

FILED
COURT OF APPEALS
DIVISION II

10 MAR -4 PM 12:34

STATE OF WASHINGTON

BY *ks*
DEPUTY

No. 40144-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN GREENHALGH, Appellant;

v.

DEPARTMENT OF CORRECTIONS, Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley
No. 08-2-00504-2

OPENING BRIEF OF APPELLANT GREENHALGH

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

ORIGINAL

pm 3-3-10

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

 1. Assignments of Error 1

 2. Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 2

C. SUMMARY OF THE ARGUMENT 4

D. ARGUMENT 5

 1. THE STANDARD OF REVIEW OF A PRA SUMMARY JUDGMENT MOTION SUPPORTED SOLELY BY AFFIDAVITS IS *DE NOVO*. 5

 2. THE EXPRESS LANGUAGE OF RCW 42.56.550(6) REQUIRES THIS COURT RULE THAT THERE WAS NO VIOLATION OF THE STATUTE OF LIMITATIONS 5

 3. 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. 8

 a) The Discovery Rule Has Been Applied In Situations In Which The Parties Have A Special Relationship 10

 b) The Special Relationship Between Citizens And Their Government Requires The Discovery Rule Be Applied To Public Records Act Cases 12

| | | | |
|----|----|---|----|
| | c) | <u>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</u> | 15 |
| 4. | | MR. GREENHALGH IS ENTITLED TO PENALTIES FROM NOVEMBER 10, 2006 UNTIL NOVEMBER 1, 2008. | 19 |
| | a) | <u>The Department is Liable For Its Failure To Provide The Fullest Assistance And Provide All The Records To Mr. Greenhalgh</u> | 19 |
| | b) | <u>The Department Must Be Penalized For Destroying The Missing Document</u> | 22 |
| 5. | | MR. GREENHALGH IS ENTITLED TO ATTORNEY FEES AND COSTS IF HE PREVAILS ON THIS APPEAL | 24 |
| | a) | <u>The Prevailing Party Against A Governmental Entity Is Entitled To Reasonable Attorney Fees And Costs In Accordance With RAP 18.1 And The PRA</u> | 24 |
| | b) | <u>Courts May Also Consider Equitable Considerations When Considering Granting Attorneys Fees And Costs On Appeal</u> | 25 |
| E. | | CONCLUSION | 26 |

TABLE OF AUTHORITIES

| Cases | Page |
|--|-------------|
| <i>Amren v. City of Kalama</i> , 131 Wn.2d 25, 929 P.2d 389 (1997) | 19 |
| <i>Burlington N., Inc. v. Johnson</i> , 89 Wn.2d 321, 572 P.2d 1085 (1997) | 6 |
| <i>Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.</i> , 129 Wn. App. 810, 120 P.3d 605 (2005) | 10 |
| <i>Cecil v. Dominy</i> , 69 Wn.2d 289, 418 P.2d 233 (1996) | 26 |
| <i>City of Bellevue v. East Bellevue Community Council</i> , 138 Wn.2d 937, 983 P.2d 602 (1999) | 6 |
| <i>Confederated Tribes v. Johnson</i> , 135 Wn.2d 734, 958 P.2d 260 (1998) | 25 |
| <i>G.W. Constr. Corp. v. Prof'l Serv. Indus.</i> , 70 Wn. App. 360, 853 P.2d 484 (1993) | 10 |
| <i>Gazija v. Nicholas Jerns Co.</i> , 86 Wn.2d 215, 543 P.2d 338 (1975) | 10, 11 |
| <i>Gevaart v. Metco Const., Inc.</i> , 111 Wn.2d 499, 760 P.2d 348 (1988) | 10 |
| <i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978) | 13, 20 |
| <i>Herman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 17 Wn. App. 626, 564 P.2d 817 (1977) | 11 |
| <i>Hunter v. Knight, Vale & Gregory</i> , 18 Wn. App. 640, 571 P.2d 212(1977) | 11 |

