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No. 63433-0-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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SHAWN FRANCIS, Appellant;

v.

DEPARTMENT OF CORRECTIONS, Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR  
SNOHOMISH COUNTY

The Honorable Michael Downes  
No. 08-2-10813-7

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BRIEF OF APPELLANT FRANCIS

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MICHAEL C. KAHRs, WSBA #27085  
Attorney for Appellant Francis  
5215 Ballard Ave. NW, Ste. 2  
Seattle, WA 98107  
(206) 264-0643

ORIGINAL

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**A. ASSIGNMENTS OF ERROR**

1. Assignments of Error.

1. The trial court erred when it entered its order dismissing this lawsuit on February 13, 2009.

2. Issues Pertaining to Assignments of Error.

1. Should the discovery rule be applied to Public Records Act cases?

**B. STATEMENT OF THE CASE**

On December 31, 2008, a lawsuit against the Department of Corrections was filed by Mr. Francis. CP 21-26. In this lawsuit, he alleged that the Department of Corrections (“DOC”) failed to provide him with all documents responsive to his request made pursuant to the Public Records Act (“PRA”), RCW 42.56. *et seq.* CP 23-26. He alleged that the one document provided by Ms. Kopoian, then Public Disclosure Coordinator at the Washington State Reformatory, was insufficient based upon evidence gathered more than one year after the last response dated November 5, 2007. CP 24-25.<sup>1</sup>

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<sup>1</sup>Ms. Kopoian did not provide a log identifying documents being withheld under an exemption to the PRA. Doing so would have provided adequate notice of the existence of other responsive records, and the statute of limitations would have run from the time the log was provided.

The Complaint alleged that on December 1, 2008, Mr. Francis had seen “numerous purchase orders, invoices, and sales receipts” that were responsive to his original complaint. *Id.* A fellow inmate, Shawn Greenhalgh, showed him these documents. *Id.* Mr. Francis filed his complaint on December 31, 2008, within one month after his learning of the existence of more documents which were responsive to his request, and less than one year after being informed by Mr. Greenhalgh about the existence of these responsive documents.

The DOC then brought a motion to dismiss based upon the one year statute of limitations set forth in RCW 42.56.550. CP 16-20. Mr. Francis filed a response, claiming that the discovery rule must apply in PRA cases. CP 9-15. A reply was filed by the DOC. CP 3-8. After oral argument, the trial court dismissed the case. CP 2.

### **C. SUMMARY OF THE ARGUMENT**

Appellant Francis will show that the discovery rule, a judicially created remedy, is appropriate for use with the Public Records Act for two specific reasons. First, that there is a special relationship between citizens and their government which gives rise to issues of fundamental fairness. Second, fundamental fairness requires that an agency which does not

documents until after the statute of limitations has passed should not reap the benefits of disregarding the precepts of the PRA.

**D. ARGUMENT**

1. THE STANDARD OF REVIEW OF A MOTION TO DISMISS MADE PURSUANT TO CR 12(b)(6) IS *DE NOVO*.

Trial court orders a motion to dismiss based upon CR 12(b)(6) are reviewed *de novo*. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Dismissal under CR 12(b)(6) “is appropriate only if ‘it is beyond doubt that the plaintiff cannot prove any set of facts to justify recovery.’” *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005) (*quoting Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). In making this determination, a trial court must presume that the plaintiff’s allegations are true and may consider hypothetical facts that are not included in the record. *Id.* at 422.

When reviewing matters under the PRA, courts are instructed to construe the PRA liberally. RCW 42.56.030. “Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest . . .” RCW 42.56.550(3).

2. THE DISCOVERY RULE IS A JUDICIALLY CREATED REMEDY BASED BOTH ON FUNDAMENTAL FAIRNESS AND THE RELATIONSHIPS BETWEEN THE PARTIES AND MUST BE APPLIED TO THE PUBLIC RECORDS ACT.

Washington first adopted the discovery rule in *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969). This case involved a surgical sponge left in an abdominal cavity for 22 years. *Id.* at 662-63. Prior jurisprudence had held fast to the three year statute of limitations. *Id.* at 664 (citing *Lindquist v. Mullen*, 45 Wn.2d 675, 277 P.2d 724 (1954)). When considering overruling prior case law, the Supreme Court asked the following question:

But what happens to the concepts of fundamental fairness and the common law's purpose to provide a remedy for every genuine wrong when, from the circumstances of the wrong, the injured party would not in the usual course of events know he had been injured until long after the statute of limitations had cut off his legal remedies? *Lindquist* did not elucidate this aspect of the statute nor seek to strike any kind of balance between two possible harms - the harm of being deprived of a remedy versus the harm of being sued. The problem thus remains with the judiciary, for, unless the legislature has acted definitively, the courts, as instruments of the common law and in furtherance of this traditional role to prevent injustice, should try to strike such a balance.

*Ruth*, 75 Wn.2d at 665 (citing *Lindquist*, 45 Wn.2d 675). The Court's answer was to strike this balance by overturning *Lindquist* and apply the "discovery rule" to medical malpractice cases involving foreign objects

left in the body cavity. *Id.* at 667.<sup>2</sup> The Court was also quite clear that absolutely no element of fraudulent concealment was required and that both parties neither knew of the injury nor tried to conceal that knowledge. *Id.*

The theory of the discovery rule is that limitations statutes are not intended to foreclose a cause of action before the injury is known, and that the term “accrue” should not be interpreted to create such a consequence. *Id.* at 667-68. In making this determination, it matters not whether the plaintiff understood the legal basis for the claim. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. *Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 760 P.2d 348 (1988); *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 120 P.3d 605 (2005). The burden is on the plaintiff to show that the facts giving rise to the claim were not discovered or could not be discovered by due diligence within the limitation period. *G.W. Constr. Corp. v. Prof'l Serv. Indus.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993).

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<sup>2</sup>Two years later, the legislature formally adopted this rule as applied to medical malpractice cases. RCW 4.16.350.

Building on *Ruth*, courts have applied the discovery rule in cases in which courts have recognized a special relationship between the parties. Mr. Francis will show that the discovery rule must apply to the PRA because there is a special relationship between the requester and the agency explicitly set forth by statute and so held by our courts. He will also show that because the agency controls disclosure, it must not use the statute of limitations to avoid responsibility for violations of the PRA.

a) The Discovery Rule Has Been Applied In Situations In Which The Parties Have A Special Relationship.

Washington Courts have previously expanded the ruling in *Ruth* to encompass situations involving special relationships between the parties. See, e.g., *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975) (professional malpractice involves a fiduciary duty which permits the discovery rule); *Kittinger v. Boeing*, 21 Wn. App. 484, 585 P.2d 812 (1978) (the employer-employee relationship creates responsibilities to the employer).

