[Cite as *State ex rel. Bell v. Strup*, 2011-Ohio-711.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Greg A. Bell,	:	
Relator,	:	
v.	:	No. 09AP-1089
Thomas Strup,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on February 17, 2011

Philip Wayne Cramer, for relator.

Isaac, Brant, Ledman & Teetor LLP, Mark Landes and *Mark H. Troutman,* for respondent.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, Greg A. Bell, commenced this original action requesting a writ of mandamus that orders respondent, Thomas Strup to provide the "annual reports" that County Employee Benefits Consortium of Ohio ("CEBCO") is required under R.C. 9.833(C)(1) to annually prepare and maintain.

I. Facts and Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter, allegedly brought pursuant to the Public Records Act, R.C. 149.43, was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, appended to this decision. In his decision the magistrate concluded (1) respondent's motion for summary judgment should be granted, (2) respondent's motion for sanctions should be denied, and (3) relator's motion for sanctions should be denied.

II. Objections

{¶3} Relator filed objections to the magistrate's decision.

A. Objections as to Findings of Fact

{¶4} Relator's objections to the findings of fact initially assert the magistrate included unnecessary but prejudicial information in the first paragraph of the magistrate's findings of fact. Although the findings in that paragraph relate to matters outside the complaint at issue, the findings contribute to a greater understanding of the procedural setting within which relator's present complaint falls. Because the information is accurate but not seminal to resolving relator's complaint, relator suffered no prejudice in the factual findings reflected in the first paragraph of the magistrate's factual findings.

{¶5} Relator also suggests the magistrate's findings of fact omit salient facts, in particular those related to his request for public compensation records under respondent's control. The magistrate thoroughly addressed the issue in his decision, noting relator's complaint seeks only the annual reports of CEBCO, not its compensation records. Although the magistrate admitted relator's pleadings create some confusion about the

issue, the magistrate ultimately and properly concluded the allegations of the complaint seek only CEBCO's annual reports. Accordingly, the additional factual findings relator suggests should be included in the magistrate's decision would not be pertinent to the issue to be determined under relator's complaint. Relator suffered no prejudice from the magistrate's decision not to include them.

{¶6} Relator's objections to the magistrate's findings of fact thus are overruled.

B. Objections to Conclusions of Law

{¶7} Relator's objections to the magistrate's conclusions of law appear to relate to the magistrate's decision that relator is not entitled to statutory damages, court costs, or reasonable attorney fees under R.C. 149.43(C)(1), as relator's right to production of CEBCO's annual reports arises under R.C. 9.833, not the Public Records Act.

{¶8} Although relator suggests the magistrate's decision is illogical, relator points to no statutory or case law to support his allegations. The magistrate explained that R.C. 9.833 requires CEBCO to prepare and maintain annual reports. It further requires the program administrator not only to "make the reports required by this division available for inspection by any person at all reasonable times during regular business hours," but, "upon the request of such person, [to] make copies of the report available at cost within a reasonable period of time." Because the duties with respect to the CEBCO report arise under R.C. 9.833, the provisions of R.C. 149.43, including the sanctions it specifies, do not apply here. Indeed, had the legislature intended R.C. 149.43 to govern all aspects of document retention and inspection, it would not have needed to include the language in R.C. 9.833 that requires the program administrator to maintain the reports, make them available for inspection, and make copies of the reports upon request. Similarly, had the

legislature intended to make costs, statutory damages, court costs, or reasonable attorney fees available upon failure of the administrator to comply with R.C. 9.833(C), it easily could have included that language in R.C. 9.833, but did not. In short, relator fails to demonstrate the flaw in the magistrate's logic. Accordingly, relator's objections to the magistrate's conclusions of law are overruled.

{¶9} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the salient facts and applied the pertinent law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we grant respondent's motion for summary judgment, deny both relator's and respondent's motions for sanctions, and deny relator's requested writ of mandamus.

Objections overruled; respondent's motion for summary judgment granted; motions for sanctions denied; writ denied.

FRENCH and CONNOR, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Greg A. Bell,	:	
Relator,	:	
v.	:	No. 09AP-1089
Thomas Strup,	:	(REGULAR CALENDAR)
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on October 15, 2010

Philip Wayne Cramer, for relator.

