

appellees, Karen Register and Pierce Township ("Respondents"). We affirm the decision of the trial court.

{¶2} In April 2007, Relator¹ sent a request for public documents to Karen Register, the Fiscal Officer for Pierce Township. On behalf of the Citizens for Open, Responsive & Accountable Government, Relator requested copies of "the drafts of minutes of the meetings of the Pierce Township Board of Trustees, as such drafts were initially presented by the Pierce Township Clerk to the Pierce Township Board of Trustees for consideration (*i.e.*, prior to any modification or amendment by the board) for" 28 meetings dating from 2001 to 2003, as well as official minutes for the meetings from a three-month period in 2004.

{¶3} When Respondents did not produce the requested documents to Relator's satisfaction, he commenced an action in August 2007 according to the Public Records Act for disclosure of the requested documents. In December 2007, Relator filed a motion to amend the original complaint, which the court granted. In January 2008, Relator filed an amended complaint for civil forfeiture, a writ of mandamus, and injunctive relief and purportedly hand delivered a copy of the amended complaint to the receptionist of Elizabeth Mason.

{¶4} Mason, an Assistant Clermont County Prosecutor, entered her appearance after the proceedings began, and had separate offices, a good distance from other members of Respondents' counsel team. Neither lead counsel, nor any other member of the defense team received service of the amended complaint, and Mason averred that she did not receive service and was not aware of the amended complaint until she reviewed the county's on-line docket and saw the filing in February 2008.

{¶5} After Respondents did not answer the amended complaint, Relator filed a motion for default judgment. However, in February 2008, after obtaining a copy of the amended complaint, Respondents filed an amended answer and opposed Relator's motion

for default judgment. In March, the court denied the motion, thereby permitting Respondents to answer the amended complaint, and the matter moved forward for disposition. During the pendency of the proceedings, which were especially acrimonious, the court considered numerous motions regarding discovery and denied several of Relator's motions. The parties later filed reciprocal motions for summary judgment, and the court granted Respondents' motion. It is from the court's denial of default judgment and several motions relating to discovery, and from the grant of summary judgment to Respondents that Relator now appeals, raising six assignments of error. For ease of discussion, we will address Relator's assignments together when proper.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED IN DENYING THE MOTION FOR DEFAULT JUDGMENT WHEN RESPONDENTS FAILED TO TIMELY RESPOND TO A PROPERLY SERVED AMENDED COMPLAINT AND RESPONDENTS FAILED TO DEMONSTRATE EXCUSABLE NEGLIGENCE FOR SUCH FAILURE TO RESPOND."

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT ERRED IN GRANTING RESPONDENTS LEAVE TO FILE AN ANSWER TO THE AMENDED COMPLAINT OUT OF TIME WITHOUT ANY SHOWING OF EXCUSABLE NEGLIGENCE ON THE PART OF THE RESPONDENTS."

{¶10} In these two assignments of error, Relator asserts that the trial court erred in denying the motion for default judgment and permitting Respondents to file an answer to the amended complaint. This argument lacks merit.

{¶11} According to Civ.R. 55(A), "when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore

1. Relator's counsel, Curt C. Hartman, is a former elected Trustee of Pierce Township, Clermont County, Ohio.

* * *." Here, Respondents failed to answer Relator's amended complaint within the allotted time and Relator properly moved for default judgment.

{¶12} However, according to Civ.R. 6(B), a court may, within its discretion, grant a party an extension of time to file an answer past the deadline for doing so "where the failure to act was the result of excusable neglect * * *." Because the court's decision to grant or deny an extension rests within its discretion, a reviewing court will not disturb the decision of the lower court absent an abuse of that discretion. *Graham v. Nigh*, Hancock App. No. 5-06-48, 2007-Ohio-2161. An abuse of discretion connotes more than a mere error of law or judgment, and instead, requires that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶13} According to the Ohio Supreme Court, "the proper standard by which the trial court is required to analyze a request for leave to plead out of rule is, as set forth in the rule, that of excusable neglect. It must appear from the record that the successfully moving party made a showing of excusable neglect sufficient to support the trial court's finding to that effect. Moreover, the determination of whether neglect was excusable or inexcusable must of necessity take into consideration all the surrounding facts and circumstances. Courts must also remain mindful of the admonition that cases should be decided upon their merits, where possible, rather than on procedural grounds." *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271 (internal citations omitted).

{¶14} Here, the trial court did not abuse its discretion by denying Relator's motion for default judgment and permitting Respondents to file an amended answer. The court held a hearing during which it heard arguments regarding the supposed service of the amended complaint on Elizabeth Mason. Mason also submitted her affidavit to the court in which she averred that she had not received a copy of the court's entry granting Relator leave to file an amended complaint. Her affidavit also stated that Relator "did not provide me with a copy of

the Relator's First Amended Complaint until Wednesday, February 6, 2008, when [counsel] hand-delivered a copy to me following a scheduling conference with the Court. Because I was not served with the First Amended Complaint, I was not aware of its filing and my clients could not respond."