In *Gazija*, an insured party suffered a loss of fishing gear when his boat sank. A question of fact presented to the jury was who had cancelled the insurance policy. The jury ruled in his favor against the insurance company. The insurance company claimed that the statute of limitations

precluded recovery. *Gazija*, 86 Wn.2d at 216-17. The *Gazija* court cited multiple cases in which the nature of the relationship between the parties, including professional relationships, controlled whether the discovery rule applied. Based upon these cases, the *Gazija* Court held that the cause of action accrued not when the policy expired but when the defendant refused to indemnify Mr. Gazija's loss.<sup>3</sup> *Id.* at 221-23.

In *Kittinger*, the discovery rule was applied to an employer-employee relationship. Mr. Kittinger was let go from Boeing. He subsequently heard that he has been accused of misconduct and that raised doubts as to why he was terminated. He had previously been informed there had been a cut back in personnel. He tried to resolve matters and when he couldn't, he filed a complaint less than two years after he had been informed of the real reason he had been let go and greater than two years after his release. *Kittinger*, 21 Wn. App. at 485-86.

The lawsuit was filed after the statute of limitations had run on his original dismissal but before it ran out after he found out about the

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<sup>3</sup>The discovery rule has since been applied to other similar professional relationships. *See, e.g., Peters v. Simmons*, 87 Wn.2d 400, 552 P.2d 1053 (1976) (attorney); *Kundahl v. Barnett*, 5 Wn. App. 227, 486 P.2d 1164 (1971) (surveyor); *Hunter v. Knight, Vale & Gregory*, 18 Wn. App. 640, 571 P.2d 212(1977) (accountant); *Herman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 17 Wn. App. 626, 564 P.2d 817 (1977) (stockbroker).

allegations of misconduct. *Id.* The *Kittinger* court analogized the employee-employer relationship to a professional relationship where the relationship is built upon trust. *Id.* at 488. As such, the discovery rule was held to apply. Similarly, because the special relationship that exists between the governing and the governed is the core basis for the PRA, the discovery rule must also apply.

b) The Special Relationship Between Citizens And Their Government Requires The Discovery Rule Be Applied To Public Records Act Cases.

There has always a special relationship between the citizen and her government. As far back as *Potter v. New Whatcom*, 20 Wash. 589, 590-91, 56 P. 394 (1899), our courts have acknowledged the special relationship between the government and the governed. A city was described as sustaining a trust relation with a member of the public and as such, the statute of limitations was held not to run on the warrant holder's claim to funds that were unlawfully converted until the warrant holder had notice or knowledge that the funds were misappropriated. *Id.* at 591. The PRA acknowledges and facilitates this relationship.

“The purpose of the Public Records Act is to preserve ‘the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and

institutions.”” *O’Connor v. Dept. of Soc. & Health Serve.*, 143 Wn.2d 895, 25 P.3d 426 (2001) (quoting *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995)). It is the right to insist on being informed as to the actions of their government and to permit the citizen to maintain control that creates this special relationship. Our Supreme Court has made this clear when it stated that “[t]he Public Records Act ‘is a strongly worded mandate for broad disclosure of public records.’” *Id.* (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)).

The Supreme Court in *PAWS* further emphasized that “[a]gencies have a duty to provide ‘the fullest assistance to inquirers and the most timely possible action on requests for information.’” *PAWS*, 125 Wn.2d at 252 (quoting RCW 42.17.290 (now RCW 42.56.100)). This duty exists, despite the fact that “such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

This special relationship between the citizen and her government can be of no less importance than the relationship between a fisherman and his insurer, the doctor and his patient or the employee and his

employer. The courts of Ohio agree. See *State ex rel. Delmonte v. Woodmere*, 2004-Ohio-2340.<sup>4</sup>

In Ohio law, the discovery rule applies to their public records act when

(1) [the requester] discovers, or should discover, that the public records sought for review have been destroyed or (2) [the requester] requests the records and is notified that he cannot review them because they have been destroyed.

*Delmonte*, ¶20 (citing *State ex rel. Hunter v. Alliance*, 2002-Ohio-1130 at 3).<sup>5</sup> After acknowledging the rule, the *Delmonte* court pointed out the pleadings fail to allege the necessary facts supporting a claim of destruction. *Id.* at ¶21.

Contrast the holding of *Delmonte* to the present case. Mr. Francis pled that he had been informed after the one year statute of limitations that further responsive records existed. He clearly set forth a factual basis for the application of the discovery rule. The facts, in conjunction with the

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<sup>4</sup>Unpublished cases from Ohio decided after May 1, 2002 may be cited as authority. Ohio Rules for the Reporting of Opinions, Rule 4. GR 14.1 looks to how our sister courts handle cases not otherwise designated for official citation. All Ohio relevant cases, rules or codes have been attached in Appendix A.

<sup>5</sup>The Ohio statute permits penalties for the improper destruction of records so there is not a strict correspondence between their and our statutory scheme but the logic applying the discovery rule does correspond. Ohio Rev. Code § 149.351.

special relationship between Mr. Francis and his government, require the discovery rule be applied to the PRA.

- c) An Agency Has Control Over Accrual Of The Cause Of Action And Must Not Be Able To Avoid Penalties By Failing to Disclosure Until The Statute Of Limitations Runs.

Where the defendant controls disclosure of information that can inform the complaining party of a cause of action, a special relationship is established which can invoke the discovery rule. We have seen this exact situation in *Kittinger*. While the *Kittinger* court expounded on the nature of the relationship, it also pointed out that deciding against Mr. Kittinger “would encourage employers to keep potentially libelous communications confidential.” *Kittinger*, 21 Wn. App. at 488. This same problem can exist with entities statutorily obligated to disclosure records. A case decided three years after *Kittinger* makes it clear that a party with a duty to disclose cannot reap the benefits of non-disclosure. *U.S. Oil & Refining Co. v. Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981).

In *U.S. Oil*, the Department of Ecology (“DOE”) was charged by statute with the duty to collect penalties for unlawful waste discharges. Under the waste regulatory scheme of RCW 90.48, the DOE had to rely on the self-reporting industry to discover violations. *Id.* at 92. Not

surprisingly, U.S. Oil failed to properly report its unlawful discharges. When the DOE suspected that monitoring reports were inaccurate and began investigating, it determined that U.S. Oil had unlawfully discharged waste. *Id.* Unfortunately, under the law that existed at that time, the DOE's discovery was subsequent to the expiration of the statute of limitations, preventing it from collecting penalties from U.S. Oil for its violations.

