[Cite as *State ex rel. Verhovec v. Northwood*, 2013-Ohio-5074.]

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

State of Ohio, ex rel.
Edward Verhovec

Appellant

v.

The City of Northwood, et al.

Appellees

Court of Appeals No. WD-13-002

Trial Court No. 2011CV0560

DECISION AND JUDGMENT

Decided: November 15, 2013

* * * * *

William E. Walker, Jr., for appellant.

John T. McLandrich and Frank H. Scialdone, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Relator-appellant, Edward Verhovec, appeals the December 19, 2012 judgment of the Wood County Court of Common Pleas granting summary judgment to appellees, the city of Northwood and Mayor Mark Stoner. For the reasons that follow, we affirm.

{¶ 2} In this public records mandamus and forfeiture case, appellant contends that appellee, city of Northwood ("the City"), wrongfully withheld or disposed of digital images relating to the City's traffic photo enforcement program. The City has used a traffic enforcement program ("Program") to help enforce traffic laws for about six years. The Program uses cameras placed at various intersections throughout the city to record digital still and video images of possible violations of local speed and red light ordinances. When a certain vehicle speed triggers a road sensor, a camera will take a picture of the vehicle in the intersection that may help determine whether the driver ran a red light or exceeded the speed limit.

{¶ 3} On June 15, 2011, appellant made a written request to the City to access records related to the Program. Appellant was hired as an investigator by attorney Paul Cushion to make public records requests for these images to the City and several other municipalities. In return, appellant would receive $4,000 each time he successfully prosecuted a request for those entries. Both parties dispute to exactly what extent appellant's record request was fulfilled. Appellant sought access to all images captured by the Program, whether enforcement actions were taken or not taken, for the entire six-year period of the Program's existence. The City asserts it provided appellant with all the public records he requested, but appellant vigorously disagrees and claims he never received images for "potential" violations.

{¶ 4} On June 30, 2011, appellant petitioned the trial court for a public records writ of mandamus pursuant to R.C. 149.43(C)(1) against the City and Mayor Mark

Stoner. Appellant also pled an alternative cause of action for statutory forfeiture under R.C. 149.351.

{¶ 5} During discovery, the City selected its police chief, Thomas Cairl, as its Civ.R. 30(B)(5) designee and he was deposed on June 7, 2012. Dissatisfied with the testimony and preparation of Chief Cairl, on August 12, 2012, appellant filed multiple motions to reopen discovery, one month past the discovery deadline.

{¶ 6} On July 26, 2012, appellees filed their summary judgment motion, arguing that appellant was not entitled to mandamus or forfeiture relief as a matter of law. Appellant opposed the motion. On December 19, 2012, the trial court granted summary judgment in favor of appellees in a two-sentence order. This appeal followed.

{¶ 7} Appellant raises three assignments of error for our review:

> Assignment of Error No. 1: The trial court erred when it ordered summary judgment despite the fact that Verhovec was denied a meaningful day in court and the due process right to prepare an opposition to summary judgment by the City's selection of an unknowledgeable Civ.R. 30(B)(5) designee who was unprepared to give meaningful testimony on noticed areas of inquiry; and refusal to produce *duces tecum* documents. Thus the trial court's order violated the First and Fourteenth Amendments to the United States Constitution.

{¶ 8} Assignment of Error No. 2: The trial court erred when it ordered summary judgment because genuine issues of material fact exist as

to whether the City provided Verhovec with access to all the records he requested; thus the trial court order violated Civ.R. 56(C).

{¶ 9} Assignment of Error No. 3: The trial court erred when it ordered summary judgment because genuine issues of material fact exist as to whether Verhovec actually wanted the records or only wanted to prove their non-existence.

The Discovery Dispute

{¶ 10} In his first assignment of error, appellant asserts that his due process rights were violated when he was unable to prepare an opposition to summary judgment because of appellees' selection of an unknowledgeable designee as defined by Civ.R. 30(B)(5). Appellant asserts the designee was unprepared to give meaningful testimony on noticed areas of inquiry and refused to produce duces tecum documents. As a result, appellant concludes that the trial court's order violated the First and Fourteenth Amendments to the United States Constitution. For the reasons that follow, we find that the trial court did not err.