| | |
|---|--------------|
| <i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 118 S. Ct. 856 (1998) | 25 |
| <i>Kittinger v. Boeing</i> , 21 Wn. App. 484, 585 P.2d 812 (1978) | 11, 12, 15 |
| <i>Kundahl v. Barnett</i> , 5 Wn. App. 227, 486 P.2d 1164 (1971) | 11 |
| <i>Lindquist v. Mullen</i> , 45 Wn.2d 675, 277 P.2d 724 (1954) | 8, 9 |
| <i>Oliver v. Harborview Medical Center</i> , 94 Wn.2d 559, 618 P.2d 76 (1980) | 17, 24 |
| <i>O'Connor v. Dept. of Soc. & Health Serve.</i> , 143 Wn.2d 895, 25 P.3d 426 (2001) | 13 |
| <i>Peters v. Simmons</i> , 87 Wn.2d 400, 552 P.2d 1053 (1976) | 11 |
| <i>Potter v. New Whatcom</i> , 20 Wash. 589, 56 P. 394 (1899) | 12, 13 |
| <i>Progressive Animal Welfare Soc'y v. Univ. of Wash.</i> , 114 Wn.2d 677, 790 P.2d 604 (1990) | 25 |
| <i>Progressive Animal Welfare Soc'y v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1995) | 5, 7, 13, 20 |
| <i>Rental Housing Ass'n of Puget Sound v. City of Des Moines</i> , 165 Wn.2d 525, 199 P.3d 393 (2009) | 6, 7 |
| <i>Ruth v. Dight</i> , 75 Wn.2d 660, 453 P.2d 631 (1969) | 8-10 |
| <i>Seattle Fire Fighters Union, Local 27 v. Hollister</i> , 48 Wn. App. 129, 737 P.2d 1302 (1987) | 25 |

| | |
|---|--------|
| <i>Skamania County v. Columbia River Gorge Comm'n</i> , 144 Wn.2d 30, 26 P.3d 241 (2001) | 6 |
| <i>Spokane Research & Defense Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005) | 17, 22 |
| <i>State ex rel. Delmonte v. Woodmere</i> , 2004-Ohio-2340 | 14 |
| <i>State ex rel. Hunter v. Alliance</i> , 2002-Ohio-1130 | 14 |
| <i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007) | 6 |
| <i>U.S. Oil & Refining Co. v. Dep't of Ecology</i> , 96 Wn.2d 85, 633 P.2d 1329 (1981) | 15, 16 |
| <i>Yousoufian v. King County</i> , 152 Wn.2d 421, 98 P.3d 463 (2004) | 17 |

Statutes

| | |
|--------------------------------|-----------|
| Ohio Rev. Code § 149.351 | 14 |
| RCW 4.16.350 | 9 |
| RCW 40.14.010 | 23 |
| RCW 40.14.060 | 23 |
| RCW 42.17.250 | 2 |
| RCW 42.17.290 | 13, 20 |
| RCW 42.17.340 | 20 |
| RCW 42.56.080 | 7 |
| RCW 42.56.100 | 13, 20-22 |

RCW 42.56.550 1, 5, 13, 18, 20, 24, 26

RCW 90.48 15

Other Authorities

GR 14.1 14

Ohio Rules for the Reporting of Opinions, Rule 4 14

RAP 18.1 24

A. ASSIGNMENTS OF ERROR

1. Assignments of Error.

1. The trial court erred when it denied Mr. Greenhalgh's Partial Motion for Summary Judgment and granted the Department of Corrections' Motion for Summary Judgment and entered its order dismissing this lawsuit on November 25, 2009.

2. Issues Pertaining to Assignments of Error No. 1.

1. Does statutory interpretation of RCW 42.56.550(6) require a holding that the statute of limitations does not begin to run when an agency withholds a record where there is no claim by the agency that the records were being provided on an installment or partial basis?

2. Should the discovery rule apply to the Public Records Act such that the date of accrual for the statute of limitations starts when the requester discovers or should have discovered that not all responsive documents were produced by the agency?