The Court found that without permitting a discovery rule to apply to situations involving self-disclosure, industries can discharge pollutants and, by failing to report violations, escape penalties. *Id.* at 92. Analogizing to other cases where the plaintiff lacks the means or ability to ascertain that a wrong has been committed, the court reasoned:

Where self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it. Like the other cases which have employed the rule, this is a case where if the rule were not applied the plaintiff would be denied a meaningful opportunity to bring a suit. Like those plaintiffs, this plaintiff lacks the means and resources to detect wrongs within the applicable limitation period. Not applying the rule in this case would penalize the plaintiff and reward the clever defendant. Neither the purpose for statutes of limitation nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands.

*Id.* at 93-94.

In a public records context, an agency has a similar role. It has both sole custody of the documents and a desire to avoid penalties for non-disclosure. There is no way for a citizen requester, short of being informed by another, to know whether or not he or she has received all responsive documents. Thus an agency, especially when faced with examination of a sensitive matter of possible malfeasance, has an incentive not to timely disclose. Our Supreme Court explicitly recognized this type of conflict when examining whether an agency must pay penalties even if it discloses them voluntarily after suit.

It allows government agencies to resist disclosure of records until a suit is filed and then to disclose them voluntarily to avoid paying fees and penalties. This rule flouts the purpose of the [PRA] and is inconsistent with *Oliver*.

*Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005) (citing *Oliver v. Harborview Medical Center*, 94 Wn.2d 559, 618 P.2d 76 (1980) (voluntary disclosure of medical records after a suit is filed does not moot the litigation because of the possibility of relitigation)).

The purpose of the penalties is to promote access to records and governmental transparency. *Yousoufian v. King County*, 152 Wn.2d 421,

435, 98 P.3d 463 (2004). If the possibility of no penalties exist, then the very situation the Supreme Court warned about can come to pass.

Here, we have this very situation – an agency is the sole source of documents responsive to a PRA request and is not facing penalties for the failure to produce because it is over one year since the request, even though Mr. Francis is an innocent requester. Under the facts of this case as set forth in the Complaint, Mr. Francis did not know, and had no reason to suspect, there were additional documents responsive to his request. He trusted and relied upon the special relationship that exists between every member of the public and any public official, and was unaware of the facts underlying the instant cause of action until after the limitation period in RCW 42.56.550(6) expired. In such a situation, accrual can only start when a requester, like Mr. Francis, knows or should know that all records were not disclosed. This moment occurred when he was informed by a fellow inmate, Shawn Greenhalgh, that additional responsive records existed.

Similarly, permitting an agency to escape penalties for withholding documents would impair the trust between the citizen and her government. To avoid this problem, the DOC must be held accountable for its failure to timely disclosure all documents within the one year period by invoking

the discovery rule. The most basic rudiments of justice and the history of judicial policy determinations set forth above compel the extension of the discovery rule as described in *U.S. Oil and Kittinger* to this case and the PRA.

3. MR. FRANCIS IS ENTITLED TO ATTORNEY FEES AND COSTS IF HE PREVAILS ON THIS APPEAL.

a) The Prevailing Party Against A Governmental Entity Is Entitled To Reasonable Attorney Fees And Costs In Accordance With RAP 18.1 And The PRA.

RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. Under the PRA, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4). This Court has determined the PRA authorizes attorney fees and costs on appeal. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). If this Court overturns the trial ruling, Mr. Francis asks that attorneys fees and cost be granted.

b) Courts May Also Consider Equitable Considerations When Considering Granting Attorneys Fees And Costs On Appeal.

Our courts have also granted costs and attorney fees based on equitable considerations. *See Confederated Tribes v. Johnson*, 135 Wn.2d

734, 958 P.2d 260 (1998). As the Supreme Court has said, “[t]he applicable equitable rule is that attorney fees may be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order.” *Id.* at 758 (citing *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154, 943 P.2d 1358 (1997), *cert. denied*, 118 S. Ct. 856 (1998); *Seattle Fire Fighters Union, Local 27 v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987)).

The rationale for this equitable remedy lies with the issue of damages.

Because the trial on the merits had for its sole purpose a determination of whether the injunction should stand or fall, and was the only procedure then available to the party enjoined to bring about dissolution of the temporary injunction, the case comes within the rule that a reasonable attorney’s fee reasonably incurred in procuring the dissolution of an injunction wrongfully issued represents damages.

*Cecil v. Dominy*, 69 Wn.2d 289, 418 P.2d 233 (1996). This award can include costs and fees at appeal. *Seattle Fire Fighters*, 48 Wn. App. at 138. Mr. Francis has had to argue that the granting of the DOC’s Motion to Dismiss was wrong thus if he prevails, he is entitled to equitable attorney fees and costs.

**E. CONCLUSION**

The discovery rule must be applied to Public Records Act cases because of the special relationship between the citizen and her government. Its application is also critical to prevent an agency taking advantage of the statute of limitations to avoid penalties for actions taken in violation of the PRA. Mr. Francis asks this Court to remand this case back to the trial court to permit litigation to show the actual accrual date and whether or not the Department of Corrections fraudulently concealed the records. He finally asks that reasonable attorney fees and costs be imposed.

DATED this 19 day of June, 2009.

Respectfully submitted,



MICHAEL C. KAHRs, WSBA #27085  
Attorney for Appellant Shawn Francis

**CERTIFICATE OF SERVICE**

I certify under the penalty of perjury under the laws of the State of Washington that on June 19, 2009, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S OPENING BRIEF

Jason Howell  
Attorney General's Office  
Criminal Justice Division  
Attorney General's Office  
P.O. Box 40116  
Olympia, WA 98504-0116

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STATE OF WASHINGTON  
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By:   
MICHAEL C. KAHR

Date: 6/19/09

## APPENDIX A

**Rule 4. “Controlling” and “Persuasive” Designations Based on Form of Publication Abolished; Use of Opinions.**

(A) Notwithstanding the prior versions of these rules, designations of, and distinctions between, “controlling” and “persuasive” opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.

(B) All court of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as deemed appropriate by the courts.

(C) Unless otherwise ordered by the Supreme Court, court of appeals opinions may always be cited and relied upon for any of the following purposes:

(1) Seeking certification to the Supreme Court of Ohio of a conflict question within the provisions of sections 2(B)(2)(f) and 3(B)(4) of Article IV of the Ohio Constitution;

(2) Demonstrating to an appellate court that the decision, or a later decision addressing the same point of law, is of recurring importance or for other reasons warrants further judicial review;

(3) Establishing *res judicata*, estoppel, double jeopardy, the law of the case, notice, or sanctionable conduct;

(4) Any other proper purpose between the parties, or those otherwise directly affected by a decision.

**Commentary (May 1, 2002)**

- a. Designations of, and distinctions between, “controlling” and “persuasive” opinions of the courts of appeals are abolished.
- b. All courts of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as considered appropriate by the courts.
- c. Unless otherwise ordered by the Supreme Court, court of appeals opinions may always be cited and relied upon for any of the following reasons:
  - (1) To seek certification of a conflict question;
  - (2) To demonstrate to an appellate court that the decision, or a later decision addressing the same point of law, is of recurring importance or otherwise warrants further judicial review;
  - (3) To establish *res judicata*, estoppel, double jeopardy, the law of the case, notice, or sanctionable conduct;
  - (4) For any other purpose as to those directly affected by the decision.

