[Cite as *Crenshaw v. Cleveland Law Dept.*, 2020-Ohio-921.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MARIAH CRENSHAW,	:	
Relator-Appellant,	:	No. 108519
v.	:	
CITY OF CLEVELAND LAW DEPARTMENT,	:	
Respondent-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART; REVERSED IN PART; REMANDED
RELEASED AND JOURNALIZED: March 12, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-899041

Appearances:

Mariah Crenshaw, *pro se*.

Barbara A. Langhenry, City of Cleveland, Director of Law, and Brandon Earl Brown, Assistant Director of Law, *for appellee*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Relator-appellant Mariah Crenshaw appeals the decision of the Cuyahoga County Court of Common Pleas granting summary judgment in favor of respondent-appellee the City of Cleveland Law Department on Crenshaw's claim for

mandamus relief and her request for statutory damages, spoliation and forfeiture damages, attorney fees and court costs under R.C. 149.43 and 149.351.

{¶ 2} For the reasons that follow, we affirm the trial court's decision as it relates to Crenshaw's request for a writ of mandamus, spoliation and forfeiture damages, attorney fees and court costs. We reverse the trial court's decision as it relates to Crenshaw's request for statutory damages and remand the case for further proceedings consistent with this decision.

Procedural and Factual Background

{¶ 3} On May 13, 2018, Crenshaw submitted a public records request electronically through the city of Cleveland's (the "city's") online public records system seeking copies of "the personnel files and disciplinary files for Officer Larry McDonald for the period January 1, 2008 to the present" (the "original records request"). Officer McDonald worked for the city from March 2017 to March 2018. Prior to working for Cleveland, he worked for the East Cleveland Police Department and the University Circle Police Department.

{¶ 4} The city sent an acknowledgement of the request to Crenshaw later that day. On May 22, 2018, Crenshaw sent a second public records request via certified mail addressed to the "City of Cleveland Public Information Request Police Records Request" at 1300 Ontario Street, Cleveland, Ohio. In her second request, Crenshaw sought copies of: (1) "the personnel files and disciplinary records of former Officer Larry McDonald"; (2) "the NCIC [National Crime Information Center]/LEADS [Law Enforcement Automatic Data System] certification of Officer

Larry McDonald" and (3) "OPATA [Ohio Peace Officer Training Academy] [c]ertification" (the "supplemental records request"). The certified mail receipt indicates that Crenshaw's supplemental records request was received on May 25, 2018.[1] The city did not acknowledge receipt of the supplemental records request.

{¶ 5} On June 7, 2018, Crenshaw filed a mandamus action against the city. Crenshaw sought (1) an order compelling the city to produce the documents she had requested in her original and supplemental records requests and (2) an award of statutory damages, attorney fees and court costs under R.C. 149.43.

{¶ 6} On July 9, 2018, the city filed a motion for a 30-day extension of time until August 9, 2018 to answer Crenshaw's complaint. The trial court granted the motion. On July 26, 2018, Crenshaw filed a motion for default judgment. The trial court denied her motion for default judgment on the grounds that it had already granted the city's motion for extension and the city's answer was not due until August 9, 2018.

{¶ 7} On August 9, 2018, the city emailed Crenshaw, notifying her that records responsive to her original records request were available for inspection and

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[1] In its motion for summary judgment, discussed *infra*, the city asserted that the certified mail receipt "was signed by [a] [Cleveland Division of Police] employee," but that, "[a]s a result of [Crenshaw's] misaddressing," the supplemental records request was never received by the Cleveland Law Department or the Cleveland Public Records Department. The record reflects that Crenshaw mailed her supplemental records request to the address identified on the city's website as the address to which public requests for police records should be directed. Accordingly, it does not appear that Crenshaw "misaddress[ed]" her supplemental records request.

downloading through the city's public records system.[2] The documents produced included copies of:

- a letter, dated February 27, 2017, informing Officer McDonald of his employment as a Cleveland patrol officer effective March 6, 2017;
- Officer McDonald's completed personal history statement, dated November 21, 2016;
- Officer McDonald's responses to personal history questions;
- Officer McDonald's high school diploma;
- a certificate, dated October 15, 2017, from the Ohio Peace Officer Training Commission ("OPOTC") and the Attorney General's Office indicating that Officer McDonald had completed the Ohio Peace Officer Basic Training Program;
- a certificate from the Cleveland Police Academy, dated May 12, 2017, indicating that Officer McDonald had completed basic law enforcement officer training;
- a certificate, dated June 28, 2007, indicating that Officer McDonald had completed the Peace Officer Basic Training Curriculum in the area of alcohol detection, apprehension and prosecution;
- a Notice of Peace Officer Appointment, dated May 12, 2017, (which includes an oath of office executed by Officer McDonald);

[2] The city did not mention Crenshaw's supplemental records request in its August 9, 2018 response. In its motion for summary judgment, the city contended that it was "not made aware of" Crenshaw's supplemental records request until "Relator filed for Summary Judgment in December 2018." This is not accurate. As stated above, the certified mail receipt indicates that the city received Crenshaw's supplemental records request on May 25, 2018. Further, the supplemental records request was specifically referenced (and a copy attached to) both Crenshaw's complaint and her opposition to the city's motion to dismiss. Accordingly, the city was (or should have been) aware of Crenshaw's supplemental records request long before she filed her summary judgment motion. The city has abandoned this contention on appeal.