3. If Mr. Greenhalgh is entitled to penalties because the Department of Corrections violated the Public Records Act, what length of time should it be penalized?

4. Is Shawn Greenhalgh entitled to an award of attorney fees and costs on appeal?

B. STATEMENT OF THE CASE

Mr. Greenhalgh took his duties as Tier Representative seriously. His job was to act as a liaison between the other inmates living on his tier and the prison administration at the Washington State Reformatory Unit (“WSRU”), Monroe Correctional Complex (“MCC”). CP 22-33. One of his enumerated tasks was to also be the inmate store representative. This position required him to make suggestions for items to be made available to offenders through the inmate store. One complaint he was looking at was the lack of barbeque sauce at WSRU that was available elsewhere.¹

Id.

To investigate the availability of other possible store items, Mr. Greenhalgh used the Public Records Act (“PRA”) to ask for store lists from other facilities with the same custody level as WSRU.² He sent his PRA request to the Public Disclosure Coordinator (“PDC”) at MCC asking for documents from Stafford Creek Corrections Center (“SCCC”). CP 34-72 (Exhibit A). The PDC at MCC then forwarded his requests to

¹It is easy to imagine that something so insignificant in the outside world would have such an importance to those living within the four walls.

²Before recodification in 2005, the Public Disclosure Act was set forth in RCW 42.17.250 et seq. Plaintiff has used the present codification except where cited in case law and, in that case, has provided the recodified statute along with the original cite for convenience.

those facilities. CP 34-72 (Exhibit B). The PDC at SCCC sent Mr. Greenhalgh two documents on December 11, 2006. CP 34-72 (Exhibit F). On December 18, 2006, Mr. Greenhalgh sent a letter asking why various items were not listed that in his experience were almost always available to inmates. CP 34-72 (Exhibit G).

Having not heard from SCCC, Mr. Greenhalgh wrote a second letter on March 21, 2007. CP 34-72 (Exhibit H). Finally, the PDC wrote back on April 2, 2007, claiming that one more document had been located. Mr. Greenhalgh paid for the document and subsequently received it with a letter dated April 18, 2007. CP 34-72 (Exhibit K). Not once during his communications with the PDC at SCCC did he receive a claim of an exemption for the missing document.³

A little over one year later, in April 2008, Mr. Greenhalgh was talking with some new arrivals from SCCC. They told him there was one missing page that had not been provided in response to his request. Two even had copies of the lists and showed him there was an additional missing page, although the publication date is not apparent. CP 73-87.

On April 23, 2008, Mr. Greenhalgh filed a lawsuit against the Department of Corrections (the "Department"). An amended complaint

³Its reasonable to assume that an exemption claim cannot be made for lists that are readily available in their entirety to almost all inmates.

was filed on July 15, 2008. CP 1-5. In this lawsuit, he alleged that the Department had failed to provide him with all documents responsive to his request made pursuant to the Public Records Act. The Department filed an answer on July 29, 2007. *Id.*

Mr. Greenhalgh then brought a motion for partial summary judgment. CP 11-21. The Department responded and brought a cross-motion for summary judgment based upon the alleged violation of the statute of limitations (“SOL”). CP 88-97. Mr. Greenhalgh filed a reply, claiming that the discovery rule must apply in PRA cases. CP 98-108. The Department filed an early reply right before the hearing set by Mr. Greenhalgh.⁴ CP 122-130. The trial court permitted a final response by Mr. Greenhalgh after oral arguments. The trial court granted the Department’s Motion for Judgment and dismissed this case on November 15, 2009. CP 139-42. A timely notice of appeal was filed on December 18, 2009. CP 143-47.

C. SUMMARY OF THE ARGUMENT

Appellant Greenhalgh will show that, based upon statutory interpretation, the statute of limitations set forth in RCW 42.56.550(6)

⁴Because the Department filed the reply out of sequence, the trial court permitted Mr. Greenhalgh to file his response to its motion for summary judgment after the hearing.

does not apply. He will also show that even if the SOL does apply the discovery rule must be extended to cover the Public Records Act. He will next show that the Department failed to provide him with all documents requested and therefore have violated the Public Records Act and should be penalized. He will finally argue he is entitled to attorney fees and costs.