**2004-Ohio-2340**  
**State ex rel. Delmonte v. Woodmere**  
**04-LW-1975 (8th)**

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2004-Ohio-2340

[Cite as State ex rel. Delmonte v. Woodmere, 2004-Ohio-2340]

STATE OF OHIO, EX REL. JORDAN S. DELMONTE, Plaintiff-appellant  
v.  
VILLAGE OF WOODMERE, ET AL., Defendants-appellees

NO. 83293  
8th District Court of Appeals of Ohio, Cuyahoga County  
Decided on May 6, 2004

CHARACTER OF PROCEEDING: Civil appeal from the Court of Common Pleas Case No. CP-CV-500092

JUDGMENT: Affirmed in Part, Reversed in Part and Remanded.

For Plaintiff-Appellant: JORDAN S. DELMONTE, ESQ., UAW Legal Service Plan, 707 Brookpark Road, Brooklyn Hts., Ohio 44109-5880

For Defendants-Appellees: JANET R. BECK, ESQ., 7650 Chippewa Road, Suite 308, Brecksville, Ohio 44141

JOURNAL ENTRY AND OPINION

ANN DYKE, J.

{¶1} Relator-appellant Jordan S. DelMonte ("appellant") appeals from the judgment of the trial court which granted a motion to dismiss in favor of defendant-appellee Village of Woodmere, et al. ("Woodmere"). For the reasons set forth below, we affirm in part, reverse in part and remand for proceedings consistent with this opinion.

{¶2} On April 28, 2003, appellant filed a complaint in mandamus against Woodmere seeking to compel Woodmere to allow him access to an inspection of certain public records maintained by Woodmere. Appellant alleged that Woodmere improperly refused to produce the requested documents for inspection and that Woodmere's conduct in so refusing violated R.C. 149.43. Appellant also alleged that Woodmere removed and destroyed certain public records and that his continued demands to access public documents were met with threats and intimidation by Woodmere. On May 27, 2003, Woodmere filed its answer and affirmative defenses and a motion to dismiss the complaint. Both parties submitted various motions prior to the trial court's opinion and order granting Woodmere's motion. The trial court issued a memorandum of opinion and order on July 2, 2003. That same day, pursuant to Civ.R. 60, appellant filed a motion to vacate the dismissal of plaintiff's first and fourth claims, which Woodmere opposed on July 9, 2003. On July 25, 2003, the trial court issued a nunc pro tunc order granting Woodmere's motion to dismiss. Appellant filed a notice of appeal on August 8, 2003, thirty six days after the trial court's original order granting Woodmere's motion to dismiss, asserting a sole assignment of error.

{¶3} We note initially that, despite appellant's filing a notice of appeal more than thirty days after the date appearing on the trial court's original memorandum and order, we consider it timely. A notation of service from the July 2, 2003 order was not noted in the appearance docket as required by App.R. 4 (A) and Civ.R. 58 (B).<sup>(fn1)</sup> Once the clerk has served the parties notice of the entry and made the *appropriate notation in the appearance docket*, notice is deemed served, and the time for filing the notice of appeal begins to run. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80. See, also, *DeFini v. Broadview Hts.* (1991), 76 Ohio App.3d 209 (holding that service is not perfected in the absence of the requisite notation on the appearance docket).

{¶4} Lest there be confusion, we note that the clerk's pagination sheet that accompanies the record on appeal lists the July 2, 2003 order. However, a judgment is effective only when entered by the clerk upon the journal. Civ.R. 58 (A). *Atkinson*, supra. Furthermore, it is axiomatic that the court speaks only through its journal. *Foyle v. Steiner* (1995), 74 Ohio St.3d 158. The pagination sheet was

prepared by the clerk's office only as a result of the instant appeal, pursuant to App.R. 10 (B), was not in existence prior to the institution of the appeal, and cannot be considered to be the court's journal. The pagination sheet merely summarizes the papers included in the record for appeal. While the trial court's July 2, 2003 paper copy of its memorandum and opinion was made a part of the file, the clerk of courts never entered the judgment into the court's computer journal and thus failed to make the judgment a part of the court's docket as contemplated by Civ.R. 58 and *DeFini*, supra.

{¶15} Therefore, service of the order granting Woodmere's motion to dismiss was not complete until the trial court's nunc pro tunc entry on July 25, 2003, when the trial court's memorandum and order was properly journalized and noted in the appearance docket. In his assignment of error, appellant contends that the trial court erred in dismissing the first and fourth claims in his complaint for failure to state a claim for which relief may be granted.

{¶16} This court independently reviews a complaint under Civ.R. 12 (B) (1) or (6) to determine whether dismissal by the trial court was properly granted. *Girts v. Raaf* (May 4, 1995), Cuyahoga App. No. 67774, citing *State ex rel. Drake v. Athens Cty. Bd. Of Elections* (1988), 39 Ohio St.3d 40. Therefore, a reviewing court need not defer to a trial court's ruling. The standard of review for a motion to dismiss for failure to state a claim pursuant to Civ.R. 12 (B)(1) and (6) is as follows:

{¶17} "It must appear beyond doubt that [plaintiff] could prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in his favor." *State ex rel. Findlay Publishing Co. v. Schroeder* (1996), 76 Ohio St.3d 580, 1996-Ohio-361. *State ex rel. Kaylor v. Bruening* (1997), 80 Ohio St.3d 142, 144, 1997-Ohio-350.

{¶18} Claim Four, R.C. 149.43

{¶19} R.C. 149.43 (B)(1) provides, in relevant part:

{¶110} " \*\*\* All public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (4) of this section, upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division."

{¶111} In this case, the trial court found that, because appellant was requesting certain records for the first time in his complaint and Woodmere had already provided appellant with certain other records, he failed to state a claim upon which relief may be granted, pursuant to *State ex rel. Taxpayers Coalition v. Lakewood* (1999), 86 Ohio St.3d 385 and thereafter dismissed the claim. However, it is well-settled that, in determining whether the complaint fails to state a cause of action pursuant to Civ. R. 12(B)(6), this court's scrutiny is limited to the four corners of the complaint. *Loveland Edn. Assn. v. Loveland City School Dist. Bd. of Edn.* (1979) 58 Ohio St.2d 31. Here, appellant alleged that Woodmere failed to comply with R.C. 149.43. In support of this allegation, appellant listed the various records which he alleged were "public" records as defined in R.C. 149.011 (G), and in the fourth claim of his complaint averred that Woodmere ignored his repeated requests, by letter and public demand, for public records and prevented him from viewing them. We find that after all factual allegations of appellant's complaint are presumed true and all reasonable inferences are made in appellant's favor, that the trial court erred in granting Woodmere's motion to dismiss appellant's fourth claim for failure to state a claim. Failing to find such facts in the complaint, we can only presume that the trial court improperly relied on information outside of the four corners of the complaint in determining that appellant was requesting certain records for the first time in his complaint and that Woodmere had already provided appellant with certain other records. We therefore reverse the judgment of the trial court as it pertains to appellant's fourth claim in the complaint.

