[Cite as *State ex rel. Doe v. Tetrault,* 2012-Ohio-3879.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE ex rel. JOHN DOE,	:	
Relator-Appellant,	:	CASE NO. CA2011-10-070
	:	O P I N I O N
- vs -	:	8/27/2012
CHRISTOPHER P. TETRAULT, et al.,	:	
Respondents-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010CVH1462

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HENDRICKSON, J.

{¶ 1} Relator-appellant, Barbara Hartman ("Relator"), appeals the decisions of the Clermont County Common Pleas Court denying summary judgment in her favor, granting summary judgment in favor of respondents-appellees, Christopher Tetrault, David Elmer, and

Pierce Township, Clermont County, Ohio ("Respondents"), and implicitly overruling a discovery request. We affirm the decisions of the trial court.

{¶ 2} In October of 2007, Pierce Township entered into an Employment Agreement with Tetrault where Tetrault would serve as Assistant Administrator for Development Facilitation. Tetrault was paid a base annual salary of $77,000 premised upon a 1,110 hour per year schedule, or 277.5 hours per calendar quarter. In addition, if Tetrault worked more than 277.5 hours per quarter, he would be paid $75 per hour for the overage, not to exceed $7,500. In order to track his hours, the Employment Agreement provided that Tetrault would maintain a daily log of his activities and time.

{¶ 3} From October of 2007 through June of 2009, Tetrault provided the Pierce Township trustees with quarterly reports, ranging from 20-82 pages in length, detailing his daily activities and listing the time spent on each task. However, sometime in June of 2009, Tetrault met with two Pierce Township trustees and was informed that the format he used in creating his quarterly reports was undesirable. Tetrault was then provided examples of trustee-approved formats by David Elmer, Pierce Township Administrator.

{¶ 4} After July 1, 2009, Tetrault began submitting quarterly one-page summary reports listing a monthly total of hours worked ("Summary Reports"). Tetrault testified that he compiled these reports by tracking the total number of hours he worked per day on a piece of scrap paper he kept in his vehicle. One piece of scrap paper could contain anywhere from one to three days listing the hours he worked. The scrap paper only contained the total number of hours worked without any references to dates, specific times, or what activities were performed during these hours. After one to three days of work, Tetrault would enter the number of hours listed on the scrap paper into the "Basecamp" website and then discard or recycle the scrap paper and start a new piece.

{¶ 5} Basecamp is an online project management website provided by a third party

and utilized by Pierce Township. The website allows employees to input information regarding their Pierce Township employment, including their hours worked. This information is then saved on the Basecamp server. Basecamp requires a username and password, but this information was announced at several Pierce Township meetings and is available to the public upon request.

{¶ 6} Tetrault utilized Basecamp through a laptop computer he was loaned by Pierce Township (the "Township Laptop"). Along with accessing Basecamp, Tetrault used the Township Laptop to generate emails, store files, and conduct non-Pierce Township business. Throughout his employment, Tetrault stated that he backed up the emails he created and received regarding his Pierce Township employment on an external hard drive. Tetrault testified that he saved all other files, notes, or documents relating to Pierce Township to Basecamp and that no document relating to his Pierce Township employment was ever saved specifically to the Township Laptop.

{¶ 7} On April 21, 2010, Relator filed a public records request with Pierce Township seeking, among other things:

> All records documenting all time expended by Chris Tetrault for or on behalf of Pierce Township from July 1, 2009 to the present, including, any description of the work or tasks performed for all such time.

{¶ 8} Upon receiving the request, Elmer contacted Tetrault and asked that he transmit to Pierce Township any public records in his possession relating to his time worked. In addition, on April 29, 2010, Elmer contacted Relator's attorney and sought to have the request narrowed, as he felt the request was ambiguous and overly broad. Relator's attorney never responded to this communication.

