appendix

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
JAMES E. PIETRANGELO, II

Relator-Appellant,

v.

CITY OF AVON LAKE, OHIO, *et al.*

Respondents-Appellees.

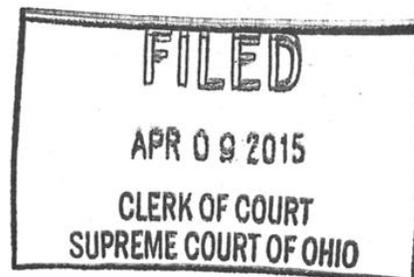
No. 2015-0495

On Appeal From the
Lorain County
Court of Appeals,
Ninth Appellate District
Case No. 14CA010571

AMENDED NOTICE OF APPEAL OF RIGHT
OF RELATOR JAMES E. PIETRANGELO, II

James E. Pietrangelo, II
33317 Fairport Drive
Avon Lake, OH 44012
(802) 338-0501
PRO SE RELATOR

Abraham Lieberman
City of Avon Lake Law Director
150 Avon Belden Road
Avon Lake, OH 44012
(440) 930-4122
COUNSEL FOR RESPONDENTS,
CITY OF AVON LAKE, OHIO,
ABRAHAM LIEBERMAN



NOTICE OF APPEAL

Pursuant to S.Ct.Prac.R. 5.01.(A)(3), Relator James E. Pietrangelo, II, and/or the State of Ohio *ex rel.* James E. Pietrangelo, II, hereby invokes the appellate jurisdiction of the Supreme Court of Ohio and appeals of right to the Supreme Court of Ohio from

the March 11, 2015 judgment (Journal Entry) (attached hereto) in part, to the extent that it denied Pietrangelo statutory damages and records/information of the dates, hours, and (fee) rates other than in the "Professional Fee Summary" on the billing statements (see also below);

the October 20, 2014 Journal Entry (attached hereto) denying Pietrangelo's motion to set aside the Magistrate's August 8, 2014 Order;

the August 18, 2014 Journal Entry (attached hereto) denying Pietrangelo's motion for summary judgment; and

the August 8, 2014 Magistrate's Order (attached hereto) denying Pietrangelo's motion to strike and for sanctions,

of the Lorain County Court of Appeals, Ninth Appellate District, in Case No. 14CA010571, *Pietrangelo v. City of Avon Lake, Ohio, et al.*, originating in said Court of Appeals. Pietrangelo does not appeal the Ninth District's March 11, 2015 judgment (Journal Entry) to the extent that said judgment (Journal Entry) granted Pietrangelo a writ of mandamus and taxed costs to the Respondents.

April 9, 2015

Respectfully submitted,

James E. Pietrangelo, II
JAMES E. PIETRANGELO, II
33317 Fairport Drive
Avon Lake, Ohio 44012
(802) 338-0501

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Notice of Appeal was served upon Respondents-Appellees by first-class U.S. Mail this 9th day of April 2015, to Avon Lake Law Director Abraham Lieberman, 150 Avon Belden Road, Avon Lake, OH 44012, Counsel for Respondents-Appellees.

James E. Pietrangelo, II
JAMES E. PIETRANGELO, II

ENTERED

STATE OF OHIO
COUNTY OF LORAIN

COURT OF APPEALS

FILED
LORAIN COUNTY

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2015 MAR 11 AM 11:53

STATE OF OHIO ex rel. JAMES E.
PIETRANGELO, II

C.A. No. 14CA010571

CLERK OF COMMON PLEAS
JOHN BABAKOWSKI

Relator

v.

9th APPELLATE DISTRICT

CITY OF AVON LAKE, OHIO, et al.

Respondents

JOURNAL ENTRY

Relator, James Pietrangelo, II, filed this action in mandamus to compel the City of Avon Lake to provide unredacted detailed invoices for attorney's fees paid to retained counsel in a litigation matter. This Court denied the parties' cross-motions for summary judgment, ordered the City to file unredacted copies of the billing statements under seal, and directed the parties to file merit briefs. The matter is now ripe for decision.

Pietrangelo made a public records request for invoices from the law firm of Porter, Wright, Morris and Arthur, LLP for services rendered to the City in connection with litigation involving Pietrangelo. In response, the City provided invoices that set forth the identity of the law firm, the matter for which services were provided, the total amount billed, and expenses and disbursements made.

the City redacted the following information:

Citing attorney-client privilege,
Journal 152 Page 110

narrative descriptions of particular legal services rendered, the exact dates on which such services were rendered, the particular attorney rendering each service, the time spent by each particular attorney on a particular day, the billing rate of each particular attorney, the total number of hours billed by each particular attorney during the period covered by the

invoice, and the total fees attributable to each particular attorney for the period covered by the invoice.