{¶112} Claim One, R.C. 149.351

{¶113} R.C. 149.351 (B) provides, in relevant part:

{¶114} "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 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:

{¶15} "(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;

{¶16} "(2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action."

{¶17} In this case, the trial court found:

{¶18} "With respect to the foregoing items, Relator alleges that Defendants removed and/or destroyed them in violation of R.C. 149.351. Moreover, Relator claims that he has been aggrieved by the apparent removal and/or destruction on the part of Defendants. Relator seeks to compel Defendants to release the documents and to recover a forfeiture in the amount of \$1,000 for each violation.

{¶19} "Specifically, Relator claims that he sought access to the documents by letter and public demand. Furthermore, he claims that Defendant's have either refused outright to provide access to the above referenced documents, and to produce those documents for Relator, or they have harassed, hounded and intimidated Plaintiff to discourage and prevent him from viewing those documents in a timely fashion."

{¶20} "Under Ohio law, a cause of action pursuant to R.C. 149.351 does not accrue until either of the following occur: (1) Relator discovers, or should discover, that the public records sought for review have been destroyed or (2) Relator requests the records and is notified that he cannot review them because they have been destroyed. *State ex rel. Hunter, et al. v. Alliance* (Stark Cty. App. 2002), 2002-Ohio-1130, 2002 WL 391692, at 3. In his pleadings, though, Relator absolutely fails to allege any facts necessary to demonstrate that a cause of action has accrued. \*\*\* " (Trial Court Memorandum of Opinion and Order, p. 3-4) The trial court thereafter dismissed appellant's claim under R.C. 149.351.

{¶21} We agree with the trial court. In this case, appellant wholly failed to allege any fact which supports the conclusion that Woodmere improperly destroyed or removed public records in violation of R.C. 149.351. Appellant did not aver that he became aware that any particular public record, which he listed in his complaint, was removed or destroyed, nor did he allege that Woodmere notified him of removal or destruction of any such record. While factual allegations of a complaint are taken as true, unsupported conclusions are not. "Unsupported conclusions of a complaint are not considered admitted, \*\*\* and are not sufficient to withstand a motion to dismiss.\*\*\*" *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324. [Internal citations omitted.] We therefore affirm the trial court's decision granting Woodmere's motion to dismiss claim one of appellant's complaint.

{¶22} Judgment affirmed in part, reversed in part and remanded.

PATRICIA ANN BLACKMON P.J., and DIANE KARPINSKI, J., concur.

It is ordered that appellees and appellant split the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the 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.

ANN DYKE, JUDGE

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

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## Footnotes

1. It appears, however, that a correction has been made to the appearance docket since this appeal was filed and received for review by this court. We decline to consider the newly amended appearance docket as an indication that, prior to this appeal, notice had been issued to the parties.

OH

Slip Opinions

**2002-Ohio-1130**  
**State ex rel. Hunter v. Alliance**  
**02-LW-0846 (5th)**

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STATE OF OHIO, EX REL MARY BETH HUNTER, ET AL, Relators, Appellees and Cross Appellants v. THE CITY OF ALLIANCE, ET AL, Respondents - Appellants and Cross Appellees

[Cite as State ex rel. Hunter v. Alliance, 2002-Ohio-1130]

2002-Ohio-1130

Case No. 2001CA00101  
5th District Court of Appeals of Ohio, Stark County.  
Decided on March 11, 2002

Civil Appeal from Stark County Court of Common Pleas Case 2000CV00775

Hon. Julie A. Edwards, P.J. Hon. William Hoffman, J. Hon. John Wise, J.

For Relators, Appellees and Cross Appellants: CHARLES D. HALL 610 Market Avenue, N. Canton, OH 44702 For Mary Beth Hunter

ALLAN L. KRASH 1001 Parkside Drive Alliance, OH 44601 For Aleida Zellweger

For Respondents, Appellants: THOMAS W. CONNORS 1000 United Bank Building 220 Market Avenue, S. Canton, OH 44702

OPINION

Edwards, P.J.

The parties herein appeal the February 22, 2001, Judgment Entry of the Stark County Court of Common Pleas issued pursuant to R.C. 149.351, concerning a forfeiture and attorney fees. Respondents-appellants-cross appellees are the Office of the Mayor of the City of Alliance and the City of Alliance [hereinafter appellants]. Relators-appellees-cross appellants are Mary Beth Hunter and Aleida Zellweger [hereinafter appellees].

STATEMENT OF THE FACTS AND CASE

On March 10, 1999, appellees Mary Beth Hunter and Aleida Zellweger, residents of the City of Alliance, requested the then Mayor of Alliance, Mayor Carr, to permit them to inspect, pursuant to R.C. Section 149.43, "all records and documents belonging to, in the possession, custody or control of, or available to you in the City of Alliance concerning Alliance Community Hospital and the decision of the Hospital Board to use eminent domain in acquiring property." Letter from appellees to Mayor of Alliance, dated March 10, 1999. (Emphasis added) Appellees specifically sought to inspect: (1) Minutes of all Meetings of the Alliance Community Hospital Board of Trustees including all information, documents and reports submitted to the Board members.

(2) All correspondence directed to you or any other official of the City of Alliance from Alliance Community Hospital or any related body. Id.

On March 29, 1999, Mayor Carr sent a written response to appellees as follows: As a member of the Board of Directors of the Citizens Health Association, I do not believe it is my responsibility to maintain the 'official records' of the organization, be they public or private. It is my understanding that the Hospital is a not-for-profit, private corporation and would be required to maintain a record of their proceedings, as do other private corporations. In addition, I do not believe individual members of Alliance City Council are required to keep minutes of council meetings, copies of ordinances or any other documents since the Clerk of Council is required to prepare and maintain such records.