{¶ 9} Tetrault provided his records to Elmer and, on May 14, 2010, Elmer forwarded 47 pages of documents to Relator which included references to the Basecamp website. Relator

responded that this was not a full and complete response to the public records request. Therefore, Elmer, again, contacted Tetrault and asked for "all records related to the Development Facilitation program." Tetrault provided Elmer with an external hard drive upon which he had copied the Township Laptop's information regarding his work for Pierce Township. The files contained on the external hard drive were copied to a flash drive and Elmer informed Relator that the information was available for pick-up at cost. Relator's counsel retrieved the flash drive on June 22, 2010.

{¶ 10} On June 30, 2010, Tetrault's employment with Pierce Township was terminated. Upon his termination, Tetrault made sure all Pierce Township information on the Township Laptop was saved to an external hard drive or Basecamp. He then set the Township Laptop back to its "factory setting," effectively erasing all data from the Township Laptop, and returned the Township Laptop to Pierce Township. Tetrault testified that he erased the Township Laptop in order to protect his files which did not relate to Pierce Township work.

{¶ 11} On July 16, 2010, Relator commenced the within action, seeking a writ of mandamus. In an amended complaint, Relator set forth two issues: (1) whether Respondents provided the public records responsive to Relator's request within a reasonable period of time under R.C. 149.43; and (2) whether Tetrault, in his capacity as a Pierce Township employee, improperly "removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of" public records in contravention of R.C. 149.351 by discarding the scrap paper and erasing the Township Laptop hard drive.

{¶ 12} Tetrault moved for summary judgment on his own, followed by Elmer and Pierce Township (together, the "Township Respondents"). Relator also moved for summary judgment on her claim as to R.C. 149.351 only. In addition, Relator requested permission from the trial court to conduct discovery out-of-state. The trial court never addressed Relator's discovery request but, instead, issued two separate decisions on the motions for summary

judgment. In its first decision, the trial court ruled that Tetrault was entitled to judgment as a matter of law, and Relator was not, because Tetrault was not a "person responsible" for public records within the meaning of R.C. 149.43(B) and he did not violate R.C. 149.351(A) by discarding the scrap paper or erasing the Township Laptop's hard drive, as these items were not "records" within the meaning of R.C. 149.011(G). In its second decision, the trial court ruled that the Township Respondents were entitled to judgment as a matter of law, and Relator was not, because the Township Respondents provided Relator with all responsive public records that existed at the time of the request within a reasonable amount of time and the Township Respondents did not destroy, nor authorize Tetrault to destroy, any "records" in violation of R.C. 149.351(A).

{¶ 13} From the trial court's decisions on summary judgment, and its failure to address Relator's discovery request, Relator appeals, raising three assignments of error. For ease of discussion, we will address Relator's first and second assignments together.

{¶ 14} Assignment of Error No. 1:

{¶ 15} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF [RESPONDENTS] AND IN DENYING PARTIAL SUMMARY JUDGMENT IN FAVOR OF [RELATOR] WITH RESPECT TO THE CLAIM BROUGHT PURSUANT TO R.C. 149.351.[1]

{¶ 16} Assignment of Error No. 2:

{¶ 17} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF [RESPONDENTS] AND IN DENYING PARTIAL SUMMARY JUDGMENT IN FAVOR OF [RELATOR] WITH RESPECT TO THE CLAIM

1. We note that Relator did not include Respondent Elmer in her motion for partial summary judgment regarding R.C. 149.351. However, our disposition of Relator's assignments of error renders this issue immaterial.

BROUGHT PURSUANT TO R.C. 149.43.[2]

{¶ 18} In her first and second assignments of error, Relator argues that the trial court erred in granting summary judgment in favor of Tetrault and, separately, the Township Respondents as to both causes of action in the amended complaint.

{¶ 19} This court reviews a trial court's decision on summary judgment under a de novo standard of review. *State ex rel. Doe v. Register*, 12th Dist. No. CA2008-08-081, 2009-Ohio-2448, ¶ 20. Summary judgment is proper when: (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 only come to a conclusion adverse to the party against whom the motion is made, construing the evidence most strongly in that party's favor. Civ.R. 56(C). The party requesting summary judgment bears the initial burden of informing the 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 as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a party moving for summary judgment has satisfied its initial burden, the nonmoving party has the reciprocal burden to set forth specific facts showing that genuine issues remain. *Id*.; Civ.R. 56(E). Summary judgment is proper if the party opposing the motion fails to set forth such facts. *Id*.

