[Cite as *Wagner v. Huron Cty. Bd. of Commrs.*, 2013-Ohio-3961.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Tod Wagner	Court of Appeals No. H-12-008
Appellant	Trial Court No. CVH 2010-1093
v.	
Huron County Board of County Commissioners, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: September 13, 2013

* * * * *

William W. Owens, for appellant.

Russell V. Leffler, Huron County Prosecuting Attorney, and
Daivia S. Kasper, Assistant Prosecuting Attorney, for appellees.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Tod Wagner, appeals the judgment of the Huron County Court of Common Pleas, dismissing his petition for a writ of mandamus. For the following reasons, we affirm, in part, and reverse, in part.

A. Facts and Procedural Background

{¶ 2} This case arises out of Wagner's submission of numerous public records requests to various public offices within Huron County, including appellees, the Huron County Board of County Commissioners and the Huron County Airport Authority. The Airport Authority is responsible for the oversight of the Huron County Airport. It is run by a five-member board of trustees, which consists of individuals appointed by the Board of County Commissioners. It has no employees. Instead, management of the Airport Authority's day-to-day operations is independently contracted. While the Board of County Commissioners appoints the members of the Airport Authority's board of trustees, the two entities are separate.

{¶ 3} At the time the requests were made, the Board of County Commissioners consisted of three commissioners: Mike Adelman, Gary Bauer, and Larry Silcox. Dennis Sokol was the president of the Airport Authority's board of trustees. Sandra Gordley was the manager of the airport pursuant to a contract entered into by her company, N.O.F.A., Inc., and the Airport Authority.

{¶ 4} In late-October 2010, Wagner sent four public records requests to the Board of County Commissioners. In his requests, Wagner demanded the production of numerous public documents, including in pertinent part: (1) a copy of the Huron County retention record policy; (2) a copy of a recorded easement between Huron County and Summit Motorsports Park, along with any documents or minutes of meetings where

discussion of the easement took place; (3) a copy of an avigation easement agreement[1] between Huron County and Summit Motorsports Park; (4) tape recordings of all Airport Authority meetings for the last 15 years; (5) printed "Veeder Root" reports[2] and reports of fuel sales; (6) audiotapes of all Huron County Board of County Commissioners meetings held between 2004 and 2006; (7) fax logs from 2002; and (8) all emails concerning the airport or the Airport Authority between 2008 and October 26, 2010.

{¶ 5} The board responded to Wagner's requests in a letter dated November 3, 2010. In that letter, the board's administrative clerk, Cheryl Nolan, informed Wagner that the retention record policy and the easement were available for pick-up. Concerning the Airport Authority's avigation easement agreement, the tape recordings of Airport Authority meetings, and the Veeder Root reports, Nolan directed Wagner to make his requests to the Airport Authority, since the Board of County Commissioners had no responsive records. In addition, Nolan informed Wagner that the audiotapes were located and would be available for his review during normal office hours with two business days'

[1] An avigation easement is "[a]n easement permitting unimpeded aircraft flights over the servient estate." *Black's Law Dictionary* 549 (8th Ed.2004).

[2] The following description of a Veeder Root report was given via Sokol's affidavit attached to appellees' motion for summary judgment:

> 8) The Veeder Root system at the Huron County Airport is a leak detection system connected to the two underground fuel tanks. The system takes periodic measurements of the fuel levels in the tanks. The Veeder Root system is highly affected by temperature and is unreliable when the volume in the tank is below three thousand gallons per tank.

notice. Finally, the letter stated that three emails were available for Wagner to pick up at the Board of County Commissioners' office.

{¶ 6} Wagner also sent a public records request to the Airport Authority. In his request, Wagner demanded copies of the Veeder Root records dating back as far as March 1, 1998, along with a copy of the avigation easement agreement, and tape recordings of Airport Authority meetings. In response, Sokol wrote a letter, dated November 5, 2010, explaining that certain documents were available for Wagner's review, but that the audiotapes of the Airport Authority's meetings were unavailable because Gordley recorded over them once she reduced the content to writing. Regarding the Veeder Root reports, Sokol stated that the Airport Authority was unable to make copies as requested due to the voluminous nature of the records. Instead, Sokol offered to provide Wagner with access to the records for his review and the ability to copy those records he found pertinent. Sokol also provided copies of the Airport Authority's meeting minutes from 2007. Further, Sokol informed Wagner that the Airport Authority was not in possession of the avigation easement agreement.