Isaac, Brant, Ledman & Teetor LLP, Mark Landes and *Mark H. Troutman*, for respondent.

IN MANDAMUS
ON MOTION FOR SUMMARY JUDGMENT
ON MOTIONS FOR SANCTIONS

{¶10} In this original action, relator, Greg A. Bell, requests a writ of mandamus ordering respondent, Thomas Strup ("respondent" or "Strup"), to provide the "annual reports" that County Employee Benefits Consortium of Ohio ("CEBCO") is required under R.C. 9.833(C)(1) to annually prepare and maintain. Relator allegedly brings this action pursuant to the Public Records Act, R.C. 149.43.

Findings of Fact:

{¶11} 1. This action, filed November 20, 2009, is the fourth in a series of mandamus actions filed by relator. In September, October, and November 2009, relator filed three actions against David W. Brooks under the Public Records Act to compel disclosure of records maintained by the County Risk Sharing Authority ("CORSA"). The mandamus actions against Brooks were consolidated and this court has already rendered final judgment that denies the requested writs in those consolidated cases. *State ex rel. Bell v. Brooks*, 10th Dist. No. 09AP-861, 2010-Ohio-4266.

{¶12} 2. According to paragraph seven of the complaint, on November 19, 2009, relator visited the CEBCO offices during regular business hours and "requested access to inspect the * * * CEBCO annual reports."

{¶13} 3. According to the complaint, at paragraph nine, Strup, holding himself out as a person responsible for public records requests, "denied Relator access to the aforesaid records, giving the reason that Relator was required to make a written request."

{¶14} 4. In his complaint, relator requests that a writ of mandamus issue pursuant to the Public Records Act, R.C. 149.43 et seq. Also, pursuant to R.C. 149.43, relator requests statutory damages, attorney fees, and costs.

{¶15} 5. On December 17, 2009, Strup filed his answer to the complaint. Strup's answer avers:

> In answering paragraph 7 of the Complaint, Respondent admits that Relator Greg Bell hand delivered a letter to Respondent on November 19, 2009, during regular business hours while seeking access to records from CEBCO. Respondent attaches a copy of the letter received from Mr. Bell as Exhibit 1 to this Answer. Respondent denies all other allegations contained in this paragraph.

{¶16} 6. However, Strup failed to attach the exhibit to his answer.

{¶17} 7. In his answer, Strup further avers:

> * * * Respondent avers that he has never had an opportunity to either grant or deny Relator Greg Bell's efforts to seek these records because he is still reviewing the necessary files to respond to Exhibit 1. Thus, Relator Greg Bell's Complaint is premature.

{¶18} 8. On December 11, 2009, Strup moved to consolidate this action with the three actions filed against Brooks.

{¶19} 9. On January 19, 2010, a conference was held by the magistrate regarding this action and the three mandamus actions filed against Brooks.

{¶20} 10. The day following the conference, on January 20, 2010, the magistrate issued an order denying Strup's motion to consolidate this action with the three mandamus actions against Brooks. The order further explained:

> The magistrate indicated at the conference that a discovery cut-off date needs to be established.
>
> Accordingly, no later than March 22, 2010, all evidence that any party wants to file in this action shall be filed. All discovery shall be initiated and completed in advance of the March 22, 2010 deadline for the filing of evidence. Any stipulation of evidence shall be filed no later than March 22, 2010. The evidence to be filed no later than March 22, 2010 relates only to the issue of whether County Employee Benefits Consortium of Ohio is a public office for purposes of the public records act.

{¶21} 11. On March 22, 2010, Strup filed a "Notice" of his filing of evidence. Strup's evidence consisted entirely of the affidavit of Brooks executed March 18, 2010. In his affidavit, Brooks avers:

> 33. By letter dated November 19, 2009, Relator Greg Bell hand-delivered a request for records to CEBCO. A copy of that letter is attached as **Exhibit I** to this Affidavit.
>
> 34. By letter dated December 1, 2009, CEBCO responded to Mr. Bell's request dated November 19, 2009. A copy of that letter is attached as **Exhibit J** to this Affidavit.

(Emphases sic.)