- a City of Cleveland Personal Information Document dated May 2017;
- a document, dated May 12, 2017, reflecting Officer McDonald's transfer from the academy and assignment to District 5;
- various "personnel action" documents;
- a job description for the patrol officer position;
- various documents relating to compensation and benefits;
- an employment eligibility verification form;
- an employee orientation checklist;
- acknowledgments of various policies and procedures and
- correspondence verifying Officer McDonald's prior service time and sick leave balance with the city of East Cleveland.

{¶ 8} The city did not offer any explanation for its delay in responding to Crenshaw's records request. It did not indicate that any records responsive to her request were not produced because they were exempt from production.

{¶ 9} That same day, Crenshaw sent a message through the city's online public records system asserting that the city's document production was incomplete because it did not include "SF400 Forms for appointments/termination, LEADS/NCIC training certificate, police academy training files, Police Chief files" and "historical data from the previous agency." She requested that Officer McDonald's "ENTIRE file including separation" be produced. On August 10, 2018, the city responded to Crenshaw, indicating that it had produced all documents in its possession responsive to her request:

> The City has reviewed its file and has determined there are no further records that are responsive to your original request. Other documents that you have now identified are either not maintained as part of an employee personnel/discipline file, or are not records maintained by the City of Cleveland. You are free to submit a new public records request for the other documents you have identified and the City will locate such records, if available.

(Emphasis deleted.)

{¶ 10} After producing the documents to Crenshaw, the city filed a motion to dismiss Crenshaw's mandamus action for failure to state a claim upon which relief could be granted pursuant to Civ.R. 12(B)(6). The city argued that Crenshaw's claims were moot because she had already received all documents in its possession responsive to her public records request. The city further argued that Crenshaw was not entitled to recover statutory damages or attorney fees under R.C. 149.43 because (1) she did not hand deliver or send her records request by certified mail and (2) she was proceeding pro se.

{¶ 11} On August 20, 2018, Crenshaw filed an opposition to the city's motion to dismiss. Crenshaw argued that the city's motion should be denied because (1) the city had responded only to her original records request and not her subsequent, "separate and more detailed" supplemental records request (which she contended was the "focus" of her mandamus action) and (2) the city's response to her original request took longer than six days (which she contended was the "reasonable time" within which to respond to her request). Crenshaw also filed a second motion for default judgment based on the city's failure to file an answer to her complaint.

{¶ 12} The parties thereafter participated in various settlement conferences in an attempt to resolve their dispute. On September 18, 2018, counsel for the city emailed Crenshaw and asked that she submit a list of the documents she contended were "missing" from the city's response to her public records requests. Crenshaw identified the following "missing" documents:

- SF400 FORMS Appointment & Termination;
- CPT [Continued Police Training] Training certificates (those should be from personnel and disciplinary records obtained from East Cleveland for hiring) 2007-2017 as required by Ohio Administrative Code 109;
- if he graduated[,] Cleveland academy, certificate;
- Yearly 24 hour training as required by Ohio Administrative Code 109;
- NCIC/LEADS Certificates;
- Oath of Office;
- Chief Files;
- Field notes by training supervisor;
- Annual gun requalification;
- Any expungements contained within the file and
- Any letters obtained from the Ohio Peace Officer Training Commission confirming up to date training or cease function letter.

{¶ 13} On October 5, 2018, the trial court summarily denied the city's motion to dismiss and Crenshaw's second motion for default judgment. The parties continued efforts to resolve their dispute. At some point while the parties were

attempting to resolve their dispute, the city produced additional documents, including copies of a November 2017 police academy certificate, field training program daily observation reports and 2017 state firearm requalification records for Officer McDonald.[3]

{¶ 14} The parties filed cross-motions for summary judgment. Crenshaw argued that she was entitled to summary judgment on her claims because there was no genuine issue of material fact that the city had failed to produce records "mandated by law and the Consent Decree[4] to become a permanent part of a police officer's personnel and disciplinary file." Crenshaw contended that the city's claim that it had no additional documents responsive to her request must mean that "documents that were obtained during the investigatory phase of hiring the officer have been destroyed," constituting a forfeiture under R.C. 149.351(A) for which she was entitled to "the maximum amount of statutory and forfeiture damages as afforded by law." Crenshaw requested that the trial court "issue a [w]rit against the [city]" and award her $1,000 in statutory damages under R.C. 149.43, $8,000 in forfeiture damages under R.C. 149.351 and "all court costs and fees."

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[3] Based on the limited information in the record before us, we are unable to determine specifically what additional documents were produced when.

[4] In May 2015, the city of Cleveland entered into a settlement agreement with the United States Department of Justice, pursuant to which the city agreed to make widespread reforms within the Cleveland Division of Police and various changes to the manner in which police services are provided "to ensur[e] that police services in Cleveland are delivered in a manner that is constitutional, effective, and consistent with community values, while preserving officer and public safety" (the "Consent Decree").