{¶ 20} Relator makes three arguments as to why the trial court's granting of summary judgment was improper: (1) the trial court improperly determined that Tetrault was not a "person responsible" under R.C. 149.43; (2) the Township Respondents did not tender all responsive records in a reasonable amount of time pursuant to R.C. 149.43(B); and (3) Respondents disposed of records in violation of R.C. 149.351.

2. We note that Relator did not actually move for partial summary judgment on her R.C. 149.43 cause of action. However, our disposition of Relator's assignments of error renders this issue immaterial.

R.C. 149.43 – Availability of Public Records

{¶ 21} We shall first address the trial court's granting of summary judgment on Relator's mandamus claim. It is settled that Relator, to secure a writ of mandamus, must demonstrate (1) a clear legal right to the relief prayed for; (2) that Respondents are under a clear duty to perform the acts; and (3) that Relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St.3d 170, 172 (1988). However, where the allegations relate solely to a public records request, the Ohio Supreme Court has held that "[t]he requirement of the lack of an adequate legal remedy, as an element of a petition for writ of mandamus, does not apply to public-records cases to compel compliance with the Public Records Act." *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶12.

{¶ 22} Relator argues that Tetrault and, separately, the Township Respondents, violated R.C. 149.43 by failing to provide records detailing and supporting Tetrault's Summary Reports, including the scrap paper Tetrault used to keep a "running tally" of his daily work hours, as well as records documenting Tetrault's time and activities in April of 2010. Relator also argues that the Township Respondents violated R.C. 149.43 by not fully answering the public records request in a reasonable amount of time.

{¶ 23} R.C. 149.43 governs the availability of public records for inspection and copying. According to R.C. 149.43(B)(1), upon request, "a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time." Pursuant to R.C. 149.43(C)(1), "if a person allegedly is aggrieved by the 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 [R.C. 149.43(B)]* * *."

{¶ 24} We shall first address Relator's argument as to Tetrault. The trial court determined that Tetrault was entitled to judgment as a matter of law because he was not a "person responsible" for public records within the meaning of R.C. 149.43. We agree.

{¶ 25} Only "public offices" and those "persons responsible" for public records have a duty to disclose public records under the Public Records Act. R.C. 149.43(B). As the Ohio Supreme Court has stated, "[w]here a *particular official* has a duty imposed by law to oversee public records that official is a 'person responsible' for those records under R.C. 149.43(B)." (Emphasis added.) *Schweikert*, 38 Ohio St.3d at 174; *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30 (1985), paragraph two of the syllabus ("When statutes impose a duty on a *particular official* to oversee records, that official is the 'person responsible' under R.C. 149.43(B)." (Emphasis added.)

{¶ 26} Thus, one who is not a "particular official" imposed with a duty to oversee records is not a "person responsible" for those records. In this case, Tetrault was an employee of Pierce Township and, therefore, a "public official" pursuant to R.C. 149.011(D). However, Tetrault was not the "particular official" charged with the duty to oversee records. Rather, he was an employee who tracked his work hours through the use of Basecamp and then submitted those hours to the Pierce Township Administrator, David Elmer. Because Tetrault was not the "particular official" charged with a duty to oversee public records, he cannot be considered the "person responsible" for the records requested under R.C. 149.43. Therefore, Tetrault's alleged failure to produce records in response to Relator's public records request was not a violation of R.C. 149.43 and reasonable minds could only conclude in Tetrault's favor.

{¶ 27} We shall next turn to the application of R.C. 149.43 as to the Township Respondents. It is uncontroverted that Pierce Township is a "public office" within the meaning of R.C. 149.011 and Elmer is a "person responsible" for Pierce Township public records.