Pietrangelo sought a writ of mandamus compelling the City to provided unredacted invoices, arguing that “the dates, hours, and (fee) rates for legal services provided * * * are clearly public records/information, and non-exempt from production by the officials.”

Relator’s Claims

The appropriate remedy to compel compliance with the Public Records Act, R.C. Chapter 149, is mandamus. *State ex rel. Physicians Committee for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, ¶ 6. “Although ‘[w]e construe the Public Records Act liberally in favor of broad access and resolve any doubt in favor of disclosure of public records,’ * * * the relator must still establish entitlement to the requested extraordinary relief by clear and convincing evidence.” *State ex rel. Motor Carrier Serv., Inc. v. Rankin*, 135 Ohio St.3d 395, 2013-Ohio-1505, ¶ 18, quoting *State ex rel. Rocker v. Guernsey Cty. Sheriff’s Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, ¶ 6. In a public records case, the relator does not need to establish that there is no adequate remedy at law. *State ex rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio St.3d 256, 2011-Ohio-625, ¶ 24.

“If a record does not meet the definition of a public record, or falls within one of the exceptions to the law, the records custodian has no obligation to disclose the document.” *State ex rel. Plunderbund Media v. Born*, Slip Opinion No. 2014-Ohio-3679, ¶ 18. In this respect, however:

Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian

has the burden to establish the applicability of an exception. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception.

State ex rel. Cincinnati Enquirer v. Jones-Kelley, 118 Ohio St.3d 81, 2008-Ohio-1770, paragraph two of the syllabus.

Under R.C. 149.43(A)(1), records kept by any public office are “public records” unless they fall under an exception. “The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys’ legal advice, is a state law prohibiting release of these records.” *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 542 (2000), citing *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 383 (1998). The Ohio Supreme Court has recognized that itemized attorney billing statement may contain a mixture of exempt and non-exempt information under R.C. 149.43. See *State ex rel. Anderson v. Vermillion*, 134 Ohio St.3d 120, 2012-Ohio-5320, ¶ 15. In this situation, narrative portions are exempt from disclosure, but public entities must disclose nonexempt portions, including “the general title of the matter being handled, the dates the services were performed, and the hours, rate, and money charged for the services.” *Id.* See also *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 524, 2011-Ohio-6009, ¶ 29.

This Court has conducted an in camera review of the unredacted invoices that were filed under seal by the City. Having done so, we agree with the City’s position that it has disclosed all of the nonexempt portions of the records with one exception: the portion of each invoice titled “Professional Fee Summary” describes the “hours, rate, and money charged for the services,” and is not exempt under R.C. 149.43. The narrative descriptions of the work performed and the billing information that correlates

to the narratives is summarized within the "Professional Fee Summary," so those items need not be disclosed apart from the "Professional Fee Summary."

With respect to the information contained in the "Professional Fee Summary" only, Pietrangelo has established that he is entitled to a writ of mandamus to compel the City to provide unredacted copies of the attorney billing records.

Statutory Damages and Attorney Fees

Pietrangelo also claims that he is entitled to the maximum amount of damages authorized by R.C. 149.43(C)(1), which authorizes statutory damages up to a maximum amount of \$1,000. Although injury is presumed in the event that a writ of mandamus issues to compel compliance with R.C. 149.43, a court may decline to award damages if it determines:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

R.C. 149.43(C)(1)(a)/(b). We conclude that, as the Ohio Supreme Court determined in *Anderson*, a large portion of the billing statements at issue in this case were exempt from disclosure and, given the interplay between *Dawson* and *Anderson*, a well-informed public office could reasonably have believed that the nonexempt portion of the

billing statements could be withheld from disclosure. *Anderson* at ¶ 26. As in *Anderson*, therefore, we conclude that Pietrangelo is not entitled to statutory damages.

Pietrangelo is also not entitled to attorney fees under R.C. 149.43(C)(2)(b) because “[t]he Supreme Court of Ohio has consistently held that an award of attorney fees is not available to the aggrieved party under the public records act absent evidence that the party paid, or was obligated to pay, an attorney to prosecute the action.” *State ex rel. Bott Law Group, L.L.C. v. Ohio Dept. of Natural Resources*, 10th Dist. Franklin No. 12AP-448, 2013-Ohio-5219, ¶ 46. Pietrangelo, an attorney licensed in the State of Ohio, represented himself in this action. As such, he is not entitled to attorney fees under R.C. 149.43(C)(2)(b). *Bott Law Group* at ¶ 45.