{¶ 15} The city opposed Crenshaw's motion and filed its own motion for summary judgment. The city argued that it was entitled to summary judgment on Crenshaw's claims because there was no genuine issue of material fact that it had "completely fulfilled" Crenshaw's public records requests when it released copies of "[a]ll personnel records" for Officer McDonald on August 9, 2018 and that Crenshaw had not shown by clear and convincing evidence that the city was withholding any documents in its possession responsive to her public records requests. The city argued that because Crenshaw had received all documents responsive to her requests, her mandamus action was moot.

{¶ 16} With respect to the documents Crenshaw claimed, in her August 9, 2018 email, that the city had failed to produce, the city asserted that "only the SF400 form is kept in the police personnel file" and that that document had been produced to Crenshaw in its initial production on August 9, 2018. The city further asserted, with respect to Crenshaw's request for NCIC/LEADS and OPATA certifications, that (1) the OPATA certification had been included in the city's original response, (2) Officer McDonald was only with the Cleveland Police Department for one year and many certifications, including NCIC/LEADS state certifications, last longer than a year and (3) other NCIC and LEADS information is "prohibited from being released by state and/or federal law."

{¶ 17} With respect to Crenshaw's request for Officer McDonald's disciplinary file and documents relating to Officer McDonald's prior employment and training with the University Circle Police Department and the East Cleveland

Police Department, the city asserted that Officer McDonald did not have a disciplinary record with the city, that documents relating to Officer McDonald's prior employment with the University Circle Police Department and the East Cleveland Police Department were not "Cleveland public record[s]" and that there was no evidence that the University Circle Police Department and the East Cleveland Police Department documents at issue were ever in the city's possession.

{¶ 18} With respect to Crenshaw's request for statutory damages, attorney fees and costs under R.C. 149.43(C)(2), the city argued that Crenshaw was not entitled to recover attorney fees or statutory damages because (1) pro se parties cannot recover attorney fees, (2) there was no evidence that Crenshaw had transmitted her records request by hand delivery or certified mail to "the public officer or person responsible for the requested records" and (3) it had responded to Crenshaw's request within a reasonable time. With respect to Crenshaw's request for "spoliation and forfeiture damages," the city argued that Crenshaw was not entitled to such damages because she had not proven by clear and convincing evidence that the city was required to keep "in-depth records from other police department[s]" or that the city had otherwise unlawfully destroyed any responsive records.

{¶ 19} In support of its motion, the city submitted: (1) copies of the Crenshaw's original and supplemental records requests; (2) copies of the documents the city produced to Crenshaw on August 9, 2018; (3) an affidavit from John Petrus, "the official record keeper for the personnel files" of the Cleveland Division of Police,

authenticating the documents produced on August 9, 2018 as "true and accurate copies of the complete records" responsive to Crenshaw's original records request; (4) copies of the August 9-10, 2018 correspondence between Crenshaw and the city regarding the requested documents allegedly missing from the production and (5) an affidavit from Kim Robertson, an assistant administrator for the city, in which she avers that "[a]ll of the responsive documents that the City held in Officer McDonald's personnel file" were "emailed" to Crenshaw on August 9, 2018.

{¶ 20} Crenshaw opposed the city's motion, arguing that the documents the city had produced did not satisfy her records requests because they did not include documents that she contended were required by the Consent Decree to be maintained within police personnel files. Crenshaw claimed that the city had "destroyed" at least 96 records that should have been in Officer McDonald's personnel files — the majority of which were "previous departments['] records" — including all documents from the University Circle Police Department and East Cleveland Police Department, 37 CPR training records, 32 records of online courses, three criminal records, an SF400 form for termination, 11 years of gun requalifications, up to three expungements and a letter from the OPOTC verifying Officer McDonald's eligibility to engage in law enforcement.

{¶ 21} Crenshaw asserted that genuine issues of material fact existed as to (1) whether she properly submitted her supplemental records request, (2) whether the city promptly produced all documents in its possession responsive to her records requests, (3) whether the city had destroyed records it was required to maintain and

(4) whether Crenshaw was entitled to statutory damages, "forfeiture and spoliation damages" attorney fees and costs under R.C. 149.43 and 149.351 based on the city's alleged failure to "promptly prepare and provide access to records" and alleged destruction of records.

{¶ 22} In support of her opposition, Crenshaw submitted: (1) portions of the city's record retention schedules; (2) a printout of the court docket; (3) a printout from the city's website indicating that 1300 Ontario St., Cleveland, Ohio, was the address to which public records requests for police records should be directed; (4) email correspondence from the OPOTC regarding the annual hours for peace officer continuing professional training from 2007-2018 and (5) a list of available certificates for online courses taken by Officer McDonald from 2013 to 2017.