{¶ 11} Ohio law is clear and this court has held that "the trial court is vested with broad discretion when it comes to matters of discovery." *Cargotec, Inc. v. Westchester Fire Ins. Co.*, 155 Ohio App.3d 653, 2003-Ohio-7257, 802 N.E.2d 732, ¶ 6 (6th Dist.). Thus, the standard of review of a trial court's decision in a discovery matter is whether the court abused its discretion. *Id.* A trial court abuses its discretion if its decision is

"unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 12} Generally, a party may obtain discovery regarding any unprivileged matter concerning the pending litigation. *State ex rel. Rhodes* v. *Chillicothe*, 4th Dist. Ross No. 12CA3333, 2013-Ohio-1858, ¶ 18, citing Civ.R. 26(B)(1). One method of obtaining discoverable matter is a deposition pursuant to Civ.R. 30. *Id*. Where the deponent is a public entity or private corporation, partnership, or association, it must designate one or more of its employees, officers, agents, or other authorized persons to testify on its behalf. *Id.*, citing Civ.R. 30(B)(5). If a deponent provides an answer that is inaccurate or evasive, the discovering party may, after exhausting other reasonable efforts, file a motion to compel pursuant to Civ.R. 37(A)(2)-(3).

{¶ 13} Appellant deposed the City's representative, Chief Thomas Cairl, on June 7, 2012. The discovery deadline was July 2, 2012. On August, 2, 2012, appellant filed a motion for continuance of discovery pursuant to Civ.R. 56(F) and a motion to compel discovery. On August 20, 2012, the trial court issued an order denying the motions. For nearly a month after the deposition of Chief Thomas Cairl, appellant never indicated he had any problems with Cairl's responses. Appellant could have certainly filed a motion to compel or a motion for continuance of discovery prior to the discovery deadline if he felt Cairl's responses were inadequate or insufficient. Instead, appellant opted to file his discovery motions after the discovery deadline had passed.

{¶ 14} Considering the tardiness of appellant's motions, we cannot conclude that the trial court abused its discretion by denying his Civ.R. 56(F) motion for a continuance and his motion to compel discovery. If appellant believed the individual provided by the City at the deposition, in accordance with Civ.R. 30(B)(5), was insufficient, he should have sought redress from the trial court prior to the discovery deadline. The trial court's ruling cannot be construed as unreasonable, arbitrary, or unconscionable.

{¶ 15} Further, even if the discovery deadline did not dispose of appellant's argument, this court is not convinced that after reviewing the deposition of Chief Thomas Cairl, he was "unknowledgeable" or "unprepared" for the deposition. Accordingly, appellant's first assignment of error is not well-taken.

The Summary Judgment Disposition

{¶ 16} Appellant's remaining assignments of error pertain to the disposition of his claims by summary judgment. We first note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64,

66, 375 N.E.2d 46 (1978). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 17} In appellant's second and third assignments of error he claims that there are genuine issues of material fact in this case as to whether the City provided appellant with access to all the requested records and whether appellant actually wanted the records or only wanted to prove their nonexistence.

{¶ 18} Appellant's complaint includes both mandamus and civil forfeiture claims. We consider first appellant's assertions of genuine issues of material fact existing pertaining to the civil forfeiture claim. R.C. 149.43(B)(1) states that "all public records responsive to [a] request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." Improper disposition of public records can result in a claim for civil forfeiture under the act. As in *Chillicothe*, 4th Dist. Ross No. 12CA3333, 2013-Ohio-1858, this action was filed when the former version of R.C. 149.351(A) was in effect which provided that: "[a]ny person who is aggrieved by the * * * [improper disposition] of a record * * * may commence an action for injunctive relief/or a civil action to recover a forfeiture in the amount of one thousand

dollars for each violation and obtain an award of reasonable attorney's fees incurred by the person in the civil action." *Id.* at ¶ 41, citing former R.C. 149.351(B)(1)-(2). Therefore, under the statute, appellant must show that he is "aggrieved" to recover a civil forfeiture. An individual is only considered to be aggrieved if he or she made a request with the goal of actually accessing the public records. *Rhodes v. City of New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2D 782, ¶ 24. If the purpose of requesting the records is only to seek a civil forfeiture and obtain a pecuniary relief, the requester is not "aggrieved." *Id.*

{¶ 19} *Chillicothe, supra,* provides nearly identical facts as the case in question. In *Chillicothe*, the appellant made public record requests to public entities for images related to red-light cameras under a contract with attorney Paul Cushion. Because we find the facts and legal issues in *Chillicothe* to be so similar to the present case, we place considerable weight on the decision and adopt a similar analysis.

