[Cite as *Arnold v. Columbus*, 2015-Ohio-4873.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Yolanda Arnold et al.,	:	
Plaintiffs-Appellants,	:	
		No. 14AP-418
v.	:	(C.P.C. No. 12CV-4117)
City of Columbus,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on November 17, 2015

Thompson & Bishop Law Offices, Christy B. Bishop, and *Dennis R. Thompson,* for appellants.

Richard C. Pfeiffer, City Attorney, *Timothy J. Mangan,* and *Wendy S. Kane,* for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Yolanda Arnold and ten other current or former employees of the Columbus Division of Fire ("Arnold") appeal from the April 21, 2014 decision and entry granting summary judgment for appellee, the City of Columbus. For the reasons that follow, we affirm in part and reverse in part the judgment of the trial court.

I. Procedural Background

{¶ 2} This case involves three state law claims Arnold originally filed as part of federal litigation in the U.S. District Court for the Southern District of Ohio, Eastern Division. The federal lawsuit alleged, among other things, employment discrimination and retaliation against Battalion Chief Arnold, an officer with the Columbus Division of Fire, arising out of a series of investigations that were conducted into allegations of

wrongdoing within the Columbus Division of Fire's Fire Prevention Bureau. The state law claims were for invasion of privacy — false light, spoliation of evidence, and public records removal/destruction.

{¶ 3} The federal district court granted summary judgment on some claims and declined to retain jurisdiction on the three remaining state law claims. During the pendency of an appeal to the Sixth Circuit Court of Appeals, Arnold refiled the state law claims in common pleas court under Ohio's savings statute. She filed her complaint on March 30, 2012. On August 3, 2012, she requested and was granted a stay until the federal appeals process was complete. In her motion, Arnold stated that "[d]iscovery on the claims in this action was completed in the federal case." (August 3, 2012 Motion to Stay.) The Sixth Circuit subsequently affirmed the decision of the federal district court, and accordingly, Arnold moved to lift the stay. On December 5, 2013, the common pleas court lifted the stay and ordered the clerk's original case schedule reinstated.

{¶ 4} When the stay was lifted, all the original deadlines, except the final pre-trial conference on February 3, 2014, and the trial date of March 3, 2014 had expired. (R. 1.) Discovery cut-off was January 18, 2013. The deadline for dispositive motions expired on January 4, 2013. (R. 1.)

{¶ 5} Nevertheless, on December 11, 2013, less than a week after the stay was lifted, the City of Columbus moved for summary judgment on all the claims. Due to trial counsel's schedule, Arnold requested and was granted an extension of time until January 16, 2014, to respond to the City of Columbus' motion for summary judgment.

{¶ 6} On January 16, 2014, Arnold filed another motion for extension of time to respond to the motion for summary judgment, and for the first time asserted the extension was needed in order to conduct discovery pursuant to Civ.R. 56(F). Arnold requested 120 days to conduct additional discovery.

{¶ 7} Despite the earlier representation that discovery was complete, counsel for Arnold attached affidavits and exhibits to the motion asserting that "additional discovery is needed to further delve into the facts surrounding the destruction and removal of the hard drive that was taken from the hard drive [sic] in Battalion Chief Yolanda Arnold's desk top computer in her office." (Thompson Affidavit at ¶ 26.)

{¶ 8} Also, counsel for Arnold stated that "[d]iscovery is necessary to ascertain what happened to certain highly relevant and probative records relating to the investigations to which the Plaintiffs were subjected by the City of Columbus, particularly the unprecedented third investigation conducted by an outside third party." (Thompson Affidavit at ¶ 33).

{¶ 9} Counsel also sought to take the depositions of the attorneys for the City of Columbus in order to ascertain what happened to notes allegedly given to counsel for the City of Columbus by Brooke Carnavale, the human resource representative for the Safety Director. At a discovery conference in the federal case, counsel for the City of Columbus represented that they had no such records to produce. (Thompson Affidavit at ¶ 34-39.)