The official records of the Hospital are deposited at their facility and if such are required (sic) that is the appropriate place to request them. On April 28, 1999, the appellees filed a Verified Complaint in Mandamus in this court. An amended Complaint in Mandamus was filed May 20, 1999. The appellees

sought a writ of mandamus ordering appellants to make the records sought available to appellees, pursuant to R. C. 149.43, and a forfeiture for any public records improperly destroyed by the Mayor, pursuant to R. C. 149.351. Further, appellees sought attorney fees pursuant to R. C. 149.43(C) and 149.351. In a deposition, on July 21, 1999, Mayor Carr admitted that she regularly received copies of the Association's Board minutes at her office. She also indicated that the minutes were addressed to her in her official capacity as mayor. However, Mayor Carr testified that after she would receive the minutes at her office, "I took them home and then destroyed them." Hunter v. Carr (Feb. 22, 2000), Stark App. No. 1999CA00134, unreported, 2000 WL 222044. [hereinafter Hunter I]. When questioned further on the issue, Mayor Carr indicated that she took the records home and shredded them. Mayor Carr also testified that she "did not know" why she would take them home and destroy them. *Id.* Further, Mayor Carr testified that she did not take all of the minutes home and shred them in one instance. Transcript of Proceedings, Vol. 2, 213 - 214. However, while the Mayor confirmed she did this on more than one occasion, she did not know how many times she did so. *Id.* In Hunter I, this court determined that minutes delivered to the Mayor of Alliance, in her official capacity as Mayor of the City of Alliance, were public records and subject to disclosure pursuant to R.C. Section 149.43. Hunter I. Specifically, we held that "when the mayor received the minutes at issue she was required to maintain them and make them available to the public as required by R.C. Section 149.43. Her failure to maintain those records and her act of removing them from her public office and destroying them in her private home is a violation of the Public Records Laws." *Id.* However, we denied appellee's request that appellants be ordered to "produce" the records. As the Mayor testified, those records were destroyed by her. This court entered final judgment in favor of appellees. This court found, further, that it did not have jurisdiction over appellees' request for forfeiture or attorney fees. *Id.* Subsequent to our decision in Hunter I, on March 28, 2000, appellees filed a Complaint in Mandamus in the Stark County Court of Common Pleas. In the Complaint, appellees sought a forfeiture of \$1,000 per violation of R.C. 149.351, attorney fees and a writ of mandamus directing appellants to make the documents in question available. An evidentiary hearing on appellees' Complaint was held on August 21 and August 29, 2000. In the subsequent Judgment Entry, filed February 22, 2001, the trial court rendered judgment in favor of appellees and against appellants. Based upon the language used in the request for documents, the trial court reviewed the documents that had been provided by another source, looking for references to eminent domain. The trial court found that the minutes in question contained nine references to eminent domain. The trial court found that the destruction of the documents constituted one violation. Appellees were awarded a \$1,000.00 forfeiture each and attorney fees. It is from the February 22, 2001, Judgment Entry that the parties appeal, raising the following assignments of error: Issues Raised on Appeal

#### ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED BY NOT BARRING APPELLEES' FORFEITURE CLAIM BECAUSE IT WAS FILED OUTSIDE OF THE APPLICABLE STATUTE OF LIMITATIONS.

Issues Raised on Cross Appeal

#### HUNTER CROSS-APPEAL ASSIGNMENT OF ERROR

THE TRIAL COURT MADE AN ERROR OF LAW WHEN IT AWARDED A FORFEITURE OF \$1,000.00 TO RELATOR MARY BETH HUNTER UPON A FINDING OF NINE SEPARATE RESPONSIVE RECORDS TO THE PUBLIC RECORDS REQUEST.

#### ZELLWEGER CROSS-APPEAL ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FAILING TO AWARD A FORFEITURE OF ONE THOUSAND DOLLARS TO CROSS-APPELLANT, ZELLWEGER, FOR EACH DOCUMENT AND RECORD DESTROYED BY MAYOR JUDY CARR.

In the sole assignment of error raised on appeal by appellant, appellant argues that appellees' action was barred by the applicable statute of limitations. We disagree. Appellees' action was brought pursuant to R.C. 149.351, which states: (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. . . . (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 . . . the following in the court of common pleas of the county in which division (A) of this section allegedly was violated . . . : . . . (2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an award of the reasonable

attorney's fees incurred by the person in the civil action. (Emphasis added)

The statute of limitations for a R.C. 149.351 civil suit is set forth by R.C. 2305.11(A). An action upon a statute for a penalty or forfeiture shall be commenced within one year after the cause of action accrues. R.C. 2305.11(A)(1). There is no contention that appellees were not aggrieved by the destruction of documents. The issue is when the claim accrued and the statute of limitations began to run. Appellant argues that the statute of limitations was triggered when the violation, i.e. the destruction of public records, occurred. Appellant asserts that the documents were destroyed prior to March 16, 1999. Since the Complaint was not filed until March 28, 2000, or over a year beyond the date the public records were destroyed, appellant argues the claim was barred. Appellees contend that the discovery rule should be applied, thereby extending the time in which to file the Complaint. Appellees contend that the statute of limitations was not triggered until July 21, 1999, when the Mayor admitted during a deposition that she had taken the minutes home and shredded them. Appellant responds that even if the discovery rule is applied, the statute of limitations was triggered March 16, 1999, when a newspaper article, in the Alliance Review, reported that the Mayor acknowledged that she had destroyed the records. Appellant presented evidence that both appellees were aware of the article and its contents. Our review shows that this is a case of first impression. Revised Code 2305.11(A) states that a forfeiture action shall be commenced within one year after the cause of action accrues. Generally, the statute of limitations for violations of a statute begins to run when the statute is violated. Squire v. Guardian Trust Co. (1947), 79 Ohio App. 371. Appellant asks this court to apply this general rule herein, especially in light of the principle that "forfeitures are not favored in law or equity." State v. Lillock (1982), 70 Ohio St.2d 23, 26. The "discovery rule" has been applied in some exceptional circumstances. In such cases, the statute of limitations begins to run "when a plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury." Investors REIT One v. Jacobs (1989), 46 Ohio St.3d 176, 179. In applying the discovery rule, it is the discovery of facts that serves to trigger the statute of limitations. Lynch v. Dial Finance Company (1995), 101 Ohio App.3d 742, 747. However, the discovery rule has been given narrow application and applied in only limited situations. The rule has been applied to some types of actions also listed in R.C. 2305.11(A). (For example, medical malpractice, Oliver v. Kaiser Community Health Foundation (1983), 5 Ohio St.3d 111, and legal malpractice Skidmore Hall v. Rottman (1983), 5 Ohio St.3d 210). This court finds no cases in which a reviewing court has applied the discovery rule to a R.C. 149.351 action. In fact, at least one court, in dicta, rejected application of the discovery rule to forfeiture cases stating: "[i]n light of the narrow application of the discovery rule, we cannot, without express legislative or judicial authority, create law where none exists." Hughes v. City of North Olmstead (Jan. 23, 1997), Cuyahoga App. No. 70705, unreported, 1997 WL 25515. While not argued by the parties, this court notes that there is an alternative analysis applicable to this situation. That analysis is based on the fact that a cause of action does not arise until damages occur. Therefore, the statute of limitations does not begin to run until the damages occur. The Ohio Supreme Court has stated the following: [I]n [some] situations . . . the application of the general rule would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence. Wyer v. Tripi (1971), 25 Ohio St.2d 164, 168. In such cases, a cause of action for damages does not arise until actual injury or damage ensues. See Kunz v. Buckeye Union Ins. Co. (1982), 1 Ohio St.3d 79, (cause of action against insurer for failure to obtain coverage accrued at date of loss); Velotta v. Leo Petronzio Landscaping, Inc. (1982), 69 Ohio St.2d 376, paragraph two of the syllabus ("actual injury" rule applied in action for negligence brought by vendee against builder-vendor of completed residence). O'Stricker v. Jim Walter Corp. (1983), 4 Ohio St.3d 84, 87 (citations omitted).