{¶ 23} In April 2019, the trial court denied Crenshaw's motion for summary judgment and granted the city's motion for summary judgment. The trial court held that Crenshaw's mandamus action was moot and that Crenshaw was not entitled to statutory damages or attorney fees under R.C. 149.43 because (1) the city had "properly complied with R.C. 149.43(B) and provided [Crenshaw] with all documents that [Crenshaw] requested that were in the [city's] possession" and (2) Crenshaw, as a pro se litigant, was not entitled to attorney fees. With respect to court costs, the trial court indicated that they were "assessed as directed."

{¶ 24} Crenshaw appealed the trial court's decision, raising the following three assignments of error for review:

> Assignment of Error I: Procedural defect; the trial court abused its discretion when denying an unopposed motions [sic] for default judgment when appellees failed to answer the complaint as requirement by Ohio Civil Rule of Procedure 5.
>
> Assignment of Error II: The trial court erred to relator-appellant's prejudice and abused its discretion in awarding summary judgment to respondent-appellee's [sic] when material facts of issue still remained.
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> Assignment of Error III: The trial court erred as a matter of law and abused its discretion in denying relator/appellant's R.C. 149.43(C)(1) motion for damages, costs and attorney fees because R.C. 149.43(C)(2)(b)(i) required the court to make awards under statutory, spoliation, and forfeiture damages for missing and destroyed records.

Law and Analysis

Motions for Default Judgment

{¶ 25} In her first assignment of error, Crenshaw contends that the trial court abused its discretion in failing to grant her July 26, 2018 and August 20, 2018 motions for default judgment, based on the city's alleged failure to timely answer her mandamus complaint. This assignment of error is meritless.

{¶ 26} We review a trial court's ruling on a motion for default judgment for abuse of discretion. *See, e.g., Caldwell v. Active Time L.L.C.*, 8th Dist. Cuyahoga No. 108561, 2019-Ohio-4069, ¶ 7; *Melling v. Scott*, 8th Dist. Cuyahoga No. 103007, 2016-Ohio-112, ¶ 28. An abuse of discretion occurs where a trial court's decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *Sunshine Ltd. Partnership v. C.A.S.T.L.E. High School, Inc.*, 8th Dist. Cuyahoga No. 106245, 2018-Ohio-2298, ¶ 13.

{¶ 27} Civ.R. 55(A) authorizes the trial court to enter a default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules."

{¶ 28} Civ.R. 12(A)(1) provides that, as a general matter, a defendant "shall serve his [or her] answer within 28 days after service of the summons and complaint upon him [or her]." Pursuant to Civ.R. 6(A), the court "for cause shown may at any time in its discretion * * * with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed." Loc.R. 8(C) of the Cuyahoga County Common Pleas Court, General Division, provides that a party may obtain an extension of time, not to exceed 30 days, in which to answer, plead or move, by filing a written stipulation approved by all parties or obtaining court approval.

{¶ 29} In this case, the record reflects that the city was served with the mandamus action on July 12, 2018. On July 9, 2018, prior to the deadline for serving its answer, the city filed a motion for extension of time to answer Crenshaw's complaint. The trial court granted the city leave until August 9, 2018 to answer the complaint. Accordingly, the trial court properly denied Crenshaw's first motion for default judgment filed on July 26, 2018 on the ground that the city's deadline for serving its answer, as extended by the court, had not yet passed.

{¶ 30} Where a defendant files a motion pursuant to Civ.R. 12, the time for filing a responsive pleading is postponed until after the court rules on the motion. Civ.R. 12(A)(2)(a). On August 9, 2018, the city filed a motion to dismiss pursuant to

Civ.R. 12(B)(6). As such, the city's answer was not due until after the trial court ruled on the city's motion to dismiss. Crenshaw's second motion for default judgment, filed on August 20, 2018, was filed before the trial court ruled on the city's motion to dismiss. Because the city's answer was not yet due, the trial court properly denied Crenshaw's second motion for default judgment. Crenshaw's first assignment of error is overruled.

Motion for Summary Judgment

{¶ 31} Crenshaw's second and third assignments of error relate to the trial court's decision granting the city's motion for summary judgment. In her second assignment of error, Crenshaw contends that the trial court erred and abused its discretion in granting the city summary judgment on her mandamus claim. In her third assignment of error, Crenshaw contends that the trial court erred and abused its discretion in granting the city summary judgment on her claim for statutory damages, "spoliation and forfeiture damages," attorney fees and costs under R.C. 149.43 and 149.351.

Standard of Review

{¶ 32} 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).[5] We accord no deference to the trial court's decision and conduct

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[5] While the general rule is that the standard of review in a mandamus case is abuse of discretion, *see, e.g., S/O ex rel. Am. Ctr. for Economic Equality v. Jackson*, 2015-Ohio-4981, 53 N.E.3d 788, ¶ 11 (8th Dist.), where the lower court grants summary judgment on a mandamus claim, the appellate court reviews the decision de novo, s*ee, e.g., State ex rel. Manley v. Walsh*, 142 Ohio St.3d 384, 2014-Ohio-4563, 31 N.E.3d 608, ¶ 17, citing

an independent review of the record to determine whether summary judgment is appropriate.