Conclusion

A writ of mandamus is granted to compel the City to provide Pietrangelo with copies of the relevant attorney billing statements with the “Professional Fee Summary” portion unredacted. In all other respects, Pietrangelo’s petition is denied.

Costs are taxed to Respondents.

The clerk of courts is hereby directed to serve upon all parties not in default notice of this judgment and its date of entry upon the journal. *See Civ.R. 58(B)*.


Judge

Concur:
Whitmore, J.
Moore, J.

COURT OF APPEALS

STATE OF OHIO)
COUNTY OF LORAIN)

FILED
LORAIN COUNTY
2014 OCT 20 P 12:40

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO ex rel. CLAYTON E. COMMON PLEAS
PIETRANGELO, II RON NABAKOWSKI

C.A. No. 14CA010571

Relator

v.

9th APPELLATE DISTRICT

ENTERED

CITY OF AVON LAKE, OHIO, et al.

Respondents

JOURNAL ENTRY

This matter is before the Court pursuant to Relator's motion to set aside the magistrate's order under Civ.R. 53(D)(2)(b). Relator moved to strike portions of Respondents' answer. This Court's Magistrate denied the motion. Relator has moved to set aside the magistrate's order under Civ.R. 53(D)(2)(b), and Respondent has opposed the motion. Relator asserts two grounds for the motion: (1) that the magistrate's order is "perfunctory" and contains no findings of fact, and (2) that he was "entitled as a matter of law" to have portions of Respondents' answer stricken.

With respect to Relator's first argument, this Court notes that the Rules of Civil Procedure do not generally require findings of fact. See Civ.R. 52. Compare *State ex rel. Add Venture, Inc. v. Gillie*, 62 Ohio St.2d 164, 165 (1980) (limiting the application of Civ.R. 52 to "judgments."). A magistrate is not required to provide findings of fact when acting under Civ.R. 53(D)(2)(a), and Relator's motion is not well taken on this basis.

Civ.R. 12(F) permits a court to strike from responsive pleadings "any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter."

Contrary to Relator's position, Civ.R. 12(F) does not entitle him as a matter of law to the relief he requested. Instead, it permits a court to exercise its discretion to strike offensive matter. *State ex rel. Morgan v. new Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 26. *Maxim Ents., Inc. v. Haley*, 9th Dist. Summit No. 24666, 2009-Ohio-5541, ¶ 7. Relator moved this Court to strike Respondents' affirmative defenses for three reasons. First, he argued that the matters labeled as "affirmative defenses" by Respondents are not affirmative defenses in the technical sense of the term and must be stricken. Even if this Court assumes this proposition to be true, the validity of an alleged affirmative defense is an issue that can be determined upon consideration of the merits without prejudice to Relator, and the motion was properly denied in this respect. Second, Relator argued that Respondents' affirmative defenses are unsupported or inaccurate. This is a matter that is more properly determined upon consideration of the merits of this case, and the motion was also properly denied in this respect. Finally, Relator maintained that Respondents' references in paragraph five of his affirmative defenses to pleadings filed by Relator in a related case are "scandalous" to the extent that they impugn his reputation as an attorney. Viewing the language at issue in its context, however, the motion was properly denied in this respect as well.

With respect to Respondents' initial averments set forth in paragraphs 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the answer, Relator argued that the statements therein are frivolous, nonresponsive, or both. Having examined the paragraphs at issue, this Court cannot agree. Indeed, this Court's review of the allegations of the complaint to which Respondent pleaded indicate that the averments frequently consist of lengthy paragraphs setting forth multiple factual and legal propositions, sometimes with

citations to legal authority. Under these circumstances, the motion to strike portions of Respondents' answer was properly denied.

The motion to set aside the magistrate's order dated August 8, 2014, is denied.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a horizontal line.

Judge

COURT OF APPEALS

STATE OF OHIO)
COUNTY OF LORAIN)

FILED)
LORAIN COUNTY)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2014 AUG 18 P 1:32

STATE OF OHIO
PIETRANGELO, II

ex rel. JAMES E. CLERK OF COMMON PLEAS
RON NABAKOWSKI

C.A. No. 14CA010571

ON APPELLATE DISTRICT

ENTERED

Relator

v.