{¶ 10} Finally, counsel asserted additional discovery was needed to develop facts as to who was providing information to the Columbus Dispatch with respect to Arnold's claim for invasion of privacy — false light. (Thompson Affidavit at ¶ 41-46, 48.)

{¶ 11} The trial court denied the Civ.R. 56(F) motion for an extension of time, noting the City of Columbus' argument that the plaintiffs had not exercised any of the time prior to the issuance of the stay to complete discovery, that they had represented to the court that discovery was complete, and that the plaintiffs had years during the pendency of the federal lawsuit to acquire the needed material. The trial court then granted Arnold an additional 21 days to file her memorandum contra to the motion for summary judgment. (February 20, 2014 Decision and Entry.) The trial court then granted a third extension of time until March 20, 2014, for Arnold to file her memorandum contra.

{¶ 12} Eventually, the matter was fully briefed, and on April 21, 2014, the trial court granted the City of Columbus' motion for summary judgment. This appeal followed.

II. Issues for Appeal

{¶ 13} Appellate counsel for Arnold has filed a brief which is long in factual accusations about misconduct in the federal and state courts, but completely lacking in assignments of error. This failure of appellate counsel to abide by one of the most fundamental rules of the Ohio Rules of Appellate Procedure makes our job as a reviewing court much more difficult. It is not our job to both create the assignments of error and then rule on the assignments of error we have drafted.

{¶ 14} The City of Columbus, in an effort to provide some appellate normalcy in this appeal, has responded to the brief filed on behalf of Arnold with a brief which groups the issues presented for review from the Arnold brief into groups and then responds to Arnold's issues. The issues presented for review in the Arnold brief are:

> 1. Whether the trial court abused its discretion by entering a stay and, upon re-lifting the stay, adhered to deadlines long since passed.
>
> 2. Whether the trial court abused its discretion in permitting a defendant to file an untimely motion for summary judgment, while simultaneously denying discovery to the plaintiff following a lift of a year-long stay.
>
> 3. Whether the trial court abused its discretion in not granting Appellants' substantiated Rule 56(F) motion, in light [of] the fact of no discovery ensued in this case by court fiat.
>
> 4. Whether the trial court can consider unauthenticated "opinions" on different issues from federal cases dealing with unrelated claims, which were specifically declined in jurisdiction by a federal court.
>
> 5. Whether the trial court can abdicate its duty to follow the dictates of *Dresher v. Burt* (1996), 75 Ohio St.3d 280, and controlling law in this District, as well as pertinent case law in other district courts.
>
> 6. Whether the trial court had a duty to review the entire record in a light most favorable to the non-movant.
>
> 7. Whether the trial court properly granted summary judgment on claims in which there were (even on limited evidence) genuine issues of material fact.

{¶ 15} The first three issues concern procedural issues in the trial court. The remaining four issues involve the trial court's granting of a motion for summary judgment, focusing on the proper standard for summary judgment and asserting that genuine issues of material fact are present in each claim before the court.

III. Stay of the Proceedings

{¶ 16} The determination of whether to issue a stay of proceedings generally rests within the court's discretion and will not be disturbed absent a showing of an abuse of discretion. *State ex rel. Verhovec v. Mascio,* 81 Ohio St.3d 334, 336 (1998).

{¶ 17} Taken literally, the first issue asserts that the trial court should not have entered a stay in the litigation because a parallel case was proceeding in federal court. We find that the state court trial judge was acting in the best interests of all parties by temporarily staying the state court proceedings, thus allowing the issues to be clarified and narrowed by the federal court proceedings. Certainly the trial court here did not abuse its discretion in entering a stay of limited duration and in lifting the stay, particularly since Arnold requested both the stay and the lifting of the stay. Additionally, Arnold represented to the trial court that discovery on the state claims was complete. Once the stay was lifted and the range of issues had been narrowed, the trial court had a legitimate interest in moving the proceedings forward. No abuse of discretion occurred with respect to the issue.