{¶15} Also at the hearing, Relator did not contradict Respondents' claim that Relator failed to serve any other attorney with the amended complaint, and instead, relied solely on the supposed hand delivery to Mason to perfect service. Based on this uncontested fact, as well as Mason's sworn statement that she was not served, the court had ample evidence before it to determine that based on the circumstances, excusable neglect existed to fulfill the requirement in Civ.R. 6(B). See, also, *T.S. Expediting Servs., Inc. v. Mexican Industries, Inc.*, Wood App. No. WD-01-060, 2002-Ohio-2268, ¶12 (noting that "proper service of process is needed before a trial court can render a valid default judgment. If service is not made according to the Civil Rules, such service is improper and a valid judgment cannot be rendered against the defendant").

{¶16} After the court denied Relator's motion for default judgment, the court asked if the parties wanted to address Respondents' motion for leave to file an amended answer. Relator's counsel then stated, "based upon the Court's denial of the motion for default, there would be no opposition then to the motion for leave." The court then granted Respondents leave to file "without opposition." Because the court's decision to deny default judgment was not an abuse of discretion, it naturally follows that the court's grant of Respondents' unopposed motion for leave to file an amended answer was not an abuse of discretion either. Having found that the trial court did not abuse its discretion by denying Relator's motion for default judgment and granting Respondents' motion for leave to file an amended answer, Relator's first and second assignments of error are overruled.

{¶17} Assignment of Error No. 3:

{¶18} "THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND IN DENYING RELATOR'S MOTION FOR SUMMARY JUDGMENT."

{¶19} In the third assignment of error, Relator argues that the court erred by granting Respondents' motion for summary judgment instead of his own. This argument lacks merit.

{¶20} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Byrd v. Smith*, Clermont App. No. CA2007-08-093, 2008-Ohio-3597. Civ.R. 56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8.

{¶21} After a de novo review of the record, the trial court did not err in granting Respondents' motion for summary judgment and denying Relator's motion. The central issue to the case at bar is Respondents' duty under the Public Records Act to provide Relator with requested records.

{¶22} According to R.C. 149.43(A)(1), "public record means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units." Section (B)(1) of the same act provides that, "upon request * * *, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours."

{¶23} Although Relator asserted in his motion for summary judgment that he was entitled to a writ of mandamus directing the production of the requested documents, the record demonstrates that Respondents produced the documents in accordance with the Public Records Act so that summary judgment in their favor was appropriate.

{¶24} According to Relator's request for information originally sent to Karen Register,

Relator was requesting "the drafts of minutes of the meetings of the Pierce Township Board of Trustees, as such drafts were initially presented by the Pierce Township Clerk to the Pierce Township Board of Trustees for consideration (i.e., prior to any modification or amendment by the board) for" 28 meetings that occurred between 2001 and 2003. Relator also requested official minutes for the December 15, 2001 meeting and official minutes for all meetings from October to December 2004.

{¶25} In response, Register sent Relator a letter dated June 12, 2007 in which she informed Relator that draft minutes for two meetings were available but that the draft minutes for 17 meetings could not be located. However, Register informed Relator that the official minutes for those 17 meetings were available for his review.

{¶26} In Register's affidavit, attached to Respondents' summary judgment motion, she averred that "based on my custom, practice and experience, at all times relevant to this matter, the official minutes adopted by the Board of Trustees are identical to the final draft considered and approved by the Board of Trustees." Register went on to aver that Respondents had "provided the Relator with all official minutes for the dates set forth in the First Amended Complaint and, therefore, has provided the Relator with all final drafts presented to the Board of Trustees for consideration and adoption for the dates as set forth in the First Amended Complaint." The only three dates that Respondents failed to produce the minutes for review were the three dates that Register was not present to record the minutes so that the Board did not adopt any minutes for those three meetings. Register concludes her affidavit by stating that Respondents had not "removed, destroyed, mutilated, transferred, damaged or disposed of" any records in violation of the Public Records Act.

{¶27} In his response to Respondents' motion for summary judgment, Relator countered by questioning the admissibility of Register's affidavit and whether she came to know Relator's identity. However, these two matters failed to raise genuine issues of material

fact and did not preclude summary judgment.

{¶28} During the hearing, Relator tried to demonstrate why Respondents failed to fulfill the document request. However, Relator's argument further demonstrates why Respondents had already fulfilled their duty by making the official minutes available for review. During the hearing, Relator stated, "basically, we're seeking draft meeting minutes as they were presented by the township clerk to the board of trustees for consideration. * * * the clerk drafts them in her office. Those aren't public records. They do not become public records until she presents them to the board for consideration." However, the minutes presented to the board for consideration were identical to the official minutes made available to Relator for review. Therefore, reasonable minds could only conclude that Respondents already provided the originally requested meeting minutes, and had therefore fulfilled the duty set forth in the Public Records Act so that they were entitled to judgment as a matter of law.