Thus, Relator's argument against the Township Respondents is not based upon whether they are responsible for the records, but upon their alleged failures to produce all of the records responsive to Relator's request and to do so in a reasonable amount of time. Relator makes three unpersuasive arguments as to why the Township Respondents violated R.C. 149.43.

{¶ 28} First, Relator argues that the Township Respondents failed to produce the scrap paper and any other documents Tetrault used in generating his quarterly Summary Reports through Basecamp. However, Relator fails to establish that any of these documents were in the possession or control of the Township Respondents. Rather, the evidence clearly shows that Tetrault created his Summary Reports through Basecamp with the assistance of the scrap paper, which he then discarded or recycled. There is no evidence that the Township Respondents ever received, or were aware of, the scrap paper or any other documents. As there "can be no clear legal duty on one to furnish records which are not in his possession or control," reasonable minds could only conclude in the Township Respondents' favor. *State ex rel. Bradley v. Shannon*, 24 Ohio St.2d 115, 116 (1970).

{¶ 29} Second, Relator argues that the Township Respondents violated R.C. 149.43 by failing to produce any records relating to Tetrault's time worked in April of 2010. Relator's public records request was made April 21, 2010. Relator states that no records were produced showing the time Tetrault worked from April 1 to April 21, 2010. As such, Relator asserts that the Township Respondents violated R.C. 149.43 by not producing these records. However, there is no evidence that records relating to April of 2010 existed at the time Relator made her request. In fact, the Township Respondents presented affidavit testimony that these documents were not yet created. Because one does not have a "duty to create or provide access to nonexistent records," and there is no evidence that any records from April 1 to April 21, 2010 existed at the time of Relator's request, reasonable minds could only conclude that the Township Respondents did not violate R.C. 149.43 by not producing said documents.

State ex rel. Lanham v. Smith, 112 Ohio St.3d 527, 2007-Ohio-609, ¶ 15; *State ex rel. Ohio Patrolmen's Benevolent Assn. v. Mentor*, 89 Ohio St.3d 440, 448 (2000).

{¶ 30} Finally, Relator argues that the records were not produced by the Township Respondents within a reasonable amount of time as required by R.C. 149.43. What is a reasonable amount of time is dependent upon all of the facts and circumstances in each case. *State ex rel. Consumer News Serv. Inc. v. Worthington Bd. of Edn.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶ 37. In this case, Relator's public records request was made April 21, 2010. The Township Respondents answered on May 14, 2010 with 47 pages of documents. In addition, the Township Respondents made more documents available at the end of May on a flash drive, which Relator obtained on June 22, 2010. Furthermore, as will be demonstrated below, any remaining documents in question were not "records" required to be produced. Based upon all the facts and circumstances of this case, we find that the Township Respondents answered Relator's public records request within a reasonable amount of time and in compliance with R.C. 149.43.

{¶ 31} For the foregoing reasons, we find that no genuine issues of material fact exist, Respondents are entitled to judgment as a matter of law, and reasonable minds could only conclude in favor of Respondents as to Relator's cause of action pursuant to R.C. 149.43.

R.C. 149.351 – Prohibiting Destruction or Damage of Records

{¶ 32} We shall next address Relator's contention that Tetrault, in his capacity as a Pierce Township employee, violated R.C. 149.351 by improperly disposing of records.

{¶ 33} R.C. 149.351(A) provides that "[a]ll 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 * * *." R.C. 149.351(B) allows a person who is "aggrieved" by a violation or threatened violation of R.C. 149.351(A) to commence a civil action for injunctive relief and/or to recover a $1,000 civil forfeiture award

plus reasonable attorney's fees for each violation. *State ex rel. Bell v. London*, 12th Dist. Nos. CA2010-11-027, CA2010-11-029, 2011-Ohio-3914, ¶ 27; *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶ 28-44.

{¶ 34} Relator contends that Tetrault violated R.C. 149.351 twice: first, by discarding the scrap paper upon which he kept a daily "running tally" of his work hours; and second, by erasing all documents from the hard drive of the Township Laptop. Respondents counter that Relator is not an "aggrieved party" pursuant to R.C. 149.351 and, therefore, cannot recover a civil forfeiture award. We shall address each argument separately.