IV. Timeliness of the Motion for Summary Judgment

{¶ 18} Summary judgment motions may be filed after the matter is set for pretrial or trial only with leave of the court. Civ.R. 56(A). The granting of leave to file an untimely motion for summary judgment is discretionary with the trial court. *Brinkman v. Toledo,* 81 Ohio App.3d 429, 432 (6th Dist.1992). In this case, the City of Columbus filed its motion approximately three months before the scheduled trial date, but nearly one year after the deadline for dispositive motions had passed. The City of Columbus neither asked for nor received leave of court to file its motion.

{¶ 19} The City of Columbus has represented that it did not need leave of court to file its motion because the original trial date had passed, and no pre-trial or trial date was in effect. (Appellee's Brief, 17-18.) However, this is simply not true. The motion for summary judgment was filed on December 11, 2013, and the Clerk's Original Case Schedule set the final pre-trial conference for February 3, 2014, and the trial for March 3, 2014. (R. 1.)

{¶ 20} In her brief, Arnold asserts the motion for summary judgment was filed "over the protests of Appellants." (Appellant's Brief, 7.) However, a review of the record shows that Arnold's only argument was that the City of Columbus' motion for summary

judgment was premature in that Arnold had not had time to complete discovery. (R. 75.) The trial court's ruling on the Civ.R. 56(F) motion for extension of time is discussed below.

{¶ 21} The term "abuse of discretion" implies that the court's attitude was unreasonable, arbitrary or unconscionable, more than just an error of law or judgment. We perceive no abuse of discretion in allowing the untimely motion to be considered, nor do we perceive that the timing of the motion caused any prejudice to accrue to Arnold. Arnold's failure to object before the trial court to the initial untimeliness of the motion for summary judgment militates against her present argument that the trial court should have sua sponte struck the motion. "While summary judgment decisions are reviewed under a de novo standard, de novo review does not afford appellants with a 'second chance' to raise arguments they should have raised in the trial court." *Mindlin v. Zell*, 10th Dist. No. 11AP-983, 2012-Ohio-3543, ¶ 18.

V. Civ.R. 56(F) Motion for Continuance

{¶ 22} In *Whiteside v. Conroy*, 10th Dist. No. 05AP-123, 2005-Ohio-5098, ¶ 37, this court set out the standard of review for denial of a party's Civ.R. 56(F) motion:

> "The court's discretion in granting continuances pursuant to Civ.R. 56(F) should be exercised liberally in favor of the nonmoving party who has requested a reasonable interval for the production of necessary rebuttal material." *Carrier v. Weisheimer Cos., Inc.* (Feb. 22, 1996), Franklin App. No. 95APE04-488, citing *Whiteleather v. Yosowitz* (1983), 10 Ohio App.3d 272, 461 N.E.2d 1331. Ultimately, however, " '[t]he provisions of Civ.R. 56(F) are all discretionary. They are not mandatory.' " *Martinez v. Yoho's Fast Food Equip.*, Franklin App. No. 02AP-79, 2002-Ohio-6756, at ¶ 14, quoting *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 648, 662 N.E.2d 1112. Accordingly, we cannot reverse a trial court's denial of a party's Civ.R. 56(F) motion absent an abuse of discretion. *Martinez* at ¶ 14, quoting *Davisson* at 648, 662 N.E.2d 1112. An abuse of discretion constitutes more than an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Rather, it entails an action that is unreasonable, arbitrary or unconscionable. *Id*.

{¶ 23} Thus, a trial court's denial of a Civ.R. 56(F) motion is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Id*.

{¶ 24} Arnold failed to conduct any discovery in the four-month period between the filing of the complaint and the granting of the stay. She never raised the issue of the need for additional discovery until more than one month after the City of Columbus filed its motion for summary judgment. "[A] party's own lack of diligence undermines his or her claim that sufficient reasons exist for a Civ.R. 56(F) continuance." *Whiteside* at ¶ 39. In addition, counsel for Arnold made a professional representation to the state trial court that discovery on the state court claims had been completed in the parallel federal case.

{¶ 25} Counsel first asked for an extension of time to respond to the motion for summary judgment because of other demands on trial counsel and was granted the extension. Despite an earlier assertion to the court that discovery was complete, counsel then asked for more time to conduct discovery. The decision not to grant more time for discovery, supposedly already completed, was not an abuse of discretion.