{¶ 33} Under Civ.R. 56, summary judgment is appropriate when no genuine issue exists as to any material fact and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party, entitling the moving party to judgment as a matter of law. On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

Ohio's Public Records Act

{¶ 34} Former R.C. 149.43(B)(1), as amended, sets forth the duty of a public office in responding to a public records request. The version applicable in this case states as follows:

State ex rel. Anderson v. Vermilion, 134 Ohio St.3d 120, 2012-Ohio-5320, 980 N.E.2d 975, ¶ 8-9; *State ex rel. Ames v. Brimfield Twp. Bd. of Trustees*, 11th Dist. Portage No. 2019-P-0018, 2019-Ohio-5311, ¶ 8. Even if, however, we were to have applied an abuse-of-discretion standard, it would not change the result here.

> Upon request and subject to division (B)(8) of this section, 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. * * * [U]pon request, 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.

{¶ 35} R.C. 149.43(C) provides a remedy when a public office fails to comply with its obligation under R.C. 149.43(B)(1). The version applicable in this case states, in relevant part:

> (1) If a person allegedly 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 in accordance with division (B) of this section or by any other 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 * * *
>
> (b) Commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(2) of this section. * * *
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> (2) If a requester transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, * * * the requester shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section. The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. * * * The existence of this injury shall be conclusively presumed.

> The award of statutory damages shall be in addition to all other remedies authorized by this section.

Writ of Mandamus

{¶ 36} In her second assignment of error, Crenshaw contends that the trial court erred in granting summary judgment in favor of the city on her mandamus claim because genuine issues of material fact exist as to whether the city failed to provide all documents responsive to her requests "that were in their possession or should have been." Crenshaw does not identify in her appellate brief the specific documents she contends she requested that are in the city's possession and that the city failed to produce. Instead, she refers generally to various filings she made below that she contends (1) identify "specific documents that are mandated by statute and by the Consent Decree * * * to be held within a peace officer's files" and (2) that "clearly state" that "records were not provided."

{¶ 37} "'Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act.'" *State ex rel. Cincinnati Enquirer v. Deters*, 148 Ohio St.3d 595, 2016-Ohio-8195, 71 N.E.3d 1076, ¶ 18, quoting *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C)(1). As a general matter, R.C. 149.43 must be construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996).

{¶ 38} To prevail on a claim for mandamus relief in a public records case, the relator must establish, by clear and convincing evidence, a clear legal right to the requested relief and a corresponding clear legal duty on the part of the respondent to provide the relief. *State ex rel. Ellis v. Maple Hts. Police Dept.*, Slip Opinion No. 2019-Ohio-4137, ¶ 5; *State ex rel. Carr v. London Corr. Inst.*, 144 Ohio St.3d 211, 2015-Ohio-2363, 41 N.E.3d 1203, ¶ 19-20. Clear and convincing evidence is "'that measure or degree of proof * * * which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Unlike relators in other mandamus cases, "'[r]elators in public-records mandamus cases need not establish the lack of an adequate remedy in the ordinary course of law.'" *State ex rel. Data Trace Information Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 25, quoting *State ex rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 24.

{¶ 39} "'R.C. 149.43(C) requires a prior request as a prerequisite to a mandamus action.'" *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, 861 N.E.2d 530, ¶ 14 (where requester never specifically requested police chief's notes as part of his public records request, requester was not entitled to a writ of mandamus compelling their production), quoting *State ex rel. Taxpayers Coalition v. Lakewood*, 86 Ohio St.3d 385, 390, 715 N.E.2d 179 (1999). Further, a

public office has no obligation to create records in response to a relator's request or to provide access to records that do not exist. *Lanham* at ¶ 15 ("Respondents have no duty to create or provide access to nonexistent records."). Thus, to obtain mandamus relief, the relator must show, by clear and convincing evidence, that public records he or she requested exist and are in the possession of the respondent.

{¶ 40} Where a public office produces the requested records prior to the court's decision in a mandamus action, the relator's mandamus action is moot. *State ex rel. Kesterson v. Kent State Univ.*, 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, ¶ 13; *State ex rel. Patituce & Assocs., L.L.C. v. Cleveland*, 2017-Ohio-300, 81 N.E.3d 863, ¶ 2, 4 (8th Dist.).

{¶ 41} In this case, the city presented evidence, including the affidavits of Petrus and Robertson, demonstrating that it had produced all documents in its possession responsive to Crenshaw's records requests. *See, e.g., State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 15. To avoid summary judgment on her mandamus claim, Crenshaw needed to present Civ.R. 56(C) evidence of specific facts rebutting that evidence, i.e., evidence from which it could be reasonably inferred that the city was, in fact, in possession of documents responsive to her records requests that it failed to produce.