We applied this same reasoning in Fritz v. Bruner Cox, LLP (Stark, 2001), 142 Ohio App.3d 664, 667 (citing Gray v. Estate of Barry (1995), 101 Ohio App.3d 764.) In Fritz we found that a cause of action did not accrue against accountants until there had been a finding made against the plaintiffs by the Internal Revenue Service of money and penalties due. Therefore, the statute of limitations did not start running when the accountants committed negligence. It only started to run when the damages occurred. In the case sub judice, we find there are persuasive reasons to deviate from the application of the general rule in instances where public records have been removed, destroyed, mutilated or otherwise inappropriately transferred, damaged or disposed of. The purpose of the Ohio Public Records Act, R. C. 149.43, is to allow citizens access to public records, thereby exposing government activity to public scrutiny. State ex rel. Long v. Cardington Village Council (2001), 92 Ohio St.3d 54, 56 and State ex rel. Sensel v. Leone (March 31, 1999), Butler App. No. CA97-05-102, unreported, 1998 WL 54392, reversed on other grounds (1999), 85 Ohio St.3d 152. The exposure of government activity to public scrutiny is essential to the proper working of a democracy. Sensel, supra. (citing State ex rel. Gannett Satellite Network, Inc. v. Petro (1997), 80 Ohio St.3d 261, 264; State ex rel. WHIO-TV7 v. Lowe (1997), 77 Ohio St.3d 350, 355). "Scrutiny of public records allows citizens to evaluate the rationale behind government decisions so government officials can be held accountable." Sensel (citing White v. Clinton Cty. Bd. Of Commrs. (1996) 76 Ohio St.3d 416, 420).

Revised Code 149.351 is a deterrent to the improper disposition of public records. Since the improper disposition of the document is not likely to be made public, or may be kept secretive, the public may not be aware of the act until someone seeks to review an improperly disposed of record. Further, the need for the record may not manifest itself immediately. Lastly, we note that a governmental body may not be forthcoming in acknowledging the wrongful disposition. A significant amount of time may pass between the wrongful act and the point the wrongful act is discovered. Without application of a discovery rule, a statute of limitations may expire before the wrongful conduct could be discovered. See *Oliver v. Kaiser Community Health Foundation* (1983), 5 Ohio St.3d 111 (examines and articulates policy considerations for adoption of "discovery rule" in medical malpractice actions). If a party's opportunity to bring a forfeiture action pursuant to R. C. 149.351 passes before one can discover the wrongful act, the deterrent effect of the statute is significantly lessened or even lost. Surely if we protect the interests of those individuals injured by medical or legal malpractice through a latent injury, we should protect the public from the wrongful disposition of public records. Such records allow the public to evaluate the actions of government which is fundamental to the operation of a democracy. Based on the preceding reasons, we conclude that the general rule, that the statute of limitations begins to run when a wrongful act occurs, should not be applied in the case sub judice. Either the "discovery" rule or the "occurrence of damage" rule should be applied. The statute of limitations begins to run on the same date in this case regardless of which of these two rules is applied. If the discovery rule is applied, the statute of limitations was triggered when appellants discovered, or should have discovered, that the public records they sought to review had been destroyed. In this case, that date was July 21, 1999, when the Mayor admitted the public records had been destroyed. Prior to that date, the Mayor failed to admit publicly or directly to appellees that the records had been destroyed when given an opportunity to do so. Appellees' initial public records request was made through a letter, dated March 10, 1999. At a subsequent Alliance City Council meeting, the Mayor was asked for a response to the March 10, 1999, public records request. However, the Mayor did not respond in any manner. On March 26, 1999, appellee Hunter's attorney sent a letter to the Mayor. The letter referenced the March 10, 1999, public records request and noted the Mayor's lack of response to that request. The letter also expressed concern over the March 16, 1999, Alliance Review article which reported that the Mayor had destroyed the records. The Mayor responded in a letter dated March 29, 1999. In the letter, the Mayor stated that it was not the Mayor's responsibility to maintain the official records sought. The Mayor claimed that the hospital was the appropriate place to request the desired public records. We reject appellants' contention that the statute of limitations was triggered when a newspaper article appeared reporting that the Mayor had acknowledged that she destroyed the documents sought. While the record may demonstrate that the appellees were aware of the article and its contents, we find that the newspaper article was insufficient in this case to provide actual or constructive notice to a reasonable person that R. C. 149.351 had been violated. See *Hughes v. City of North Olmstead* (Jan. 23, 1997), Cuyahoga App. No. 70705, unreported, 1997 WL 25515. Newspaper articles are unreliable hearsay. Cf. *State v. Self* (1996), 112 Ohio App.3d 688, 694. In addition, as pointed out above, the Mayor never confirmed the information in the newspaper article until the Mayor's July 21, 1999, deposition. If the occurrence of damage rule is applied, we find that the damages also occurred on July 21, 1999. That is because we find that damages did not occur until after the appellees had made a request for the public records and had been notified they would not be getting them because the records had been destroyed. In other words, as the trial court found, "[appellees] became aggrieved parties within the meaning of R. C. 149.351 when they made a proper request for public records and such records were not made available to them due to the fact that Mayor Carr had destroyed them." Judgment Entry, filed February 22, 2001, Findings of Fact and Conclusions of Law, para. 6. Therefore, we find that the statute of limitations was triggered, under either analysis, on July 21, 1999. This gave the appellees until July 21, 2000, to file an action for forfeiture. Since the Complaint was filed prior to July 21, 2000, on March 28, 2000, appellant's assignment of error is overruled.