VI. Summary Judgment

{¶ 26} In her fourth, fifth, and sixth issues presented for review, Arnold argues the trial court used an improper standard when ruling on the motion for summary judgment. She claims the City of Columbus did not meet its burden under *Dresher v. Burt*, 75 Ohio St.3d 280 (1996), to demonstrate the absence of genuine issues of material fact on elements of Arnold's claims. She contends that the City of Columbus presented as fact inadmissible findings made in the federal litigation, and that the trial court improperly relied on these findings in ruling in favor of the City of Columbus. Arnold further argues that the trial court did not view the evidence in the light most favorable to the nonmoving party, ignoring the evidence in favor of Arnold that was attached to her Civ.R. 56(F) motion as well as certain deposition transcripts that Arnold asserts support her claim.

VII. Summary Judgment Standard of Review

{¶ 27} Our review of summary judgment on appeal is de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 8. To obtain summary judgment, the movant must show 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) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 24.

{¶ 28} The movant bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher*. Once the moving party meets this initial burden, the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id*.

{¶ 29} Summary judgment is appropriate when the evidence is construed most strongly in favor of the nonmoving party, and reasonable minds can reach only one conclusion, that being adverse to that party. Civ.R. 56(C).

{¶ 30} As explained by the Supreme Court of Ohio:

> The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

(Emphasis sic.) *Dresher* at 293.

{¶ 31} The City of Columbus attached opinions from the federal litigation to its motion for summary judgment and asked the trial court to take judicial notice of the facts therein. Civ.R. 56(C) limits the type of evidentiary materials that a trial court can consider when ruling on summary judgment to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, [that are] timely filed in the action." *Id*. Civ.R. 56(C) places strict limitations upon the type of documentary evidence that a party may use in support of or in opposition to summary judgment. Documents that do not fall within one of the categories of evidence listed in Civ.R. 56(C) may be introduced as proper evidentiary

material only when incorporated by reference into a properly framed affidavit pursuant to Civ.R. 56(E). *Thompson v. Hayes*, 10th Dist. No. 05AP-476, 2006-Ohio-6000, ¶ 103. " ' "Documents which are not sworn, certified, or authenticated by way of affidavit have no evidentiary value and shall not be considered by the trial court." ' " *Id.*, quoting *State ex rel. Shumway v. Ohio State Teachers Retirement Bd.*, 114 Ohio App.3d 280, 287 (1996), quoting *Mitchell v. Ross*, 14 Ohio App.3d 75 (8th Dist.1984).

{¶ 32} Here, the City of Columbus did not incorporate the federal cases into an affidavit. Nor can the federal cases serve as evidence with respect to the state law claims at issue, because those claims were dismissed by the federal court without prejudice, and the federal court declined to accept jurisdiction over the claims. At best, the facts determined in the federal cases are dicta, and may provide some background information concerning the history of litigation.

{¶ 33} Arnold seeks to use the affidavits and exhibits attached to her Civ.R. 56(F) motion for a continuance as evidence in response to the motion for summary judgment. In the interest of fairness, we shall consider these materials as part of the response to the motion for summary judgment since they are authenticated and attached to sworn affidavits in connection with a motion filed under Civ.R. 56.

{¶ 34} However, the same cannot be said for much of the evidence Arnold submitted in response to the City's motion for summary judgment. Arnold refers to her deposition in the federal litigation, but that is not part of the record in this case. Also, the "exhibits" attached to her memorandum in opposition to the motion for summary judgment are not incorporated by reference into a properly framed affidavit and consist of a hodge-podge of exhibits from the federal litigation, including results of the investigations into misconduct in the Division of Fire, emails, copies of articles from the Columbus Dispatch, charges of discrimination from various plaintiffs, copies of the plaintiffs' first set of interrogatories and requests for admission (with no answers or responses), miscellaneous public records requests from Arnold to Fire Chief Ned Pettus, a copy of the City of Columbus' Public Records Policy, and an Ohio Municipal Records Manual from 2000.