{¶ 42} Crenshaw did not do that here. Crenshaw's supposition that the city "should have" obtained additional documents as part of its investigatory process when hiring Officer McDonald and "should have" maintained those documents and other documents related to his employment and training in his personnel file is not

"clear and convincing evidence" that the city had additional documents responsive to her request that it failed to produce and does not otherwise create a genuine issue of material fact as to whether the city failed to produce documents in its possession responsive to her public records requests.[6] A relator's belief that a document exists (or should exist) is not sufficient to create a genuine issue of material fact as to whether the document exists. *See, e.g., State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 26 (relator's claimed "reasonable and good faith belief" that documents "do, in fact, exist" "did not constitute sufficient evidence to establish that the documents do exist" for purpose of mandamus claim under Ohio Public Records Act); *State ex rel. Clinton v. MetroHealth Sys.*, 8th Dist. Cuyahoga No. 100590, 2014-Ohio-4469, ¶ 47-48 (trial court properly granted summary judgment in favor of respondent on mandamus claim where relator "only provided speculation, rather than clear and convincing evidence, that the records relating to her request[s] * * * even exist in

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[6] Crenshaw also argues on appeal that she is entitled to a writ of mandamus because certain field training program daily observation reports produced by the city were missing pages and were, therefore, incomplete. Crenshaw did not raise this issue in her summary judgment briefs below; therefore, we will not address it here. *See, e.g., Shadd v. Cleveland Civ. Serv. Comm.*, 8th Dist. Cuyahoga No. 107603, 2019-Ohio-1996, ¶ 27 ("Appellants cannot raise an issue for the first time on appeal that they did not raise to the trial court."); *Scott Fetzer Co. v. Miley*, 8th Dist. Cuyahoga No. 108090, 2019-Ohio-4578, ¶ 41 ("A party cannot raise new issues or arguments for the first time on appeal; failure to raise an issue before the trial court results in a waiver of that issue for appellate purposes."); *Lycan v. Cleveland*, 8th Dist. Cuyahoga Nos. 107700 and 107737, 2019-Ohio-3510, ¶ 32-33 ("It is well-established that arguments raised for the first time on appeal are generally barred and a reviewing court will not consider issues that the appellant failed to raise in the trial court."), citing *Cawley JV, L.L.C. v. Wall St. Recycling L.L.C.*, 2015-Ohio-1846, 35 N.E.3d 30, ¶ 17 (8th Dist.).

light of [respondent's] contention that they do not"); *State ex rel. Morabito v. Cleveland*, 8th Dist. Cuyahoga No. 98829, 2012-Ohio-6012, ¶ 13-14, 17 (city was entitled to summary judgment on mandamus claim based on city's alleged failure to produce a videorecording where relator did not set forth specific facts raising a genuine issue of fact regarding the continued existence of the videorecording, but rather, "through a series of questions endeavor[ed] to conjure the specter of doubt"); *see also Tomaydo-Tomahhdo L.L.C. v. Vozary*, 2017-Ohio-4292, 82 N.E.3d 1180, ¶ 20 (8th Dist.) ("pure speculation * * * cannot defeat a summary judgment motion").

{¶ 43} Accordingly, the trial court did not err in determining that there was no genuine issue of material fact that the city had produced all documents in its possession responsive to Crenshaw's records requests and in granting summary judgment in favor of the city on Crenshaw's mandamus claim. The city's production of the responsive documents in its possession after Crenshaw filed her complaint rendered Crenshaw's application for a writ of mandamus moot. Crenshaw's second assignment of error is overruled.

Statutory Damages, Forfeiture Damages, Attorney Fees and Costs

{¶ 44} In her third assignment of error, Crenshaw contends that the trial court erred in granting the city summary judgment on her claim for statutory damages under R.C. 149.43, "spoliation and forfeiture damages" under R.C. 149.351 and attorney fees and costs based on "missing and destroyed records" and the city's failure to timely produce all of the documents she requested.

{¶ 45} After it has received a public records request, a public office has a duty to promptly provide any responsive records within a reasonable amount of time. R.C. 149.43(B)(1). R.C. 149.43(C)(2) provides for statutory damages of $100 per business day, up to $1,000, if a court determines that the public office "failed to comply with an obligation in accordance with [R.C. 149.43(B)]." A requester may also be entitled to recover, under certain circumstances, attorney fees and court costs if a public office fails to properly comply with a public records request.

{¶ 46} Although a mandamus claim is rendered moot when a relator has received all of the public records responsive to a request, the relator may be entitled to other remedies if the production of records was not completed '"within a reasonable period of time.'" *Kesterson*, 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, at ¶ 13, quoting R.C. 149.43(B) and (C). "Even when a claim for the production of records has been satisfied, a separate claim based on the untimeliness of the response persists unless copies of all required records were made available 'within a reasonable period of time.'" *Kesterson* at ¶ 19, quoting R.C. 149.43(B)(1). The production of requested documents does not moot a claim for statutory damages or attorney fees under R.C. 149.43(C). *See, e.g., Kesterson* at ¶ 31-32, 34-35, 38; *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 2009-Ohio-590, 902 N.E.2d 976, ¶ 18.

{¶ 47} The city contends that the trial court properly determined that Crenshaw was not entitled to recover statutory damages under R.C. 149.43(C)(2)

because (1) her original records request was not sent via certified mail and (2) it responded to Crenshaw's records requests within a reasonable time.