D. ARGUMENT

1. THE STANDARD OF REVIEW OF A PRA SUMMARY JUDGMENT MOTION SUPPORTED SOLELY BY AFFIDAVITS IS *DE NOVO*.

Courts review agency actions under the PRA *de novo*. RCW 42.56.550(3). The onus is on the agency making the claim. RCW 42.56.550(1). This Court “stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence.” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) (“PAWS”). Therefore, it is not bound by the trial court's factual findings.

2. THE EXPRESS LANGUAGE OF RCW 42.56.550(6) REQUIRES THIS COURT RULE THAT THERE WAS NO VIOLATION OF THE STATUTE OF LIMITATIONS.

RCW 42.56.550(6) is quite explicit about when the one year statute of limitations begins to run. The plain language of RCW

42.56.550(6) requires the statute of limitations be triggered when one of two conditions precedent is present: an exemption claim or the last document from an partial or installment document production. Neither is present here, because there were no exemptions claimed and the records were not produced on a partial or installment basis.

Looking at statutory interpretation, a statute's plain language is subject to only one interpretation, the inquiry stops because no explanation is necessary. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Statutory construction also requires that an act be read as a whole with each part being given its full effect. *City of Bellevue v. E. Bellevue Cmty. Council*, 138 Wn.2d 937, 946, 983 P.2d 602 (1999). A statutory construction which renders meaningless or superfluous any part of a statute must be avoided. *Burlington N., Inc. v. Johnson*, 89 Wn.2d 321, 326, 572 P.2d 1085 (1997). All parts of an act must be considered as a whole and harmonized, if possible, to give it the legislative intent. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 45, 26 P.3d 241 (2001). Statutory construction was the basis of the Supreme Court's examination of RCW 42.56.550(6) in *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009).

In *Rental Housing Association*, the City of Des Moines had claimed that the SOL had run from August 17, 2005, when a letter was

provided which claimed general exemptions. *Id.* at 536-37. Rental Housing Association disagreed because the exemption log did not provide sufficient detail to enable one to properly question a response. *Id.* at 536. The Supreme Court, citing to its decision in *PAWS*, held that a “claim of exemption” is effectively made when records are cited with particularity. *Id.* at 537 (*quoting PAWS*, 125 Wn.2d at 270). Using the same analysis, it is clear that the records were not provided in a partial or installment basis.

RCW 42.56.080 states in relevant part the following:

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.

RCW 42.56.080.

The plain language of RCW 42.56.550(6) is clear. The authority for an agency providing records in a partial or installment basis is when those records are part of a larger set of records. That is not the case here. Mr. Greenhalgh had asked for lists of what inmates at SCCC could order. After the initial production, he questioned that production, twice. Thanks to his persistent questioning, he was provided one more document. At no time did the Department treat the request as a partial or installment request. There is no such language in any of the correspondence from the

Department to Mr. Greenhalgh using this language. Because no exemption was claimed and because the responses to the request referenced neither installment nor partial document production, the statute of limitations in RCW 42.56.550(6) does not apply.

3. 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.

Even assuming, arguendo, that the statute of limitations had run, the discovery rule must be applied to the Public Records Act. The discovery rule must apply for two reasons: (1) there is a special relationship between citizens and their government; (2) the Department would have to self-report a violation and public policy requires application of the discovery rule.

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 667.⁵ 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

⁵Two years later, the legislature formally adopted this rule as applied to medical malpractice cases. RCW 4.16.350.

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. Profl Serv. Indus.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993).

Building on *Ruth*, courts have applied the discovery rule in cases in which courts have recognized a special relationship between the parties. Mr. Greenhalgh 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.⁶ *Id.* at 221-23.