{¶ 35} Arnold did incorporate a charge of discrimination into an affidavit of Pamela Gordon, an assistant city attorney, that was filed in the federal litigation.

{¶ 36} In sum, the parties have made it exceedingly difficult to review the motion for summary judgment because of a lack of admissible Civ.R. 56(C) evidence in the record.

{¶ 37} Nevertheless, with these standards in mind, we shall proceed to review the motion for summary judgment with respect to each of Arnold's claims.

VIII. Invasion of Privacy – False Light

{¶ 38} Arnold alleged that the "[City of Columbus'] various acts toward Plantiff Arnold constitute invasion of privacy – false light." (Complaint at ¶ 166). Ohio recognized the tort of false light invasion of privacy in *Welling v. Weinfield*, 113 Ohio St.3d 464, 2007-Ohio-2451.

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id. at syllabus.

{¶ 39} Arnold filed an affidavit with her Civ.R. 56(F) motion. In it she referred to various newspaper articles to support her claim, but she has never identified any specific comment attributable to the City of Columbus as being untrue or a specific public official or actor who had knowledge of or acted in reckless disregard as to the falsity of the publicized matter. The articles themselves were not properly incorporated into an affidavit in accordance with Civ.R. 56(E). In order to maintain a viable claim for false-light invasion of privacy, the statements made about the plaintiff must necessarily be untrue and serious enough to be offensive to a reasonable person. *Welling* at ¶ 52, 54.

{¶ 40} When the City of Columbus pointed out the complete lack of factual content in her pleadings about what allegedly false statements were made that could be attributed to the City of Columbus, Arnold responded that the articles accused her and her subordinates of criminal activity. However, the fact of the matter is that city officials conducted investigations into disparate treatment based on race, overtime abuse,

mismanagement and theft in office at the Division of Fire. Some of these allegations of wrongdoing within the department originated with Arnold herself. Newspaper articles reporting that these investigations occurred are not false statements despite the fact that the investigations resulted in no charges of wrongdoing.

{¶ 41} The City of Columbus met its burden to show the lack of evidence in the false light claim, and Arnold failed to establish a genuine issue of material fact. Thus, summary judgment on this claim was appropriate.

IX. Spoliation

{¶ 42} To establish a claim for spoliation of evidence, a plaintiff must establish the following elements:

> (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts[.]

Smith v. Howard Johnson Co., Inc., 67 Ohio St.3d 28, 29 (1993).

{¶ 43} Arnold's spoliation claim largely centers on the allegation that the City of Columbus or its employees removed and then destroyed the hard drive from Arnold's work computer at a time when litigation was pending.

{¶ 44} According to the complaint filed in the case:

> Defendant's acts in removing data files from Plaintiff Yolanda Arnold's computer, destroying the hard drive, and making it impossible to recover files and data that she maintained regarding the actions of various Columbus Fire Department personnel who were making false and misleading allegations of misconduct towards Fire Prevention Bureau inspectors and Plaintiff, all done after she had filed charges of discrimination and reported the ongoing absences of Chief Paxton, constitutes spoliation of evidence.

(Complaint at ¶ 168.)

{¶ 45} Arnold alleged in her complaint that in March of 2005, after she had filed a charge of discrimination with the Ohio Civil Rights Commission, her personal computer at work was accessed and files were deleted. (Complaint at ¶ 67.) However, in her

affidavit, she claims someone without authorization in late 2004 accessed her work computer. (Yolanda Arnold Affidavit at ¶ 12.) In her response to the motion for summary judgment, Arnold also claims her computer was accessed in the fall of 2004. She also claims that at "roughly the same time," (late 2004) the logbook containing all the records pertaining to alleged missed inspections disappeared. These facts are relevant to the spoliation claim, because these earlier acts all took place before Arnold filed her first charge of discrimination.