{¶ 7} On November 8, 2010, Wagner responded to Nolan's letter, informing her that he would pick up the records and review the audiotapes in person. Wagner was subsequently permitted to review the requested audiotapes for 2004 and 2005, but Nolan had not yet been able to locate the tapes from 2006. She subsequently located the 2006 tapes. After locating the 2006 tapes, Nolan sent Wagner an email at the email address listed on his letterhead informing him that the tapes were available for his review.

{¶ 8} Unsatisfied with the responses he received from the Board of County Commissioners and the Airport Authority, Wagner proceeded to file a complaint for a writ of mandamus and injunctive relief, alleging that appellees unlawfully delayed the production of public records and destroyed certain public records. Following the filing of Wagner's complaint, Nolan discovered additional emails that were responsive to Wagner's request, and forwarded them to him.

{¶ 9} On December 30, 2011, appellees filed their motion for summary judgment. Prior to responding, Wagner filed his own motion for summary judgment. The trial court heard arguments on the cross-motions on January 19, 2012. Ultimately, the court denied Wagner's motion for summary judgment, and granted appellees' motion for summary judgment, in part. A two-day trial began on February 9, 2012, to dispose of the remaining issues concerning the audiotapes of Airport Authority meetings, the Board of County Commissioners' audiotapes from 2006, and several emails regarding the airport that Wagner alleged the Board of County Commissioners had unlawfully failed to produce. Following trial, the court issued its order denying Wagner's request for a writ of mandamus and entered judgment in appellees' favor. Wagner's timely appeal followed.

B. Assignments of Error

{¶ 10} Wagner assigns the following errors for our review:

1. The trial court erred and/or committed reversible error when it denied Appellant's motion for summary judgment.

2. The trial court erred and/or committed reversible error when it failed to find that the Veeder Root Reports were wrongfully destroyed public records.

3. The trial court erred and/or committed reversible error when it failed to find that the requested emails were public records which Appellant possessed a right to access.

4. The trial court erred and/or committed reversible error when it failed to find that the tapes are wrongfully destroyed public records.

II. Analysis

A. The trial court erroneously denied Wagner's motion for summary judgment concerning the Veeder Root reports.

{¶ 11} In Wagner's first and second assignments of error, he argues that the trial court erroneously denied his motion for summary judgment because the evidence demonstrates that the Veeder Root reports were wrongfully destroyed public records. By extension, Wagner implies that the trial court's grant of appellees' motion for summary judgment as to the Veeder Root reports was erroneous.

{¶ 12} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶ 13} Wagner challenges the trial court's denial of summary judgment based on his assertion that the Veeder Root reports were destroyed without prior authorization pursuant to R.C. 149.38 or other authorization from a valid retention schedule in existence at the time the records were destroyed. He claims that the destruction of the Veeder Root reports caused him damages by limiting his ability to compare and prove the amount of gasoline that was sold by the airport.

{¶ 14} The maintenance of public records is governed by R.C. 149.351, which provides, in pertinent part:

(A) 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 the records commissions provided for under sections 149.38 to 149.42 of the Revised Code or under the records

programs established by the boards of trustees of state-supported institutions of higher education under section 149.33 of the Revised Code.

{¶ 15} In responding to Wagner's argument concerning the Veeder Root reports, appellees posit that there is no evidence in the record that supports a determination that the records were wrongfully destroyed. Additionally, appellees argue that all of the Veeder Root reports dating back to June 9, 2007, were provided to Wagner, and the additional records that were created prior to June 9, 2007, were not provided because they are no longer in existence.

{¶ 16} In his deposition, Sokol acknowledged that the Veeder Root system periodically measured the amount of fuel contained in the two fuel tanks at the airport. While he was unable to state with certainty the frequency of those measurements, it is clear from the record that the Veeder Root system generated reports prior to June 9, 2007. Notably, appellees readily admit that the Veeder Root reports that were in existence prior to June 9, 2007, are no longer in existence.