In *Kittinger*, the discovery rule was applied to an employer-employee relationship. Mr. Kittinger had been informed there had been a cut back in personnel and was let go from Boeing. He subsequently heard that he has been accused of misconduct and that raised doubts as to why

⁶The 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).

he was terminated. 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 not if the date of the accrual was when he found out about the 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. A special relationship also exists between the governing and the governed.

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 special 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. Dep't of Soc. & Health Servs., 143 Wn.2d 895, 905, 25 P.3d 426 (2001) (*quoting PAWS*, 125 Wn.2d at 251). 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.* at 913 (*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-2340.⁷

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).⁸ 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. Greenhalgh pled that he had been informed after the one year statute of limitations that further responsive records existed. He clearly set forth a

⁷Unpublished 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.

⁸The 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.

factual basis for the application of the discovery rule. The facts, in conjunction with the special relationship between Mr. Greenhalgh 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. This exact situation occurred 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 disclose 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 is in 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 records 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 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, the Department is the sole source of documents responsive to Mr. Greenhalgh's PRA request. The Department failed to turn over all the documents. If the statute of limitations is imposed, the Department will not face any penalties for its failure to comply with the Public Records Act.

At the time of his initial request, Mr. Greenhalgh was an innocent requester. He 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 he was unaware of the facts underlying the instant cause of action until after the limitation period in RCW 42.56.550(6) expired. He had even expended extra energy to make sure he had received all the records. In such a situation, accrual can only start when a requester, like Mr. Greenhalgh, knows or should know that all records were not disclosed. This moment occurred when Mr. Greenhalgh was informed by fellow inmates that an additional responsive record 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 Department must be held accountable for its failure to timely disclosure all documents 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.

4. MR. GREENHALGH IS ENTITLED TO PENALTIES FROM NOVEMBER 10, 2006 UNTIL NOVEMBER 1, 2008.
 - a) The Department is Liable For Its Failure To Provide The Fullest Assistance And Provide All The Records To Mr. Greenhalgh.

A “person who prevails” has been defined by the Washington Supreme Court as a person who must seek judicial review to determine that the documents were wrongly withheld. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). The court held that the filing need not be the direct cause of the disclosure, so long as a court determines that disclosure had been wrongfully denied at the time the suit was brought. *Id.* The disclosure of documents prior to judgment does not moot the issue. Fees and costs are still mandatory for the period of time that disclosure was improperly denied from the time of request to disclosure. *Id.* at 102. Good faith is not a defense. *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). Because the statute of limitations cannot be applied, the Department must be subject to penalties in accordance with RCW 42.56.550(4) for its failure to provide the fullest assistance and provide all the records requested.

The Supreme Court in *PAWS* 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 42.17.340(3) (now RCW 42.56.550(3)). And it is abundantly clear that it is not for the agency to interpret the act: “[L]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” *Hearst Corp.*, 90 Wn.2d at 131. There is no wiggle room for an agency – it must fulfill its obligations under the PRA. If there is any question, the agency must seek clarification from the requester.

Mr. Greenhalgh, in furtherance of his duties as tier representative, made reasonable requests for store lists. These lists are used by all offenders under the custody of the Department of Corrections. As of December 31, 2007, there were 15,554 individuals in custody at Washington State facilities, not including those in work release. Every one of these individuals, except perhaps those in Administrative

Segregation or Intensive Management Unit, have access to the inmate store.⁹

The Department cannot argue that the existence of two lists caused confusion. Mr. Greenhalgh had asked for the “Inmate Store Price List” at SCCC. None of the documents provided to Mr. Greenhalgh had this precise title. The first document provided was titled “Stafford Creek Store Order List.” The additional one-page document subsequently disclosed was titled “Stafford Creek Property Order List.” Both lists were available to all inmates at SCCC to purchase from. If staff felt there was potential confusion, it was their obligation to request clarification from the requester. The Department is liable because it failed to provide the fullest assistance when Mr. Greenhalgh followed up his original request with inquiries into whether he had all the records.