{¶ 46} Arnold filed her first charge of discrimination on January 11, 2005, thus becoming the earliest date the City of Columbus was put on notice of pending or probable litigation. (Arnold Affidavit exhibit No. 1.) Much later, perhaps as late as early 2006, she claims the hard drive to the computer was removed. (Complaint at ¶ 71; Arnold Affidavit at ¶ 17-18.) Even later, the hard drive appears to have been inadvertently destroyed.

{¶ 47} John Fiore, technical support analyst with the Columbus Division of Fire, testified in his deposition that he began working for the Division of Fire in March of 2006. He stated that when he originally transferred to the Division of Fire, the hard drive was out of the computer in a cabinet with a sticky note attached to it with Yolanda Arnold's name on it.

{¶ 48} Some time after that, either at the end of 2006 or 2007, there were two disposals of equipment. Fiore stated: "My best guess is that in the disposal of equipment in 2007, it was placed in a box with other hard drives and disposed of." (Fiore Depo., 12.) Prior to the disappearance of the hard drive, Fiore asked another technician why the hard drive was marked. He was told, "we [are] saving it. And that was it." (Fiore Depo., 23.)

{¶ 49} The trial court found no indication that a willful destruction of the hard drive occurred. At most, the evidence showed that city employees tried to save the hard drive, but the hard drive eventually disappeared from the shelf where it was being kept. No one knows what happened to it, so a willful destruction to avoid its use as evidence is speculative at best.

{¶ 50} However, Arnold also claims that in late 2004, files were deleted from her computer hard drive, and that she asked for them to be restored, but her requests were ignored. (Arnold Affidavit at ¶12-16.) Fiore stated in his deposition that the hard drive he saw on the shelf was intact and therefore the files could have been restored, but he was

not aware at the time that any request had been made to restore them. (Fiore Depo., 13.) There was also testimony from Harold "Ed" Davis, who handles desktop support, that files were backed up on the network and were accessible from any computer on the network. "Because everything's supposed to be stored on the network, so regardless of what computer you use, you should have access to everything that you would at your computer or the computer you're using. And we try to do that on the network." (Davis Depo., 33.) Davis was not aware how long back up tapes of the files were kept. (Davis Depo., 44.)

{¶ 51} "So if you're using this computer or that computer, no matter what computer you have to, you should have the exact same accesses to the same files at any computer. That's why we suggest that you keep it on the network, because it - - we tell them if you keep it on a hard drive and your hard drive crashes, you lost everything. We can't recover that. So we tell everybody to back everything up to the network, save everything to the network." (Davis Depo., 33.)

{¶ 52} Davis also testified that while Arnold was out on leave from late 2005 to early 2006, he and Chief Jackson made the decision to switch out the PC in Arnold's office because it was "due to be changed." (Davis Depo., 37.)

{¶ 53} Construing this evidence most strongly in favor of Arnold, the City of Columbus was on notice as early as January 11, 2005 of pending or probable litigation based on Arnold's EEOC charge of discrimination. Shortly before that, files were deleted from the work computer normally used by Arnold, and a logbook disappeared. Arnold stated that she created and maintained those files that related to the assistant chief's alleged habitual absence from the department, purported missing inspections, and conduct of two officers who had allegedly made false accusations about Arnold and the other plaintiffs. (Arnold Affidavit at ¶ 14.) Despite requests to the Columbus Fire Department administration and technical support, the deleted files were never restored. (Arnold Affidavit at ¶ 16.) Eventually, Arnold's computer was replaced, her hard drive placed in a cabinet and marked "save," but sometime in late 2006 or 2007, the hard drive was destroyed.

{¶ 54} Arnold contended that all her requests to have the deleted files restored were ignored. However, Arnold never specifies when those requests were made or whether they were made before or after she filed her first charge of discrimination. The

only evidence in the record is that those requests were made in late 2004 before she filed her first claim of discrimination. (*See* Arnold Affidavit at ¶ 12-16.) Construing this evidence in a light most favorable to Arnold, one could infer that files were deleted by persons unknown, and the request to restore the files was made before the City knew of any pending or probable litigation.

{¶ 55} Therefore, Arnold has not established a genuine issue of material fact with regard to her spoliation claim concerning her work computer.