{¶ 48} Under the version of R.C. 149.43(C)(2) that was in effect at the time Crenshaw made her public records request, statutory damages were available only to a requester who proved by clear and convincing evidence that his or her written request for public records was delivered by hand or certified mail. Although Crenshaw's original public records request was submitted electronically through the city's online public records system, her supplemental records request (which included a request for all records requested in her original records request) was sent nine days later by certified mail and received by the city on May 25, 2018. Accordingly, Crenshaw would be entitled to statutory damages under R.C. 149.43(C)(2) if the city failed to "promptly prepare" the public records she requested in her supplemental records request for inspection or failed to provide copies of the responsive records in its possession to her "within a reasonable period of time." R.C. 149.43(B)(1).

{¶ 49} There is no statutory deadline by which a public office must respond to a public records request under R.C. 149.43. Whether records have been "promptly prepared" for inspection or produced with a "reasonable period of time" depends on all the relevant facts and circumstances. *Kesterson*, 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, at ¶ 20; *Deters*, 148 Ohio St.3d 595, 2016-Ohio-8195, 71 N.E.3d 1076, at ¶ 23; *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 53, 689 N.E.2d 25 (1998). As such, a public office is not required to respond to public

records requests within any "arbitrary number" of days. *Easton Telecom Servs., L.L.C. v. Woodmere*, 8th Dist. Cuyahoga No. 107861, 2019-Ohio-3282, ¶ 44.

{¶ 50} Evaluation of the timeliness of a public office's response requires consideration of "the practical and legal restrictions [a municipality] faces." *State ex rel. Shaughnessy v. Cleveland*, 149 Ohio St.3d 612, 2016-Ohio-8447, 76 N.E.3d 1171, ¶ 12. In addition, R.C. 149.43(A)(1) excludes certain information from disclosure as a public record. A reasonable response time, therefore, contemplates "'an opportunity on the part of the public office to examine records prior to inspection in order to make appropriate redactions of exempt materials.'" *Kesterson* at ¶ 20, quoting *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 640 N.E.2d 174 (1994).

{¶ 51} It is undisputed that the city responded to Crenshaw's supplemental records request on August 9, 2018, 76 days after it received the request.

{¶ 52} The city asserts that its response time was reasonable due to "the high volume of public records requests the City must process, the coordination required between several different City agencies and offices within those agencies to fulfill each request, and the redaction and review process each request must undergo." The city further asserts that the "delay" in fulfilling Crenshaw's request "was caused by the complex nature of the request," i.e., that Officer McDonald's personnel file "contained numerous documents that needed to be procured from multiple different divisions within the department" and that the city was "required meet the redactions rules, which are more extensive for officers in order to protect their identities and

the identities of their families." The city, however, presented no Civ.R. 56(C) evidence to support these assertions. Neither of the affidavits the city submitted in support of its motion for summary judgment included any explanation or justification for the city's delay in responding to Crenshaw's supplemental records request. Conclusory assertions, unsupported by evidence of facts in the record, are insufficient to support a motion for summary judgment. *See, e.g., Pomeroy v. Schwartz*, 8th Dist. Cuyahoga No. 99638, 2013-Ohio-4920, ¶ 21; *see also Single Source Packaging, L.L.C. v. Cain*, 2d Dist. Montgomery No. 2003-CA-14, 2003-Ohio-4718, ¶ 19 ("The moving party's initial burden [on summary judgment] is not discharged by making mere conclusory assertions."). Furthermore, the evidence that is in the record contradicts the city's claims.

{¶ 53} Ignoring these deficiencies, the city urges us to follow *Patituce & Assocs.,* 2017-Ohio-300, 81 N.E.3d 863, and find that its two-and-one half month delay in responding to Crenshaw's request was reasonable given that this court found an approximate three-month response time reasonable in *Patituce.* However, this case is readily distinguishable from *Patituce*. This case, unlike *Patituce*, did not involve a request for "voluminous documents." *Id.* at ¶ 7. In *Patituce*, a law firm submitted two public records requests seeking the production of policies, manuals, and regulations relating to police body cams and videos, the production of policies regarding search warrants, a list of officers in the gang impact unit and personnel files, training certifications, disciplinary reports, continuing education classes for nine specific police department employees and officers. *Id.* at ¶ 2, 10.

{¶ 54} Crenshaw, by contrast, requested the personnel file, disciplinary file, and NCIC/LEADS and OPOTA certifications for a single police officer who had worked for the city for approximately one year, from March 2017 to March 2018. The city indicated that it had no disciplinary file and no records of NCIC/LEADS certifications for Officer McDonald. Accordingly, all that remained for production was the officer's personnel file and his OPOTA certification, consisting of approximately 65 pages[7] of documents. Although a review of the documents produced shows that some information was redacted prior to the production of Officer McDonald's personnel file, e.g., the officer's social security number, date of birth, driver's license information, address and telephone numbers, there is nothing to suggest that the necessary "redaction and review process" was particularly complex or time-consuming rather than routine and ordinary.

{¶ 55} Because the city failed to meet its burden under Civ.R. 56(C), the trial court erred in granting summary judgment in the city's favor on Crenshaw's claim for statutory damages under R.C. 149.43(C)(2).