{¶22} 12. Attached to the Brooks' affidavit as Exhibit I is a letter from Bell to Strup dated November 19, 2009. Exhibit I reads:

> Pursuant to the authority of, and your duty under, Ohio Revised Code Sections 149.43 and 149.431, you are hereby requested to provide copies of the public records CEBCO maintains, which are itemized in the attached Public Records Request List. * * *

{¶23} 13. Also attached to the Brooks' affidavit as Exhibit I is the following attachment:

> Public Records Request List
>
> 1. All compensation records for CEBCO executive and administrative staff during the period from October 28, 2003 through the present.

{¶24} 14. Relator filed no evidence of his own following the magistrate's January 20, 2010 scheduling order.

{¶25} 15. However, on April 5, 2010, pursuant to the magistrate's scheduling order, relator filed his brief. On April 23, 2010, Strup filed his brief. On May 3, 2010, relator filed a reply brief.

{¶26} 16. Following completion of the briefing schedule, the magistrate scheduled another conference for June 24, 2010.

{¶27} 17. On June 24, 2010, the magistrate issued an order summarizing the conference:

> On Thursday, June 24, 2010, the magistrate held a conference. Philip Wayne Cramer, Esq., appeared on behalf of relator. Mark Landes, Esq., and Mark Troutman, Esq., appealed on behalf of respondent.
>
> Mr. Landes indicated that he was prepared to tender CEBCO annual reports to relator. There was a request that the action be dismissed upon tendering those annual reports.
>
> Mr. Cramer indicated that he will need to talk to his client who will return probably by next Wednesday, June 30, 2010. After talking to his client, Mr. Cramer agrees to call Mr. Landes to discuss an agreed resolution of this action.
>
> At the appropriate time, counsel should jointly initiate a telephone conference with the magistrate.

{¶28} 18. On August 13, 2010, Strup moved for summary judgment and for sanctions under R.C. 2323.51 and Civ.R. 11.

{¶29} 19. In support of his August 13, 2010 motion, Strup submitted the affidavit of Barbara Smith executed August 13, 2010.

{¶30} 20. According to the Smith affidavit, Smith is the administrative assistant to Mark H. Troutman who represents Strup in this action. Smith avers that she personally mailed a July 1, 2010 letter to Philip Cramer who represents relator in this action. The letter states in part:

> Please find enclosed all of the documents that Mr. Bell claims to have orally requested under R.C. 9.833(C)(1). At the conference, we understood that you had to speak with your client before discussing this further. Given our discussions with Magistrate Judge Macke on June 24, 2010, we expect that this should fully resolve the case now that any

> inconsistencies with the pleadings and his requests have been clarified.
>
> We look forward to hearing from you regarding resolution of all issues in this case without the need for additional briefing or motion practice. If additional briefing is required, we retain the option to seek sanctions. * * *

{¶31} 21. On August 20, 2010, the magistrate issued notice that respondent's August 13, 2010 motion for summary judgment is set for submission to the magistrate on September 10, 2010.

{¶32} 22. Also on August 20, 2010, the magistrate issued an order requesting that Strup file "one or more affidavits addressing the matters set forth in R.C. 2323.51(B)(5) and Civ.R. 11 that are the basis for respondent's August 13, 2010 motion."

{¶33} 23. On August 30, 2010, relator moved to strike respondent's August 13, 2010 motions and to vacate the magistrate's August 20, 2010 order giving notice of a summary judgment hearing. Also, relator's motion seeks sanction against respondent "including awarding Relator his reasonable attorney's fees incurred in bringing" relator's August 30, 2010 motion.

{¶34} 24. On August 31, 2010, the magistrate denied relator's motion to strike respondent's August 13, 2010 motion. The magistrate further denied relator's motion to strike the magistrate's August 20, 2010 order giving notice of a summary judgment hearing. The magistrate also requested that respondent respond to that part of relator's August 30, 2010 motion that seeks sanctions against Strup.

{¶35} 25. On September 2, 2010, Strup filed the affidavit of Mark Landes executed August 31, 2010. Landes represents Strup in this action. To his affidavit,

Landes attached, as an exhibit, his firm's billing report regarding billable time incurred in this action since the June 24, 2010 magistrate's conference.

{¶36} 26. On September 7, 2010, Strup filed a written response to relator's August 30, 2010 motions.

{¶37} 27. On September 10, 2010, Strup filed another written response to relator's motion for sanctions.

{¶38} 28. On September 10, 2010, relator filed a "Memorandum Contra" to respondent's motion for summary judgment and for sanctions.