{¶ 56} Finally, Arnold made other claims with respect to spoliation of evidence that relate to evidence she sought in her federal lawsuit. She claims that several witnesses had notes and documents relating to the discrimination claims, and that they had turned them over to counsel for the City of Columbus. However, when the federal magistrate judge asked about these records, counsel for the City of Columbus stated that he had no such records, or no such records existed.

{¶ 57} Arnold's attorney in the federal litigation stated in a sworn affidavit:

> Several deponents had testified that they had key notes taken during the investigations at issue, which they claimed to have turned over to Defendant's counsel.
>
> Despite inquiries, these documents were never produced.
>
> During the final call with the Magistrate, we and the Magistrate were told by counsel for Defendant that they [sic] no other documents they could produce, meaning they had been destroyed.

(Affidavit of Dennis Thompson at ¶ 18-20.)

{¶ 58} Thompson also stated:

> Brooke Carnavale, the Human Resource representative for the Safety Director, testified during her deposition in the federal cases that she had made notes of meetings with various City administration and the Safety Director regarding the third investigation and previous investigations.
>
> Ms. Carnavale also testified that she had given her handwritten notes to City's counsel.

> Ms. Carnavale's handwritten notes were never produced to plaintiffs in the federal action, although they had been requested.
>
> In the last of the several discovery conferences conducted before Magistrate Judge Kemp in the federal cases, City's counsel Timothy Mangan stated that they had no such records to produce.

(Affidavit of Dennis Thompson at ¶ 34-37.)

{¶ 59} The City vehemently denies that any destruction of records took place.

{¶ 60} Construing this evidence most strongly in favor of Arnold, one could infer that during the pendency of federal litigation, the City of Columbus destroyed documents that had been turned over during the federal litigation that were relevant to the investigations the City of Columbus conducted regarding allegations of misconduct at the Division of Fire.

{¶ 61} Accordingly, we find that Arnold has shown the existence of a genuine issue of material fact with respect to the spoliation of evidence in the federal litigation, and therefore, summary judgment on this claim was not warranted.

X. Destruction of Public Records

{¶ 62} Arnold is pursuing a forfeiture claim for alleged destruction of public records. R.C. 149.351 permits a person who is aggrieved by the removal, destruction, mutilation, or transfer of a public record to commence a civil action to recover a forfeiture in the amount of one thousand dollars for each violation, not to exceed a cumulative total of ten thousand dollars, plus an award of reasonable attorney fees incurred by the person in the civil action not to exceed the forfeiture amount recovered.

{¶ 63} In order for a plaintiff to succeed in a civil action for forfeiture under R.C. 149.351, she must have requested public records, the public office must have been obligated to honor that request, subject to certain exceptions in R.C. 149.43(B), the office must have disposed of the public records in violation of R.C. 149.351(A), and she must be aggrieved by the improper disposal. *Rhodes v. New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, ¶ 16; *Hunter v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 13AP-457, 2014-Ohio-5660, ¶ 7.

{¶ 64} R.C. 149.351(A) states in part: "All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by records commissions." A public record means "records kept by any public office." "Record" is defined to included "any document, device, or item, regardless of physical form or characteristic, including an electronic record * * * created or received by or coming under the jurisdiction of any public office of the state * * * which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). The primary theory espoused on behalf of Arnold is that her computer hard drive contained public records which were deleted from her computer and eventually destroyed. Arnold stated in her affidavit that:

> [S]everal files I had created and maintained relating to AC Greg Paxton's habitual AWOL status, the purported "missed inspections" and the conduct of Lts. Daum and Bernsweig – all officers who had made false accusations of misconduct on the part of the Fire Prevention Bureau inspectors and myself – were deleted from my computer.

(Arnold Affidavit at ¶ 14.)

{¶ 65} Arnold claimed that she filed numerous public records requests, and that she was only given limited access to some documents, was told she had to make another request, and that request was ignored. (Arnold Affidavit at ¶ 6-11.) Attached to Arnold's affidavit are a number of public records requests, dated August 27, 2010, July 16, 2008, August 20, 2007, August 1, 2007, and October 30, 2007.