CITY OF AVON LAKE, OHIO, et al.

Respondents

JOURNAL ENTRY

Relator, James Pietrangelo, II, filed this action in mandamus to compel the City of Avon Lake to provide unredacted detailed invoices for attorney's fees paid to retained counsel in a litigation matter. Pietrangelo and the City filed cross-motions for summary judgment, which are now before the Court for decision.

Pietrangelo made a public records request for invoices from the law firm of Porter, Wright, Morris and Arthur, LLP for services rendered to the City in connection with litigation involving Pietrangelo. In response, the City provided invoices that set forth the identity of the law firm, the matter for which services were provided, the total amount billed, and expenses and disbursements made. Citing attorney-client privilege, the City redacted the following information:

narrative descriptions of particular legal services rendered, the exact dates on which such services were rendered, the particular attorney rendering each service, the time spent by each particular attorney on a particular day, the billing rate of each particular attorney, the total number of hours billed by each particular attorney during the period covered by the invoice, and the total fees attributable to each particular attorney for the period covered by the invoice.

Pietrangelo sought a writ of mandamus compelling the City to provide unredacted invoices, arguing that "the dates, hours, and (fee) rates for legal services provided * * * are clearly public records/information, and non-exempt from production by the officials." The parties filed cross-motions for summary judgment.

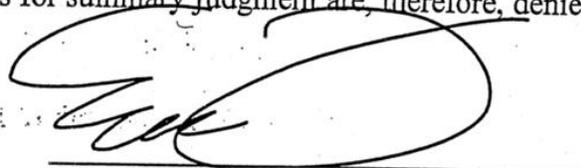
Civ.R. 56(C) provides the standard by which this Court determines whether summary judgment is appropriate:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

The moving party "bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Vahila v. Hall*, 77 Ohio St.3d 421, 429 (1997), quoting *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The nonmoving party then has a reciprocal burden to set forth specific facts, by affidavit or as otherwise provided by Civ.R. 56(E), which demonstrate that there is a genuine issue for trial. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, at ¶10. In order to prevail on a mandamus claim, a relator must establish a clear legal right to the relief requested, a corresponding clear legal duty on the part of the public office, and the lack of an adequate remedy at law. *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, ¶ 11.

In this case, we are unable to determine from the evidence before the Court whether either party is entitled to judgment as a matter of law. The critical issue in this case is whether the redacted information is “so inextricably intertwined with the privileged materials as to also be exempt from disclosure.” *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, ¶ 6, 28-29 (analyzing whether privilege attached to the contents of an attorney’s invoices after an in camera review of the relevant documents.). Without the ability to review this information – which has not been provided to this Court under seal – we cannot determine whether either party is entitled to judgment as a matter of law.

The parties’ respective motions for summary judgment are, therefore, denied.



Judge

ENTERED

COURT OF APPEALS

STATE OF OHIO)
COUNTY OF LORAIN)

) ss: FILED)
) LORAIN COUNTY)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO
PIETRANGELO, II

2014 AUG - 8 P 12: 11
ex rel. JAMES E.
CLERK OF COMMON PLEAS
RON NABAKOWSKI

C.A. No. 14CA010571

Relator

9th APPELLATE DISTRICT

v.

CITY OF AVON LAKE, OHIO, et al.

Respondents

MAGISTRATE'S ORDER

Relator has moved to strike portions of Respondents' answer and for attorney fees in connection with that motion.

The motions are denied.

C. Michael Walsh

C. Michael Walsh
Magistrate

porterwright

Porter Wright Morris & Arthur LLP
41 South High Street, Suites 2800-3200, Columbus, Ohio 43215-6194
250 East Fifth Street, Suite 2200, Cincinnati, Ohio 45202-5118
925 Euclid Avenue, Suite 1700, Cleveland, Ohio 44115-1483
One South Main Street, P.O. Box 1805, Dayton, Ohio 45401-1805
9132 Strada Place, 3rd Floor, Naples, Florida 34108-2683
1900 K Street, NW, Suite 1110, Washington, D.C. 20006

Internal Revenue Service Identification Number 31-4373657

Abraham Lieberman
City of Avon Lake
150 Avon Belden Road
Avon Lake, OH 44012

RECEIVED
DEC 06 2013
CITY OF AVON LAKE
FINANCE DEPARTMENT

December 5, 2013
INVOICE NUMBER: 1045362

Please return this page with your payment so that we can properly credit your account. If you have any questions regarding this invoice or any amount shown as previously billed and unpaid, please contact the attorney handling your matter.