1. Scrap Paper

{¶ 35} The issue is whether the scrap paper used by Tetrault to track his daily hours constitute "records" within the meaning of the Public Records Act. R.C. 149.011(G) defines "records" as including:

> 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 or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

{¶ 36} The trial court found that the scrap paper did not serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office of Pierce Township and, therefore, were not records. We agree.

{¶ 37} While Tetrault was an employee of Pierce Township, he was considered a public official. R.C. 149.011(D). However, it is clear that not all pieces of paper upon which a public official writes something is considered a "record" unless those pieces of paper serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of a public office. *State ex. rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680, ¶ 13*; State ex rel. Steffen v. Kraft*, 67 Ohio St.3d 439, 440 (1993).

{¶ 38} Although "[t]ime sheets of government employees 'fall squarely within the definition of "records"' for purposes of the Public Records Act," we do not find that the scrap paper in this case constitutes time sheets or records. *Kish v. Akron*, 109 Ohio St.3d 169, 2006-Ohio-1244, ¶ 25. Evidence shows that the scrap paper contained a "running tally" of hours that Tetrault worked for Pierce Township on a daily or semi-daily basis. The scrap paper does not contain the date of creation, the worked performed, or any other details. After inputting the hours into Basecamp, Tetrault testified that he discarded or recycled the scrap paper and began a new piece. The scrap paper was used for Tetrault's convenience to recall his hours worked and there is no evidence that the notes were kept as official records or that other Pierce Township officials had access to or used the notes. *See State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, ¶ 18-22 (holding that notes used for one's own convenience to recall events that were not kept as part of a public record or shared with other public officials do not constitute official records). Thus, we find that this scrap paper did not document the organization, functions, policies, decisions, procedures, operations, or other activities of the office of Pierce Township. To find otherwise would lead to an absurd result. *See Ronan* at ¶ 13.

{¶ 39} As Tetrault did not violate R.C. 149.351 by discarding the scrap paper, we must also find that the Township Respondents did not violate R.C. 149.351. Relator only argued that the Township Respondents' liability was established through Tetrault's actions, as a Pierce Township employee. Thus, as Tetrault is not liable, neither are the Township Respondents. Therefore, based upon the foregoing, we find that no genuine issues of material fact exist and Respondents are entitled to judgment as a matter of law on this argument.

2. The Township Laptop Hard drive

{¶ 40} The is whether Tetrault failed to copy all of the files from the Township Laptop's hard drive to the external hard drive and, therefore, erased records in contravention of R.C.

149.351. Relator contends that she obtained a mirror image of the Township Laptop's hard drive through discovery and recovered a word document entitled "Chris Tetrault's hours from July 1 to September 30" (the "Hours Document"). Relator argues that this document would have been responsive to her public records request, but was not produced by the Township Respondents. Thus, Relator asserts that Tetrault deleted the Hours Document in violation of R.C. 149.351 when he returned the Township Laptop to its "factory setting" and both Tetrault and the Township Respondents, as Tetrault's employer, are liable.

{¶ 41} Just as with the scrap paper, we do not find that the Hours Document constituted a "record." The Hours Document contains various time entries from July 1 to July 25. However, the document does not specify a year to which this information applies; it is just a listing of numbers with some unspecified dates. There is no evidence that the Hours Document was used by Tetrault as a time sheet or even used to input time onto Basecamp. In fact, Tetrault testified that he did not know what the document was or to what time period it referred. In addition, no evidence was presented that the Hours Document was provided to the Township Respondents as a time sheet. Thus, there is no evidence that the Hours Document was used to document the organization, functions, policies, decisions, procedures, operations, or other activities of Pierce Township. Therefore, the Hours Document does not constitute a "record" within the meaning of R.C. 149.011(G) and destruction of the Hours Document would not be a violation of R.C. 149.351.