{¶ 56} Crenshaw also contends that the trial court erred in failing to award her attorney fees and court costs. However, Crenshaw is a pro se litigant. Pro se litigants are not entitled to attorney fees under R.C. 149.43. *See, e.g., State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 251, 643 N.E.2d 126 (1994); *Salemi v. Cleveland Metroparks*, 8th Dist. Cuyahoga No. 100761, 2014-Ohio-3914, ¶ 36.

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[7] This figure is based on Exhibit D to the city's summary judgment motion, which Petrus stated in his affidavit were the "complete records" responsive to Crenshaw's records request.

{¶ 57} The recovery of court costs is governed by R.C. 149.43(C)(3)(a). That section provides that court costs shall be awarded when (1) the court orders the public office responsible for a public record to comply with R.C. 149.43(B), R.C. 149.43(C)(3)(a)(i), or (2) the court determines that "[t]he public office * * * responsible for the public records acted in bad faith when the office * * * voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order," R.C. 149.43(C)(3)(a)(ii), (b)(iii). The first circumstance does not apply, and Crenshaw has not claimed — much less presented any evidence — that the city acted in bad faith with respect to the timing of its document production. Accordingly, the trial court did not err in determining that Crenshaw was not entitled to an award of attorney fees or court costs under R.C. 149.43.

{¶ 58} Finally, Crenshaw contends that the trial court erred in granting summary judgment on her claim for "forfeiture and spoliation damages" under R.C. 149.351.

{¶ 59} R.C. 149.351 states in relevant 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. Those records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, destroyed, mutilated, or transferred unlawfully.

> (B) Any person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record in violation of division (A) of this section, or by threat of such removal, destruction, mutilation, transfer, or other damage to or disposition of such a record, may commence either or both of the following in the court of common pleas of the county in which division (A) of this section allegedly was violated or is threatened to be violated:
>
> > (1) A civil action for injunctive relief to compel compliance with division (A) of this section, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action;
> >
> > (2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, but not to exceed a cumulative total of ten thousand dollars, regardless of the number of violations, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action not to exceed the forfeiture amount recovered.

{¶ 60} The trial court did not expressly address Crenshaw's claim for "spoliation and forfeiture damages" in its decision granting the city's motion for summary judgment. Crenshaw, however, did not assert a claim for "spoliation and forfeiture damages" in her complaint. In her complaint, Crenshaw only sought an award of statutory damages, attorney fees and costs under R.C. 149.43 based on the city's failure to promptly comply with her records requests. She did not allege that the city had violated R.C. 149.351 or that she was entitled to "spoliation or forfeiture damages" under R.C. 149.351 based on the city's alleged unlawful removal, destruction, mutilation, transfer or disposition of records. Crenshaw asserted this claim for the first time in her summary judgment motion.

{¶ 61} A plaintiff, however, cannot assert a claim on summary judgment that was not contained within the complaint. *See, e.g., Goldman v. Nationwide Life Ins.*

Co., 8th Dist. Cuyahoga No. 97871, 2012-Ohio-3574, ¶ 14 ("[A] plaintiff cannot include claims beyond those raised in the complaint for the first time in the summary judgment stage of the litigation without amending the complaint."); *see also Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, ¶ 28 (1st Dist.) ("The plaintiff cannot fulfill his burden to show a triable issue of fact by asserting new claims in response to a properly supported motion for summary judgment."); *Wolk v. Paino*, 8th Dist. Cuyahoga No. 94850, 2011-Ohio-1065, ¶ 36-38 (plaintiff limited to allegations of complaint and may not enlarge those claims in defense to summary judgment motion).

{¶ 62} Further, even if she had properly raised the issue, Crenshaw presented no evidence beyond her own speculation, supposition and conjecture that the city once possessed and had improperly destroyed additional documents responsive to her records requests. Accordingly, Crenshaw was not entitled to recover "spoliation and forfeiture damages" under R.C. 149.351. *See, e.g., State ex rel. Doe v. Register*, 12th Dist. Clermont No. CA2008-08-081, 2009-Ohio-2448, ¶ 29-31 (relator was not entitled to injunctive and civil forfeiture relief under R.C. 149.351 due to alleged destruction of public records where respondents denied destroying the records sought and the relator failed to present any evidence that respondents had destroyed records); *cf. State ex rel. DelMonte v. Woodmere*, 8th Dist. Cuyahoga No. 83293, 2004-Ohio-2340, ¶ 21 (affirming motion to dismiss claim under R.C. 149.351 where "appellant wholly failed to allege any fact [in his complaint] which supports the conclusion that [appellee] improperly destroyed or

removed public records in violation of R.C. 149.351”). Crenshaw’s third assignment of error is sustained in part and overruled in part.

{¶ 63} Accordingly, we affirm the trial court’s decision as it relates to Crenshaw’s request for a writ of mandamus, spoliation and forfeiture damages, attorney fees and court costs. We reverse the trial court’s decision as it relates to Crenshaw’s request for statutory damages and remand the case for further proceedings consistent with this decision.

{¶ 64} Judgment affirmed in part; reversed in part; remanded.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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EILEEN A. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
LARRY A. JONES, SR., J., CONCUR