{¶ 17} In order to justify the disposal of the Veeder Root reports, appellees point to a record retention policy adopted under R.C. 149.38 by the Airport Authority in December 2010, which authorizes the disposal of Veeder Root reports after three years. However, appellees' argument overlooks the fact that the retention schedule they rely upon was enacted *after* the disposal of the Veeder Root reports and Wagner's October 27, 2010 records request. A straightforward application of R.C. 149.351(A) leads us to conclude that a public office must dispose of its public records in accordance with a

then-existing retention schedule. The statute makes no provision for the retroactive application of a retention schedule. Thus, the Airport Authority's reliance on the December 2010 retention schedule, which was adopted after the disposal of the Veeder Root reports in question, is misplaced. Absent any authorization to dispose of the records pursuant to a statute or valid retention schedule, we conclude that the Airport Authority wrongfully disposed of the Veeder Root reports that were created prior to June 9, 2007. Thus, Wagner was entitled to summary judgment as to his claim for wrongful destruction of public records pertaining to the Veeder Root reports.

{¶ 18} Accordingly, Wagner's first and second assignments of error are well-taken.

B. The trial court did not err in determining that the emails were not wrongfully-destroyed public records.

{¶ 19} In his third assignment of error, Wagner argues that the trial court erroneously determined that the emails he requested from the Board of County Commissioners were not wrongfully destroyed public records.

{¶ 20} Under Ohio's Public Records Act, a "public record" is defined as "records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units * * *." R.C. 149.43(A)(1). Moreover, "records" include "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office * * * which

serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G).

{¶ 21} At trial, Wagner introduced 68 exhibits, which allegedly contained emails that appellees failed to disclose under his public records request. Following trial, the court noted the following with respect to Wagner's exhibits:

> Finally the Relator has cited 68 instances where he alleges the Respondents have failed to comply with email record requests. The Court has heard testimony on each of the claimed exclusions and examined the evidence pertaining thereto. In each and every instance the Relator has failed to show a clear legal right to the record because either the item is not an email or the item is not a public record, or the email cited does not involve a Huron County Commissioner or employee thereof, or the item is a duplicate of an email previously responded to by the Board's Clerk, Cheryl Nolan.

{¶ 22} Having thoroughly reviewed the record before us, including the exhibits containing the emails, we concur with the trial court that the emails were not wrongfully destroyed public records. Indeed, in most instances, the exhibits Wagner refers to fail to meet the definition of a public record because the content of the emails does not "document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). Further, the remaining emails were

addressed to a different public office, namely the Huron County Engineer. Thus, Wagner's argument concerning his request for emails is without merit.

{¶ 23} Accordingly, Wagner's third assignment of error is not well-taken.

C. The trial court's judgment in favor of appellees regarding the Airport Authority's audiotapes was against the manifest weight of the evidence.

{¶ 24} In his fourth assignment of error, Wagner argues that the trial court erroneously determined that he was not entitled to relief with regard to the destruction of the audiotapes containing recordings of the Airport Authority's meetings. In its judgment entry, the trial court determined that the record was devoid of any evidence that Wagner properly requested the records from the Airport Authority. Appellees' position on appeal mirrors the court's entry. Specifically, appellees argue that "[Wagner] never produced a copy of a public records request to Appellee Airport Authority for tapes of Airport Authority meetings. The request for tapes of the Airport meetings was addressed to the County Commissioners."

{¶ 25} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), paragraph one of the syllabus. When reviewing a civil manifest weight claim, the appellate court has the obligation to presume the findings of the trier of fact are correct because the trial judge had the opportunity to assess the witnesses' demeanor and credibility. *State v. Wilson*, 113 Ohio St.3d 382,

2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. If there exists competent and credible evidence supporting the trial court's findings of fact and conclusions of law, the trial court's decision should be affirmed. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273 (1984).

{¶ 26} The trial court correctly noted that Wagner submitted a public records request to the Board of County Commissioners, which included a request for the Airport Authority's audiotapes. However, it failed to recognize the fact that Wagner made a separate public records request to the Airport Authority for the tapes. That request, which was clearly addressed to the Airport Authority, was submitted at the hearing as Exhibit 74 and was part of the record before the trial court. Consequently, we find that the trial court's judgment with respect to the Airport Authority audiotapes was against the manifest weight of the evidence.[3]

{¶ 27} Accordingly, Wagner's fourth assignment of error is well-taken.