{¶ 42} As the Hours Document is the only document that Relator argues was not produced on the flash drive, Relator's claim that Tetrault and, through him, the Township Respondents, violated R.C. 149.351 by wiping the Township Laptop's hard drive and erasing the Hours Document fails. Therefore, Respondents are entitled to judgment as a matter of law as to this issue.

3. Aggrieved Party Status

{¶ 43} Finally, we find that Relator is not an aggrieved party within the meaning of R.C. 149.351 and, as such, would not be permitted to receive a forfeiture award had a violation of R.C. 149.351 occurred. The Ohio Supreme Court has recently stated that, in order for a relator to succeed in a civil action for forfeiture pursuant to R.C. 149.351:

> [She] must have requested public records, the public office must have been obligated to honor that request, * * *, the office must have disposed of the public records in violation of R.C. 149.351(A), and [the relator] must be aggrieved by the improper disposal.

{¶ 44} *Rhodes v. New Philadelphia*, 129 Ohio St.3d 204, 2011-Ohio-3279, ¶ 16. Here, Relator satisfies the first two prongs of the test, as she made a public records request and Pierce Township was obligated to honor that request. However, Relator fails to obtain aggrieved party status because Pierce Township did not dispose of any pertinent public record in violation of R.C. 149.351(A). As the documents in question in this case—the scrap paper and Hours Document—were not "public records," nor "records" at all, Relator was not entitled to view these records and their destruction did not infringe upon any of Relator's rights. As such, Relator is not an aggrieved party within the meaning of R.C. 149.351 and Relator would not be entitled to a civil forfeiture award.

{¶ 45} Based upon the foregoing, we find that the trial court did not err in granting summary judgment to Respondents on Relator's claims pursuant to R.C. 149.43 and R.C. 149.351. No genuine issues of material fact exist, Respondents are entitled to judgment as a matter of law, and reasonable minds could only conclude in favor of Respondents. Therefore, Relator's first and second assignments of error are overruled.

{¶ 46} Assignment of Error No. 3:

{¶ 47} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPLICITLY OVERRULING [RELATOR'S] OPPORTUNITY TO OBTAIN DISCOVERY FROM AN OUT-OF-STATE WITNESS.

{¶ 48} In her third assignment of error, Relator argues that the trial court abused its discretion by implicitly overruling Relator's opportunity to obtain discovery from an out-of-state witness. Specifically, Relator contends that the trial court erred when it failed to address Relator's Motion for Commission for Out-of-State Discovery wherein Relator sought permission to take discovery from an Illinois-based company which hosts Basecamp.

{¶ 49} "[A]bsent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues." *State ex rel. Doe v. Register*, 12th Dist. No. CA2008-08-081, 2009-Ohio-2448, ¶ 40, quoting *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329. "An abuse of discretion connotes more than a mere error of law or judgment, and instead, requires that the court's attitude was unreasonable, arbitrary, or unconscionable." *Id*., citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 50} "[W]hen a trial court fails to rule on a pretrial motion, it may ordinarily be presumed that the court overruled it." *Id*. at ¶ 42, quoting *Marshall* at 469. Assuming, therefore, that the trial court overruled Relator's motion to conduct out-of-state discovery, we find that its decision to do so was not an abuse of discretion.

{¶ 51} Relator was likely aware of the existence of Basecamp as early as May 14, 2010, when the Township Respondents produced the first 47 pages of public records. However, it is clear that Relator knew about the Basecamp website, at the latest, by January 25, 2011, when Relator received Tetrault's discovery responses disclosing that all of the documents related to the public records request could be found on Basecamp. Yet, Relator waited until June of 2011, six days before the trial court's discovery deadline, to request permission to depose a Basecamp employee.

{¶ 52} As Relator had ample time to conduct discovery after learning of the existence of Basecamp, the trial court's implicit overruling of the Motion for Commission for Out-of-State Discovery was not arbitrary, unreasonable, or unconscionable. Therefore, Relator's third and

final assignment of error is overruled.

{¶ 53} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.