{¶ 66} Arnold states in her affidavit that:

> The only records that were ever produced to me were meeting minutes for the executive staff meetings, excluding the early May 2005 meeting where the third investigation was discussed and a November 2005 meeting, and (10) PT-14s and (10) OF 237s.
>
> I was permitted to sit in a room with a computer to access some PT-14s for a total of 2 hours (4 days, ½ hour each day).

(Arnold Affidavit at ¶ 7-8.)

{¶ 67} Later in her affidavit, Arnold states that on February 8, 2010, some records were produced pursuant to discovery requests in the federal litigation. (Arnold Affidavit at ¶ 19-21.)

{¶ 68} She also claimed the logbook that disappeared in late 2004 was a public record, and that other records and documents were removed from the Fire Prevention Bureau.

{¶ 69} In her complaint, Arnold alleged the following:

> Defendant's acts in removing data files from Plaintiff Arnold's computer, destroying the hard drive, and making it impossible to recover files and data that she maintained regarding the actions of various Columbus Fire Department personnel who were making false and misleading allegations of misconduct towards Fire Prevention Bureau inspectors and Plaintiff, as well as the removal of certain records and documents from the Fire Prevention Bureau relating to allegedly missed inspections, constitute unauthorized removal and destruction of public records.

(Complaint at ¶ 170.)

{¶ 70} The City of Columbus has responded that Arnold failed to produce any evidence as to what public records were allegedly destroyed. The City of Columbus also claims that Arnold failed to put forth any evidence that she requested the files from the hard drive pursuant to a public records request and that her request was denied. The City of Columbus also contends that a mandamus action is the appropriate means by which Arnold can retrieve public records.

{¶ 71} Arnold claims the files that were deleted from her computer were public records, and that she asked the fire department to restore the files. However, it is not evident in any of the public records requests attached to her affidavit that she made a public records request for the deleted files or for the missing logbook. Thus, the City of Columbus was correct in pointing to the absence of evidence on this element of her forfeiture claim.

{¶ 72} With respect to the public records requests attached to her affidavit, Arnold claims she was denied access to these records in whole or in part, but there is no evidence in the record that any of the requested documents were destroyed improperly.

XI. Conclusion

{¶ 73} Construing Arnold's "issues presented for appeal" as assignments of error, the first, second, and third issues are overruled, the fourth, fifth, and sixth issues are overruled as moot given our de novo standard of review, and the seventh issue is sustained in part as to the spoliation claim and overruled with respect to the invasion of privacy — false light claim and the public records forfeiture claim. The judgment of the Franklin County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings in accordance with this decision.

Judgment affirmed in part, reversed in part; case remanded.

HORTON, J., concurs.
LUPER SCHUSTER, J., concurs in part and dissents in part.

LUPER SCHUSTER, J., concurring in part and dissenting in part.

{¶ 74} I agree with the majority opinion in its disposition of the first, second, third, fourth, fifth, and sixth "issues presented for review." I further agree with the majority in its disposition of the seventh "issue presented for review" with regards to the invasion of privacy — false light claim and the public records forfeiture claim. However, because I find no error in the trial court granting summary judgment as to the spoliation claim, I respectfully dissent from that portion of the majority opinion.

{¶ 75} The majority notes the appellant's failure to fully articulate actual assignments of error. In the portion of her merit brief addressing her spoliation claim, appellant advances arguments regarding the deletion of files from her computer and the destruction of her computer hard drive. I concur with the majority overruling this "issue presented for review" with regard to the computer files and hard drive.

{¶ 76} However, the majority then determines there is a genuine issue of material fact with respect to the spoliation of evidence in the federal litigation and sustains in part the seventh "issues presented for review" on this basis. Because appellant did not argue in her brief for reversal based on spoliation of the notes and documents related to her federal litigation, I would not address this issue. Therefore, I respectfully dissent on the spoliation issue related to notes and documents in the federal litigation.

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