{¶29} The other issue for which Respondents were granted summary judgment involves Relator's request for civil forfeiture and injunctive relief based on R.C. 149.351, which is invoked when public documents have been, or are threatened to be, removed, destroyed, mutilated, transferred or otherwise damaged or disposed. According to the Ohio Supreme Court, a violation of R.C. 149.351 means "any attempted or actual removal, mutilation, destruction, or transfer of or damage to a public record that is not permitted by law." *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, paragraph two of the syllabus.

{¶30} Relator asserts that Respondents violated R.C. 149.351 because their failure to produce the requested documents demonstrates a willful violation. Essentially, Relator's argument calls for this court to speculate that the reason Respondents did not produce the draft minutes was because they unlawfully destroyed them. However, we will not. Instead, Register averred that neither she nor Pierce Township destroyed the records, and Relator has failed to produce any evidence that Respondents violated the statute by destroying

records. See *State ex rel. DelMonte v. Village of Woodmere*, Cuyahoga App. No. 83293, 2004-Ohio-2340, ¶21 (affirming motion to dismiss where "appellant wholly failed to allege any fact which supports the conclusion that [appellee] improperly destroyed or removed public records in violation of R.C. 149.351").

{¶31} Having found that the trial court properly granted summary judgment in favor of Respondents and that the Respondents did not violate R.C. 149.351, Relator's third assignment of error is overruled.

{¶32} For ease of discussion, we will address Relator's final three assignments of error together.

{¶33} Assignment of Error No. 4:

{¶34} "THE TRIAL COURT ERRED IN DENYING RELATOR'S MOTION TO COMPEL DISCOVERY FROM RESPONDENTS."

{¶35} Assignment of Error No. 5:

{¶36} "THE TRIAL COURT ERRED IN FAILING TO FORMALLY RULE UPON RELATOR'S REQUEST FOR ADDITIONAL TIME TO CONDUCT DISCOVERY PURSUANT TO RULE 56(F)."

{¶37} Assignment of Error No. 6:

{¶38} "THE TRIAL COURT ERRED IN DENYING RELATOR'S MOTION TO ENFORCE PREVIOUSLY ISSUED SUBPOENA DUCES TECUM."

{¶39} In these three assignments of error, Relator asserts that the trial court erred in denying various discovery-related motions. This argument lacks merit.

{¶40} "[A]bsent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues." *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329. As previously stated, an abuse of discretion connotes more than a mere error of law or judgment, and instead, requires that the court's attitude was

unreasonable, arbitrary or unconscionable. *Blakemore*.

{¶41} The trial court did not abuse its discretion by denying Relator's motion to compel discovery. Instead, Relator moved the court to compel Respondents to provide documentation and information that they had previously provided. Relator also requested that the court compel Respondents to answer or expound upon interrogatories that had already been answered. Therefore, the court's decision to not compel these duplicate discovery requests was not unreasonable, arbitrary, or capricious.

{¶42} The trial court did not abuse its discretion by failing to formally rule upon Relator's request for additional time to conduct discovery. Initially, we note that "when a trial court fails to rule on a pretrial motion, it may ordinarily be presumed that the court overruled it." *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d at 469. Assuming, therefore, that the trial court overruled Relator's motion for additional discovery time, we find that its decision to do so was not an abuse of discretion.² Instead, Relator's motions had been pending for a year and the parties had ample time to conduct discovery. Because the trial court properly overruled the motion to compel, it follows that Relator did not need additional time to pursue discovery so that the trial court's decision to deny the request for additional time was not arbitrary, unreasonable, or capricious.

{¶43} Relator filed motions with the court asking it to enforce subpoenas duces tecum directed to the Hamilton County Sheriff's Office and the Ohio Attorney General's Office. We initially note that neither of these parties were joined as parties to the dispute. See *In re Tracy M.*, Huron App. No. H-04-028, 2004-Ohio-5756 (stating that nonparty witnesses have standing to file motions to quash subpoenas at the trial court level and may defend a favorable judgment on appeal). Through its final judgment entry, the trial court overruled as moot Relator's outstanding motions to enforce and did not abuse its discretion by doing so.

Relator, through the motions to enforce the subpoenas, moved the court to compel the Attorney General and Hamilton County Sherriff's Office to turn over documents, communications, and various items connected to computers owned and operated by Pierce Township. The Attorney General and Sherriff were involved in the matter because of an on-going criminal investigation regarding unauthorized use of Karen Register's computer and possible tampering with Pierce Township Board of Trustees' records by Relator's counsel during and after his tenure as a Pierce Township Board of Trustees member. At the hearing, the trial court heard arguments regarding the pending criminal cases and was free to determine that it did not need the subpoenaed material in order to determine the summary judgment issue. Therefore, its decision to deny Relator's motion for enforcement of the subpoenas duces tecum was not arbitrary, unreasonable, or unconscionable.

{¶44} Having found that the trial court did not abuse its discretion by overruling the discovery-related motions, Relator's fourth, fifth, and sixth assignments of error are overruled.

{¶45} Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur.

2. We also note that in the trial court's final judgment entry, the court overruled as moot all pending motions.

[Cite as *State ex rel. Doe v. Register*, 2009-Ohio-2448.]