{¶ 20} Appellant correctly asserts that the Ohio Supreme Court has found that public requesters are presumed to want the records they request and that when a public office seeks to rebut this presumption they must do so with clear and convincing evidence. *City of New Philadelphia* at ¶ 24. "Clear and convincing evidence is the highest level of evidentiary support necessary in a civil matter." *In re Stacy S.*, 136 Ohio App.3d 503, 520, 737 N.E.2d 92 (6th Dist.1999). However, we have little trouble finding that appellees have satisfied this heightened standard. Appellant admitted in his deposition that he had no interest in the content of the images and was simply interested in whether

they existed or not. Further, in his deposition, appellant concedes that his only reason for interest in the records was to satisfy his contract with attorney Paul Cushion so he could get paid. As a result, appellees have established through clear and convincing evidence that appellant's goal in requesting the records was to seek forfeiture and he is therefore not an aggrieved party entitled to civil forfeiture under former R.C 149.351(B)(1)-(2).

{¶ 21} Unlike the forfeiture claim, appellant's pecuniary interest in seeking forfeiture under the act does not render his mandamus claim moot. Appellant asserts in an affidavit in opposition to summary judgment that appellees "did not provide [him] with any digital images captured of potential violations that occurred from 2006 thru March 2011." As mentioned, R.C. 149.43(B)(1) requires that public records be prepared and made available in a reasonable time to any person requesting them. However, both R.C. 149.43(B)(2) and Ohio case law restrict these requests to those which are not ambiguous, overly broad, or all encompassing. *See State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 23. Because of their overbreadth, such requests do not rise to the status of a request pursuant to R.C. 149.43. *State ex rel. Davila v. Bellefontaine*, 3d Dist. Logan No. 8-11-01, 2011-Ohio-4890, ¶ 45. An Ohio court has found a public record request to be all encompassing and thus unenforceable to sustain a mandamus or forfeiture claim where the relator requested "all traffic reports." *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 756, 577 N.E.2d 444 (10th Dist.1989). Other examples of overly broad requests include a citizen request for all e-mail messages, text messages, and

correspondence sent to and from a state representative over a general period of time in her official capacity in the General Assembly. *See State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 19; *see also State ex rel. Davila v. East Liverpool,* 7th Dist. Columbiana No. 10-CO-16, 2011-Ohio-1347, ¶ 24 (request of reel-to-reel tapes utilized by a police department to record 911 calls and radio traffic over 2,191 separate days overly broad).

{¶ 22} Here appellant is requesting all of the digital images of the photo enforcement program over its entire six-year existence. Such a request, like those previously mentioned, is unreasonable in scope and should not be entitled to mandamus relief. In addition, appellant seeks not only those images that were used in enforcement of the program but also any images of "potential" violations. We note that this issue was not present in *Chillicothe* because the appellant there was seeking images for a program that had only been in place for roughly a year. However in this case, the request by appellant is indefinite and overbroad because he sought all the digital images over the existence of a six-year program. It is therefore not a request pursuant to R.C. 149.43, and appellant is not entitled to mandamus or forfeiture. Based on the aforementioned reasons, we find that there are no genuine issues of material fact and that the trial court properly granted summary judgment. Accordingly, we find Assignments of Error Nos. 2 and 3 not well-taken.

{¶ 23} For the foregoing reason reasons, appellant's three assignments of error are found not well-taken. We find that the trial court did not err when it granted summary

judgment in favor of appellees. On consideration whereof, we affirm the judgment of the Wood County Court of Common Pleas. We order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE