

[Cite as *State ex rel. Kirin v. Evans*, 2015-Ohio-3965.]
PER CURIAM.

{¶1} Victor J. Kirin, Jr. (“Relator”) filed an original action seeking a writ of mandamus against Mahoning County Common Pleas Court Judges Shirley J. Christian and James C. Evans (“Respondents”). His complaint asserts that Respondents failed to respond to his public records requests by failing to grant two motions filed in his civil case asking for the production of transcripts. For the following reasons, Respondents’ request for summary judgment is granted, and Relator’s request for a writ of mandamus is denied.

STATEMENT OF THE CASE

{¶2} This action rises from the civil suit Relator filed as a pro se plaintiff captioned *Kirin v. Ritchie*, Mahoning County Common Pleas No. 2013CV756. The case was assigned to Respondent Judge Evans in Courtroom 1. The defendant filed a motion to dismiss or for summary judgment. This motion was set for hearing before a magistrate on May 15, 2013. Thereafter, the parties were provided time to supplement their filings, and the summary judgment hearing was continued.

{¶3} On August 14, 2013, Relator filed a “Motion for the Production of Transcripts under O.R.C. 2301.25 and Ohio Civil Rule 53(7).” (Original all caps.) He asked the court “to ORDER a full and complete copy” of the transcript for the “trial” held on May 15, 2013 and prayed the motion “be granted at costs with in this matter.” His motion claimed the transcript was mandated because false or misleading testimony was presented and used in making the court’s “decision.”

{¶4} There is no indication to what decision he was referring. The summary judgment hearing proceeded before the magistrate on September 12, 2013. The magistrate did not issue a decision after the hearing. No action occurred in the case until a July 2014 assignment notice was issued setting the case for a status hearing.

{¶5} On August 8, 2014, Relator filed a “Motion for the Production of Transcripts under O.R.C. 2301.25.” He asked the court “to ORDER a full and complete copy” of the transcript of the “trial” held on September 12, 2013 and prayed the motion “be granted at costs within this matter.” Although no decision had been issued, he again stated that the transcript was mandated because false or misleading testimony was presented and used in making the court’s “decision.”

{¶6} Relator also filed a motion seeking the magistrate's recusal. Respondent Judge Christian, who began serving in Courtroom 1, overruled the recusal motion as moot. She explained that she would be ruling on the pending summary judgment motion. On November 3, 2014, Respondent Judge Christian issued a final order granting summary judgment against Relator. No appeal was taken from that order.

{¶7} On April 21, 2015, Relator filed the within original action against the two Common Pleas Court Judges responsible for his civil action. His complaint stated the transcripts were public records required to be released under R.C. 149.43. He asserts Respondents denied his "lawful request for public records" by failing to produce the transcripts in response to the two motions for the production of transcripts he filed pursuant to R.C. 2301.25. He claims he is entitled to statutory damages of \$100 for each day his request remains unfulfilled after the filing of this action.¹

{¶8} Respondents filed a motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. They attached certified copies of Relator's motions and referred to various items from the docket in the underlying lawsuit. On June 25, 2015, we converted the motion to dismiss into a motion for summary judgment as permitted by Civ.R. 12(B). Our entry provided Respondents time to supplement the filing and provided Relator fourteen days to respond.

¹ Besides containing a public records mandamus action under R.C. 149.43, Relator's complaint also contained a count for destruction of public records under R.C. 149.351 and a negligence count. On June 5, 2015, this court sua sponte dismissed the latter two counts for lack of jurisdiction. See *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 684 N.E.2d 72 (1997) (appellate court may sua sponte consider its own jurisdiction). As we explained, R.C. 149.351 specifies that an action for destruction of public records must be filed in the common pleas court. R.C. 149.351(C). See also *Patriot Water Treatment, L.L.C. v. Ohio Dept. of Natural Resources*, 10th Dist. No. 13AP-370, 2013-Ohio-5398, ¶ 34. We also pointed out that the court of appeals cannot hear a tort action seeking compensatory damages. See Ohio Constitution, Article 4, Section 3(B). See also *State ex rel. American Outdoor Advertising Co., L.L.C. v. Abell*, 11th Dist. No. 2008-P-0073, 2010-Ohio-319, ¶ 53, citing *Williams v. Franklin Cty. Sheriff Dept.*, 10th Dist. No. 05AP-207, 2005-Ohio-4573, ¶ 14.

On June 11, 2015, Relator filed a document contesting our June 5, 2015 entry. He seems to believe that our decision granted a request by Respondent without allowing him time to respond. However, Respondents' motion did not raise the jurisdictional issues related to counts two and three. Our decision was clearly said to be a sua sponte dismissal for lack of jurisdiction and was not related to Respondent's motion, which is the subject of the present entry. Appellant's submissions on the topic of his public records action are all being considered in making the present decision.

Respondents supplemented the motion with an affidavit and certified copies of pertinent items from the civil case.

{¶9} Respondents contend that Relator failed to show the elements for a mandamus action: a clear legal right to relief, a clear duty to perform, and the absence of a plain and adequate remedy in the ordinary course of law. They note that once a case is dismissed, pending motions are deemed denied. Respondents conclude that the failure to appeal after the trial court dismissed the civil suit precludes this request for a writ of mandamus.

{¶10} Respondents also point out that the right to receive copies of public records is dependent upon a request to the public office responsible for those records, citing R.C. 149.43(B)(1). They quote: “When statutes impose a duty on a particular official to oversee records, that official is the ‘person responsible’ under R.C. 149.43(B).” See *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30, 33, 485 N.E.2d 706 (1985). They explain that notes and electronic records of court proceedings shall be kept and preserved in the office of the official court reporter, citing R.C. 2301.20. Respondents conclude that Relator sought the records from the wrong person as it is the court reporter, not the judge, who is the official responsible for the records.

{¶11} Relator’s public records claim asks for a writ of mandamus ordering the Respondents to produce the transcripts requested by his two motions. His submissions also make various propositions unrelated to his public records action. For instance, he makes assertions about bias, misconduct, fraud upon the court, and the crime of tampering with evidence. He emphasizes the portion of R.C. 2301.20 requiring all civil actions in the common pleas court to be recorded. He notes that Civ.R. 53 requires all proceedings before a magistrate be recorded. He alternatively suggests that mandamus should issue if the records do not exist.

LAW & ANALYSIS

{¶12} As to his proposition that the records may not exist, Relator’s filings suggest that the records were destroyed or that no recordings or stenographic notes were created during the hearings. As aforementioned, the destruction of public records claim brought pursuant to R.C. 149.351 was dismissed for lack of jurisdiction;

the statute requires such a claim to be brought in the common pleas court. See R.C. 149.351(A), (C). Regarding the suggestion that the proceedings were not recorded, R.C. 149.43 deals with actual records, not records that were never made. See, e.g., R.C. 149.011(G) (defining records); *State ex rel. Morabito v. Cleveland*, 8th Dist. 98829, 2012-Ohio-6012, ¶ 14 (the duty imposed by the public records statute is to supply records not to create records). Accordingly, any (alleged) failure to record proceedings within a civil case does not fall under the rubric of a public records mandamus action.

{¶13} As Respondents point out, Relator’s motions are characterized as having been denied, and he failed to appeal from the final order in the civil case. “[W]hen a trial court fails to rule on a pretrial motion, it may ordinarily be presumed that the court overruled it.” *State ex rel. V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198, 201 (1998). The presumed denial of such motions can be presented to an appellate court in an assignment of error on appeal of the final order in the case. See *id.* (reviewing whether motion should have been granted).

{¶14} In the ordinary case, a relator seeking a writ of mandamus must show: (1) a clear legal right to the action requested; (2) a corresponding clear legal duty of the respondent to perform the action; and (3) the absence of a plain and adequate remedy in the ordinary course of law. See, e.g., *State ex rel. Gaydosh v. Twinsburg*, 93 Ohio St.3d 576, 578, 757 N.E.2d 357 (2001). Relator had a plain and adequate remedy at law for any alleged failure to record the proceedings in his civil case, a case that is now closed.

{¶15} Relator does not establish how the matter before us is not moot. The civil case was concluded by summary judgment. The magistrate issued no decision on the motion for summary judgment, and the trial court did not rely on any proceedings that occurred before the magistrate. The complaint in this original action seeks to remedy a perceived recording failure in a closed civil case. Count one was framed as a public records mandamus action, which is a special statutory action brought under R.C. 149.43 for the failure to provide public records.