Furthermore, the Department is required to keep all requested documents that are the subject of a PRA request even if they are slated for destruction. RCW 42.56.100. This statute states the following:

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and

⁹Individuals in the Intensive Management Unit have much more limited privileges.

RCW 40.14.010 defines with a broad brush all agency records as public records. All records must be retained for six years unless the agency in question shows to the state records committee that such retention is unnecessary and uneconomical. RCW 40.14.060(b). The Department made such an argument to the records committee and, as a result, inmate store lists are archived for only one year. CP 34-72 (Exhibit W, X).

Examination of the evidence shows that the 2006 store list was dated November 2006. The 2007 store list was dated November 2007. As the November 2007 list supplants the November 2006 list, the proper start date for retention is November 2007. Per the schedule kept by the Secretary of State, the Department of Corrections is obligated to maintain custody of the record after its use until November 2008. Thus, the proper date for destruction is the critical end date for determining the period of liability, not the date Plaintiff was notified of the destruction.¹⁰

Using the retention schedule to determine the date of wrongful withholding is both logical and appropriate. It is logical because it is not known when the original record was destroyed. It is appropriate because otherwise it could be an incentive for an agency to take actions to destroy

¹⁰Mr. Greenhalgh was notified on August 26, 2008, that all the records which could be provided had been. CP 34-72 (Exhibit R).

documents it does not wish to be released because the penalty is lower the sooner the record is destroyed. Our Supreme Court has explicitly agreed with this type of reasoning:

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 PDA and is inconsistent with *Oliver*.

Spokane Research, 155 Wn.2d at 103 (citing *Oliver v. Harborview Medical Center*, 94 Wn.2d 559 (voluntary disclosure of medical records after a suit is filed does not moot the litigation because of possible relitigation)).

Using this logic and applying it to the facts of this case, the Department must be penalized from November 10, 2006, to November 1, 2008. This is a total of 722 penalty days.

5. MR. GREENHALGH 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 attorney 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

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.

Rationale. It was the Committee's view that the distinction between opinions that are controlling and those that are only persuasive, based solely on whether the opinions were published in the Ohio Official Reports, should be abolished. The "controlling" nomenclature is primarily the historical result of an inability to physically print all court of appeals opinions, and that distinction is no longer necessary or useful (a) because many appellate judges give equal weight to published and unpublished opinions, and (b) because technology now permits all appellate opinions to be easily and readily obtained electronically.

Also, nationally there is increasing criticism of maintaining the "published/controlling" versus "unpublished/persuasive" dichotomy. (See *Anastasoff v. United States*, 223 F.3d 898 (2000), dismissed as moot en banc 235 F.3d 1054 (8th Cir. 2000); "Publication Rights," *The American Lawyer*, October 2000, pg. 15-16; "Legal Shortcuts Run Into Some Dead Ends," *The New York Times*, Sunday, October 8, 2000, pg. 4; "Justice in the Dark," *Forbes*, October 30, 2000, pg. 72-74; "Publish or Perish," *Litigation*, Spring 2001, pg. 59-65.) The Committee recognized the concern that with the designations abolished, and all appellate opinions are "controlling," there is some burden on the practitioner to sift through the large number of opinions to find those that are the "best" precedent.

New 4(C) retains the Supreme Court's discretion to order that a court of appeals opinion not be cited or relied upon in other cases.

Previous rule:

- a. Opinions published in the Official Reports are controlling authority in the district, and unpublished opinions are controlling only as to the parties.
- b. An unpublished or unofficially published court of appeals opinion may be cited for any of the following reasons:
 - (1) As controlling authority between the parties;
 - (2) As persuasive authority only on a court, including the deciding court, in the district in which it was rendered;
 - (3) By the appellate court of another district for purposes of certifying a conflict question to the Supreme Court.
- c. A majority of the panel that decided the case and the Supreme Court Reporter determine if the opinion is reported and therefore controlling.

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

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. Wyler 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).

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