{¶39} 29. On September 16, 2010, Strup filed a "Reply" in support of his motion for summary judgment and for sanctions.

Conclusions of Law:

{¶40} It is the magistrate's decision that this court grant respondent's motion for summary judgment.

{¶41} It is also the magistrate's decision that this court deny respondent's August 13, 2010 motion for sanctions.

{¶42} It is further the magistrate's decision that this court deny relator's August 30, 2010 motion for sanctions.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

{¶43} CEBCO is a not-for-profit corporation organized under R.C. 1702.01 that operates a joint self-insurance program to provide health care benefits for member Ohio political subdivisions pursuant to R.C. 9.833. (See answer at ¶3.)

{¶44} R.C. 9.833(C) provides:

> (1) Such funds shall be reserved as are necessary, in the exercise of sound and prudent actuarial judgment, to cover potential cost of health care benefits for the officers and employees of the political subdivision. A report of amounts so reserved and disbursements made from such funds, together with a written report of a member of the American academy of actuaries certifying whether the amounts reserved conform to the requirements of this division, are computed in accordance with accepted loss reserving standards, and are fairly stated in accordance with sound loss reserving principles, shall be prepared and maintained, within ninety days after the last day of the fiscal year of the entity for which the report is provided for that fiscal year, in the office of the program administrator described in division (C)(3) of this section.
>
> The report required by division (C)(1) of this section shall include, but not be limited to, disbursements made for the administration of the program, including claims paid, costs of the legal representation of political subdivisions and employees, and fees paid to consultants.
>
> The program administrator described in division (C)(3) of this section shall make the report required by this division available for inspection by any person at all reasonable times during regular business hours, and, upon the request of such person, shall make copies of the report available at cost within a reasonable period of time.

{¶45} R.C. 149.43(C)(1) provides:

> If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order

> fixing statutory damages under division (C)(1) of this section.
> * * *

{¶46} Summary judgment is appropriate when the movant demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) 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, said party being entitled to have the evidence construed most strongly in his favor. *Turner v. Turner*, 67 Ohio St.3d 337, 339-340, 1993-Ohio-176; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶47} Civ.R. 56(E) states:

> * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶48} Relator does not deny that he has received, during the pendency of this action, all of the so-called CEBCO annual reports that CEBCO is statutorily required to prepare and maintain under R.C. 9.833.

{¶49} However, relator contends that he is entitled to litigate in this action the question of whether respondent or CEBCO must provide the records requested by relator in his November 19, 2009 letter to Strup. As earlier noted, the letter requested "[a]ll

compensation records for CEBCO executive and administrative staff during the period from October 28, 2003 through the present."

{¶50} Clearly, relator's complaint only alleges that respondent was required to provide the CEBCO annual reports pursuant to an alleged verbal request made by relator on November 19, 2009. The complaint fails to allege a November 19, 2009 written request for CEBCO compensation records or, for that matter, fails to allege that CEBCO compensation records were ever requested by relator either verbally or in writing.

{¶51} Relator suggests that his complaint must be read to include the November 19, 2009 written request for CEBCO compensation records because Strup alleged in his answer that relator hand-delivered the November 19, 2009 letter requesting compensation records. The magistrate disagrees with relator's suggestion.

{¶52} This court is not required to read into relator's complaint something that relator himself seems unwilling to allege. Civ.R. 15(A) provides for the amendment of a complaint. Because Strup has filed his answer, relator may only amend his complaint by leave of court or by written consent of the adverse party. However, leave of court shall be freely given when justice so requires. Civ.R. 15(A).

{¶53} But relator has not moved to amend his complaint, and so this court need not determine whether justice would require leave to amend in this situation.

{¶54} Relator cannot rely upon Strup's answer as an amendment to his complaint. In short, this action does not present the question of whether relator is entitled to production of CEBCO compensation records, nor does it present the issue of whether CEBCO is a public office under the Public Records Act.

{¶55} Given the above analysis, it is clear that Strup is entitled to summary judgment because relator has now received all the records that he sought to compel through this mandamus action.

{¶56} Moreover, relator is not entitled to statutory damages, court costs or reasonable attorney fees, pursuant to R.C. 149.43(C)(1), for the delay in providing to relator the CEBCO annual reports. This is so because any clear legal right to production of the CEBCO annual reports arises under R.C. 9.833(C)—not under the Public Records Act.

RESPONDENT'S AUGUST 13, 2010 MOTION FOR SANCTIONS

{¶57} R.C. 2323.51(B)(1) provides:

> * * * [A]t any time not more than thirty days after the entry of final judgment in a civil action or appeal, 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 incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct * * *.

{¶58} R.C. 2323.51(A) defines "Conduct":

> (1) "Conduct" means any of the following:
> (a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action[.]"

{¶59} R.C. 2323.51(A) also defines "Frivolous conduct":

> (2) "Frivolous conduct" means either of the following:
>
> (a) Conduct of an inmate or other party to a civil action * * * that satisfies any of the following:

> (i) 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 a needless increase in the cost of litigation.
>
> (ii) 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.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶60} In essence, Strup alleges that relator engaged in frivolous conduct when he refused to dismiss this action after receipt of the CEBCO annual reports. By relator's failure to dismiss this action (or perhaps relator's failure to move for leave to amend the complaint), Strup was put in a position of having to prepare and file a motion for summary judgment.

{¶61} There is no allegation from Strup that this original action was frivolous at its filing. After some seven months into the pendency of this action and, after the magistrate pointed out to counsel at the June 24, 2010 conference that the complaint sought only CEBCO annual reports, Strup provided the annual reports to relator.

{¶62} Given this scenario, this magistrate finds it difficult to see how relator has engaged in frivolous conduct by simply refusing to dismiss his action and allowing Strup

to file his motion for summary judgment. Relator has engaged in no affirmative act that can be said to be frivolous conduct. That a motion for summary judgment could have been avoided by relator's filing of a notice of dismissal is not, in the magistrate's view, cause for sanctions.

RELATOR'S AUGUST 30, 2010 MOTION FOR SANCTIONS

{¶63} In his August 30, 2010 motion, relator asserts:

> On August 13, 2010, Respondent filed his *Motion for [S]ummary Judgment of Respondent Thomas Strup and Motion for Sanctions Under R.C. 2323.51 and Civ.R. 11* (hereinafter "Offending Motions" or "OM"). Said motions were intentionally filed for the purpose of delay, in violation of Rule 11 of the *Ohio Rules of Civil Procedure* (hereinafter "Civ. R."), and Rule 3.3 of the *Code of Professional Conduct* and Relator therefore moves that they be stricken. Further, said motions were willfully filed in violation of said rules, and Relator therefore moves that Respondent be subjected to appropriate action, including an award of Relator's reasonable attorney's fees incurred in bringing this Motion. * * *

(Emphases sic.)

{¶64} Clearly, Strup's August 13, 2010 motion for summary judgment and his motion for sanctions were not filed by Strup for the purpose of delay, as relator asserts here. Nor do the motions violate Civ.R. 11 or Rule 3.3 of the Ohio Rules of Professional Conduct.

{¶65} In support of his motion for sanctions, relator alleges that paragraph 13 of Strup's answer contains a "false statement." (Relator's September 10, 2010 memorandum contra.) According to relator, on the date of the filing of Strup's answer, i.e., December 17, 2009, respondent could not have still been reviewing the necessary files because, by letter dated December 1, 2009, Strup's counsel informed relator that he

was not entitled to production of the CEBCO compensation records requested in relator's November 19, 2009 letter.

{¶66} The magistrate understands relator's point. Nevertheless, the magistrate does not believe that paragraph 13 of the answer contains an intentional false statement. In fact, it was respondent who disclosed the December 1, 2009 letter to this court by submitting the Brooks' affidavit. The December 1, 2009 letter from Strup's counsel to relator regarding the CEBCO compensation records is attached to the Brooks' affidavit as an exhibit.

{¶67} While it appears that paragraph 13 of Strup's answer contains an incorrect statement, this magistrate was not misled given respondent's submission of the Brooks' affidavit.

{¶68} Clearly, relator is not entitled to sanctions against respondent.

{¶69} Accordingly, it is the magistrate's decision that this court grant respondent's motion for summary judgment. It is also the magistrate's decision that this court deny respondent's August 13, 2010 motion for sanctions. It is further the magistrate's decision that this court deny relator's August 30, 2010 motion for sanctions.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).