{¶16} The Supreme Court has explained that the third element of a standard mandamus action is not required in a public records case brought under R.C. 149.43

because the statute allows for a mandamus action if the person has been denied public records which a public official had a duty to provide. See *id.* at 580; *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 426-427, 639 N.E.2d 83 (1994). Consequently, the mere fact that a relator may have an adequate remedy at law does not bar a mandamus action filed under R.C. 149.43. *Id.*

{¶17} We now turn to the other two elements of a mandamus action: whether Relator had a clear legal right to the relief he requested and whether Respondents had a clear legal duty to perform the action requested of them. Upon request, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. R.C. 149.43(B)(1). Upon request, a public office or person responsible for the records shall make copies of the requested public record available at cost and within a reasonable period of time. *Id.*

{¶18} A mandamus action can be commenced if a person is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection or any other failure to comply with an obligation imposed by division (B). R.C. 149.43(C)(1). The mandamus action can be filed in the common pleas court, the appellate court, or the Ohio Supreme Court. *Id.* Statutory damages are fixed at \$100 per day from the day the mandamus action was filed, up to a \$1,000 maximum. *Id.*

{¶19} Relator's motions for the trial court to order transcripts were expressly filed under R.C. 2301.25. This statute provides in pertinent part:

{¶20} When ordered by the prosecuting attorney or the defendant in a criminal case or *when ordered by a judge of the court of common pleas in either civil or criminal cases*, the costs of transcripts shall be taxed as costs in the case, collected as other costs, whether the transcripts have been prepaid or not, as provided by section 2301.24 of the Revised Code, paid by the clerk of the court of common pleas quarterly into the county treasury, and credited to the general fund. (Emphasis added.)

{¶21} This statute refers to R.C. 2301.24, which deals with "Compensation for making transcripts and copies" and provides:

{¶22} The compensation of reporters for making written transcripts as provided in section 2301.23 of the Revised Code shall be fixed by the court of common pleas of the county in which the trial is held. If more than one transcript of the same testimony or proceeding is ordered, the reporter shall make copies of the transcript at cost pursuant to division (B)(1) of section 149.43 of the Revised Code or shall provide an electronic copy of the transcript free of charge. *The compensation shall be paid by the party for whose benefit a transcript is made. The compensation for transcripts requested by the prosecuting attorney or an indigent defendant in criminal cases or by the trial judge in either civil or criminal cases, and for copies of decisions and charges furnished by direction of the court shall be paid from the county treasury and taxed and collected as costs.* (Emphasis added.)

{¶23} This leads to R.C. 2301.23, which is entitled “Transcripts of testimony to be furnished” and provides:

{¶24} When notes have been taken or an electronic recording has been made in a case as provided in section 2301.20 of the Revised Code, *if the court or either party to the suit requests written transcripts of any portion of the proceeding, the reporter reporting the case shall make full and accurate transcripts of the notes or electronic recording.* The court may direct the official reporter to furnish to the court and the parties copies of decisions rendered and charges delivered by the court in pending cases.

{¶25} When the compensation for transcripts, copies of decisions, or charges is taxed as a part of the costs, the transcripts, copies of decisions, and charges shall remain on file with the papers of the case. (Emphasis added.)

{¶26} The statute cited therein provides that all criminal and civil actions in the court of common pleas shall be recorded and the reporter shall take accurate notes of or electronically record the oral testimony. R.C. 2301.20. “The notes and electronic records shall be filed in the office of the official reporter and carefully preserved * * *.” *Id.* See also R.C. 2301.26 (notes and electronic records shall be carefully preserved in the office of the reporter).

{¶27} The public records request is to be made to the public office or person responsible for the public records. R.C. 149.43(B)(1). Respondents assert that the court reporter is the person responsible for preserving the records and the person responsible for generating the written transcript. See R.C. 2301.20; R.C. 2301.23. Respondents conclude that the court reporter, rather than a common pleas judge, was the person responsible for producing transcripts from the notes or electronic recording of a proceeding and thus the person with the duty to produce a transcript upon a proper request.

{¶28} The court reporter is obligated to make full and accurate transcripts “if the court or either party to the suit request written transcripts” in a case where notes have been taken or an electronic record has been made. R.C. 2301.23. The compensation of the court reporter for making written transcripts “shall be paid by the party for whose benefit a transcript is made.” R.C. 2301.24. Relator does not indicate that he made a request with the court reporter for transcripts. See *State ex rel. Moore v. Brown*, 2d Dist. No. 16831 (Dec. 19, 1997) (if relator wanted testimony transcribed, the proper procedure was to pay the court reporter to prepare a transcript).