#### CROSS APPEAL ISSUES

On cross appeal, the appellees raise the issue of the number of violations that occurred, the total amount of forfeiture to be awarded and how that sum should be awarded to the two appellees. The trial court found that the Mayor's conduct constituted one violation and awarded \$1,000.00 to each of the appellees. Appellee Hunter maintains that the trial court found nine minutes (public records), directly responsive to appellees' public records request, had been destroyed. Therefore, appellee Hunter argues that the appellees should have been awarded \$9,000.00 each. However, appellee Zellweger contends that the request for documents encompassed each month of the Hospital's Minutes and Agendas from January, 1997, through March 25, 1999, totaling 54 documents. Therefore, since 27 agendas and 27 minutes, or 54 documents, were generated during the 27 months involved, appellee Zellweger argues that appellees should be awarded \$54,000.00. The interpretation of a statute is a question of law. *Neiman v. Donofrio* (1992), 86 Ohio App.3d 1, 3. An appellate court's review of the interpretation and application of a statute is de novo. *State v. Sufronko*

(1995), 105 Ohio App.3d 504, 506. Additionally, an appellate court does not give deference to a trial court's determination when making its review. *Id.* "In construing a statute, a court's paramount concern is the legislative intent in enacting the statute." *State v. S.R.* (1992), 63 Ohio St.3d 590, 594. In order to determine the legislative intent, a court must first look to the statute's language. *Shover v. Cordis* (1991), 61 Ohio St.3d 213, 218, overruled on other grounds (1998), 81 Ohio St.3d 506. "Words used in a statute are to be taken in their usual, normal and customary meaning." *Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 173 (citing R.C. 1.42). Further, unless a statute is ambiguous, the court must give effect to the plain meaning of a statute. *Id.* (citing *State v. Waddell* (1995), 71 Ohio St.3d 630, 631). From a plain reading of R. C. 149.351, we find that the trial court committed an error of law in the award of the forfeiture. Revised Code 149.351 states the following: 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, . . . may commence . . . the following in the court of common pleas of the county in which division (A) of this section allegedly was violated. . . : . . . (2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action. R.C. 149.351(B)(2).

The definition of "[r]ecords" includes any document, device, or item . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). By considering the definition of records in light of R.C. 149.351, we conclude that a violation is the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a document, device or item, which documents the organization, functions, policies, decisions, procedures, operations, or other activities of the governmental office. The minutes destroyed were previously held by this court to be public records. What we did not address in that previous decision was whether the agendas were public records. We note that there is a good argument to be made that these agendas are not records under R. C. 149.011(G) in that they do not "document" anything. They merely set forth an outline of what is expected to be covered at a meeting. On the other hand, we can envision a scenario in which it may be important to know what was in an agenda sent to a public official prior to a meeting. It may be important because a public official may take some sort of action based on the knowledge of what he or she believes will be discussed at the upcoming meeting. Therefore, we find that an agenda of a meeting does document what is expected to be covered at a meeting. And, since in the case sub judice, these agendas were received by the mayor in the course of her public duties, we find them to be public records under R. C. 149.011(G). Even though we conclude that the agendas are public records, we do not conclude that they are separate public records from the minutes. We find that the agenda and minutes from each of the meetings forms the record for each of the meetings in the case sub judice. The destruction of all or of any part of an agenda and minutes set would constitute one violation of the statute. More simply stated, if the agenda and minutes of a meeting were destroyed, that is one, not two violations of the statute. The meeting itself is the relevant unit of measure, not the number of documents which describe the meeting. The documents which contain a description of what is supposed to happen at a meeting and what actually did happen at the meeting are the record of the meeting. Therefore, we disagree with appellee Zellweger who contends that the minutes and the agenda from each meeting should constitute two public records, even though we agree that the agenda is a public record. Under the preceding analysis, the most violations of R. C. 149.351 which could be found are twenty-seven since the agendas and minutes from twenty-seven meetings were destroyed. The trial court did not find twenty-seven violations. The trial court did not award a separate amount for each set of minutes and agendas that were shredded. Instead, the trial court treated the "failure to comply with each of the Relators' requests a single violation" and found each Relator entitled to an award of One Thousand Dollars (\$1,000.00). (Emphasis added.) The trial court relied on *Beacon Journal Publishing Co. v. Stow* (1986), 25 Ohio St.3d 347. The law has been modified since that decision, and we do not agree with the conclusion of the trial court. We find that a forfeiture award which is based on the number of requests made for public records, is no longer mandated by the statute and does not comply with the purpose of the current statute. R. C. 149.351 says that records shall not be destroyed, and an aggrieved person may file suit for a forfeiture of \$1,000.00 for each violation of the statute. We find each violation in the case sub judice means each public record that is destroyed. The relevant inquiry is not how many requests were made and not complied with, but how many public records were destroyed which had been requested. The appellees in this case requested the records concerning Alliance Community Hospital and the decision of the Hospital Board to use eminent domain in acquiring property. They did not request all records of the Hospital Board. The trial court found a total of nine references to eminent domain in the minutes of meetings for the time period from January, 1997, through March 25, 1999. We are unable to enter judgment based on this finding. First of all, we cannot tell if agendas were considered by the trial court. Secondly, we cannot tell how many minutes were involved in those nine references. It is possible that, during the course of one meeting, more than one reference to eminent domain was made. Thirdly, we cannot determine how many of the references to eminent domain were references

concerning the decision of the Hospital Board to acquire property. Therefore, we reverse and remand this matter to the trial court for it to determine how many public records (an agenda and minutes from a meeting of the Hospital Board) that dealt with the decision of the Hospital Board to use eminent domain to acquire property, were destroyed by Mayor Carr. A \$1,000.00 forfeiture shall be awarded for each public record that was destroyed by Mayor Carr which had also been requested by the appellees. The next question is how the forfeiture should be awarded since, in this case, we have two relators (appellees). We find that the question is answered by our determination that R.C. 149.351 is punitive in nature and not designed to compensate the aggrieved party. Punitive awards are designed to punish the guilty party and deter the prohibited conduct. See Digital & Analog Design Corp. v. North Supply Co. (1992), 63 Ohio St.3d 657, 660, rejected on other grounds by Zoppo v. Homestead Ins. Co. (1994), 71 OS3 552, 557; Detling v. Chockley (1982), 70 Ohio St.2d 134. Compensatory damages, on the other hand, are awarded to make the victim whole. Digital & Analog Design Corp. v. North Supply Co., *supra*. In that the statute in question is punitive in nature, designed to deter the destruction of public records, we find that the award of any forfeiture must be shared among the relators. Therefore, since we have two relators in this case, any forfeiture awarded should be divided among the appellees, the relators, in equal shares. This matter is, therefore, reversed and remanded to the trial court. The trial court is instructed to make an award of damages in accordance with this opinion. The total forfeiture shall then be ordered to be split equally between the appellees. Appellees' cross assignments of error are sustained, in part, and overruled, in part. Therefore, the judgment of the Stark County Court of Common Pleas is affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion.

Edwards, P.J. Hoffman, J. and Wise, J. concur

OH

Slip Opinions

## **149.351 Prohibiting destruction or damage of records.**

(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. Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed 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, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action.

Effective Date: 07-01-1992