III. Conclusion

{¶ 28} For the foregoing reasons, the judgment of the Huron County Court of Common Pleas is affirmed, in part, and reversed, in part. Having determined that Wagner was entitled to summary judgment on his claims concerning the Veeder Root reports, and that the trial court's decision with respect to the Airport Authority's audiotapes was against the manifest weight of the evidence, we remand this matter to the

[3] On remand, the parties will have an opportunity to set forth their respective positions on the question of whether the audiotapes constitute public records. Until then, we limit our analysis to the arguments set forth by the parties.

trial court to do the following: (1) determine the extent of Wagner's damages, including the appropriate amount of attorney's fees, as to his claims regarding the Veeder Root reports; and (2) conduct further proceedings with respect to Wagner's claims regarding the Airport Authority audiotapes consistent with our determination that Wagner did, in fact, request the records from the appropriate entity. Costs are to be split evenly between the parties pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J.
CONCUR. _____
JUDGE

James D. Jensen, J.,
CONCURS IN PART,
DISSENTS IN PART AND
WRITES SEPARATELY.

JENSEN, J.

{¶ 29} I concur with the majority decision as to the Veeder reports and the 68 emails at issue. I dissent, however, with the majority decision to remand the case as to the Airport Authority audiotapes. In my view, the trial court's judgment was not against the manifest weight of the evidence. Therefore, I would affirm the trial court's denial of the writ of mandamus as to those audiotapes.

{¶ 30} The scope of appellate review is narrow. "A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of * * * evidence is not." (Citations omitted.) *Blake Homes, Ltd. v. FirstEnergy Corp.*, 173 Ohio App.3d 230, 241, 2007-Ohio-4606, 877 N.E.2d 1041 (6th Dist.). A review of the record indicates that the trial court's denial of the writ as to the audiotapes is corroborated by competent, credible evidence.

{¶ 31} At trial, the chairman of the Airport Authority board of trustees testified that board meetings were taped, after which an administrator would prepare typed-written minutes based upon the tapes. The administrator would then submit the minutes to the board for approval and signature by the chairman. Once approved, the administrator would re-use the audiotapes at future meetings, taping over and effectively erasing audio from previous meetings. As a result of this practice, the audiotapes requested by appellant were not available.

{¶ 32} In his fourth assignment of error, appellant alleges that the trial court erred when it "failed to find that the Tapes Are Wrongfully Destroyed Public Records." I disagree.

{¶ 33} The audiotapes were a tool used for the administrator's convenience in preparing minutes. While the minutes of Airport Authority meetings are certainly "records" as that term is defined in R.C. 149.011(G), the audiotapes are not. Therefore, erasure of the tapes, as a matter of law, was not improper under R.C. 149.351. *E.g. State ex rel. Doe v. Tetrault*, 12th Dist. Clermont No. CA2011-10-070, 2012-Ohio-3879, ¶ 38.

{¶ 34} The Supreme Court of Ohio has had occasion to evaluate the practice of using, and then deleting, audiotapes of official meetings in *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 57, 748 N.E.2d 58 (2001). Although the issues were different in that case, the court was not critical of a village's practice of deleting audiotapes of meetings once minutes had been prepared. The court said,

> [F]or the following reasons, respondents' contention that their audiotapes complied with * * * R.C. 149.43 * * * is meritless. First, [village council] never treated these audiotapes as the official minutes of their meetings. Instead, the typewritten minutes are prepared from the tapes as well as from notes taken during the meetings. At the beginning of regular council meetings, the council reviews and approves the written minutes, not the tapes, of prior meetings. * * *

Third, * * * the council unanimously voted to erase tapes of council meetings after the written minutes had been approved. *Id.* at 57.

{¶ 35} For the same reasons, I would find that the audiotapes in this case were not "records," and thus, their erasure did not violate R.C. 149.351. I would affirm the trial court's denial of appellant's writ of mandamus as to the audiotapes. Therefore, I respectfully dissent with the majority decision as to appellant's fourth assignment of error.