{¶29} The Supreme Court has ruled that R.C. 149.43 may not be used to circumvent R.C. 2301.24, which provides that the compensation for reporters shall be paid by the party for whose benefit the transcript is made. *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 2004-Ohio-4354, 814 N.E.2d 55, ¶ 4-8. See also *State ex rel. Slagle v. Rogers*, 106 Ohio St.3d 1402, 2005-Ohio-3040, 829 N.E.2d 1215 (on reconsideration to add a holding). R.C. 149.43 is a general statute addressing the public’s right to access public records whereas R.C. 2301.23 is a specific statute requiring a designated fee to be paid to the court reporter when seeking transcripts. *State ex rel. Slagle*, 103 Ohio St.3d 89 at ¶ 15. Therefore, the cost of ordering transcripts from the court reporter “must take precedence” over the “at cost” provision in R.C. 149.43(B)(1). *Id.* at ¶ 6. See also *State ex rel. Slagle*, 106 Ohio St.3d 1402 at ¶ 19 (“a party to an action may not circumvent payment to the official court reporter of the fees designated by the court pursuant to R.C. 2301.24 for a copy of the

transcript of proceedings in that action by requesting a certified copy of that transcript from the clerk of courts pursuant to R.C. 2303.20(Z).”).

{¶30} One may freely inspect, without copying, transcripts of proceedings in that action that are already on file as part of the public court file. *State ex rel. Slagle*, 106 Ohio St.3d 1402 at ¶ 19. *See also State ex rel. Slagle*, 103 Ohio St.3d 89 at ¶ 17 (can ask for a copy of a tape “at cost” as the phrase is used in the public records law). However, a party to a lawsuit cannot use the Ohio Public Records Act to obtain, at actual cost, photocopies of court transcripts. *State ex rel. Slagle*, 103 Ohio St.3d 89 at ¶ 4, 14. “[I]f a party to an action seeks a transcription of an audiotape of a court proceeding, then that party is required to follow the procedure set forth in R.C. 2301.24 and to pay the designated fee to the court reporter.” *Id.* at ¶ 17. *See also Lawrence v. Shaughnessy*, 8th Dist. No. 2015-Ohio-885, ¶ 6 (mandamus action against judge dismissed because “to the extent that Lawrence seeks to obtain a copy of his transcript at costs through R.C. 149.43, a public records mandamus may not be used to circumvent payment to the official court reporter of the fees designated by the court and statute.”)

{¶31} There is a difference between a refusal to release transcripts already prepared and a decision by the court to not order transcripts for its own use. *See generally State ex rel. Slagle*, 103 Ohio St.3d 89. What Relator now claims were public records requests were motions filed with the common pleas court by a party in a civil case under R.C. 2301.25. The motions were requests for the trial court to order the transcripts for filing in the civil case and to have the transcript taxed as costs. Relator’s motions urged that the transcripts were needed by the trial court due to false or misleading testimony provided at the hearings. However, the magistrate issued no decision on the motion for summary judgment, and the trial court did not rely on any proceeding before the magistrate in granting the Motion for Summary Judgment. There is no clear legal duty within R.C. 2301.25 on the part of the trial court to order transcripts from the court reporter for its own use. We also note that a decision on the taxing of costs is discretionary, and a writ of mandamus cannot control judicial discretion. R.C. 2731.03 (a writ of mandamus can require an inferior tribunal to exercise its judicial power or proceed to discharge its function, but it

cannot control judicial discretion). *See also State ex rel. Motley v. Capers*, 23 Ohio St.3d 56, 57-58, 491 N.E.2d 311 (1986) (in mandamus action seeking to compel judge to sign the proposed narrative statement under App.R. 9(C) or to order a transcript from the court reporter at public expense, Court held that transcript is considered unavailable where civil party is indigent and ordered judge to perform App.R. 9(C) duty rather than order transcript).

{¶32} For all of the foregoing reasons, Respondents' request for summary judgment is granted, and Relator's request for a writ of mandamus is denied. This case is hereby dismissed.

{¶33} Costs taxed against Relator. Final order. Clerk to serve notice as provided by the Civil Rules.

Robb, J., concurs.

Donofrio, P.J. concurs.

Waite, J., concurs.