Thank you,

Porter Wright Morris & Arthur LLP

Cincinnati, Ohio (513) 381-4700
Cleveland, Ohio (216) 443-9000
Columbus, Ohio (614) 227-2000

Dayton, Ohio (937) 449-6810
Naples, Florida (239) 593-2900
Washington, D.C. (202) 778-3000

PLEASE RETURN THIS PAGE WITH YOUR PAYMENT	
Client:	City of Avon Lake
Matter:	James Pietrangelo v. Avon Lake
Client/Matter Number:	4013244 - 195809
Attorney Handling:	Ms. Koesel
Statement Amount:	\$34,097.89

PAID
DEC 12 2013
CITY OF AVON LAKE
FINANCE DEPT.

TOTAL AMOUNT DUE UPON RECEIPT. THANK YOU FOR YOUR PROMPT PAYMENT.

PO 32294 \$ 30,000.00
PO 32506 \$ 4,097.89

Aut. A10171308705



Date _____ Name _____ Services _____ Hours _____

REDACTED
ATTORNEY-CLIENT PRIVILEGE
State ex rel. Besser v. Ohio State Univ.
87 Ohio St.3d 535, 542 (2000)

REDACTED
ATTORNEY-CLIENT PRIVILEGE
State ex rel. Besser v. Ohio State Univ.
87 Ohio St.3d 535, 542 (2000)

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ATTORNEY-CLIENT PRIVILEGE
State ex rel. Besser v. Ohio State Univ.
87 Ohio St.3d 535, 542 (2000)

REDACTED
ATTORNEY-CLIENT PRIVILEGE
State ex rel. Besser v. Ohio State Univ.
87 Ohio St.3d 535, 542 (2000)

<u>Professional Fee Summary</u>	<u>Hours Worked</u>	<u>Billed Per Hour</u>	<u>Bill Amount</u>
Margaret M. Koesel	78.25	275.00	21,518.75
Tracey L. Turnbull	43.00	275.00	11,825.00
C. D. Jalandoni	2.50	225.00	562.50
Margaret M. Koesel	2.10	0.00	N/C
Totals	125.85		\$33,906.25

TOTAL FEES \$ 33,906.25

DISBURSEMENTS and/or EXPENSES

Copy Expense	\$ 88.92
Copy Expense (Color)	97.00
Facsimile Charges	0.72
Outside Copy	5.00

TOTAL DISBURSEMENTS and/or EXPENSES \$ 191.64

TOTAL INVOICE \$ 34,097.89

LITIGATION SERVICES

Case: Pietrangelo v. Avon Lake

Date	Description of Services	Hours Worked	Fees Earned	Fees Authorized	Fees Billed	Balance
10/08/13	[REDACTED]	2.00	\$ 200.00	\$ 10,000.00	\$ 200.00	\$ 9,800.00
	[REDACTED]	3.00	\$ 300.00		\$ 300.00	\$ 9,500.00
	[REDACTED]	1.00	\$ 100.00		\$ 100.00	\$ 9,400.00
	[REDACTED]	1.50	\$ 150.00		\$ 150.00	\$ 9,250.00
	[REDACTED]	2.75	\$ 275.00		\$ 275.00	\$ 8,975.00
	REDACTED					\$ 8,975.00
	ATTORNEY-CLIENT PRIVILEGE	0.50	\$ 50.00		\$ 50.00	\$ 8,925.00
	State ex rel. Besser v. Ohio State Univ. 87 Ohio St.3d 535, 542 (2000)	1.00	\$ 100.00		\$ 100.00	\$ 8,825.00
	State ex rel. Pietrangelo v. Avon Lake 9th Dist. Lorain No. 14CA010571 Journal 152, Page 110 (March 11, 2015)	7.25	\$ 725.00		\$ 725.00	\$ 8,100.00
11/06/13	[REDACTED]	0.25	\$ 25.00		\$ 25.00	\$ 7,975.00
	[REDACTED]	4.75	\$ 475.00			\$ 7,950.00
	[REDACTED]	0.50	\$ 50.00			\$ 7,950.00
11/26/13	[REDACTED]	8.25	\$ 825.00			\$ 7,950.00

Rsth = Please Submit Thanks
Ordinance 126-2013
\$ 1,350

[Handwritten Signature]