

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Tod Wagner

Court of Appeals No. H-14-010

Appellant

Trial Court No. CVH 20101093

v.

Huron County Board of County
Commissioners, et al.

DECISION AND JUDGMENT

Appellee

Decided: February 27, 2015

* * * * *

William W. Owens, for appellant.

Russell V. Leffler, Huron County Prosecutor, and Daivia S. Kasper,
Assistant Prosecuting Attorney, for appellee.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Tod Wagner, appeals the judgment of the Huron County Court of Common Pleas, ruling in favor of appellees, the Huron County Board of County Commissioners and the Huron County Airport Authority, following proceedings

conducted pursuant to our remand in *Wagner v. Huron Cty. Bd. of Cty. Commrs.*, 6th Dist. Huron No. H-12-008, 2013-Ohio-3961. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} In *Wagner, supra*, we set forth the relevant facts in this case as follows:

This case arises out of Wagner's submission of numerous public records requests to various public offices within Huron County, including appellees * * *.

* * *

At the time the requests were made, the Board of County Commissioners consisted of three commissioners; Mike Adelman, Gary Bauer, and Larry Silcox. Dennis Sokol was the president of the Airport Authority's board of trustees. Sandra Gordley was the manager of the airport pursuant to a contract entered into by her company, N.O.F.A., Inc., and the Airport Authority.

In late-October 2010, Wagner sent four public records requests to the Board of County Commissioners. In his requests, Wagner demanded the production of numerous public documents, including in pertinent part: (1) a copy of the Huron County retention record policy; (2) a copy of a recorded easement between Huron County and Summit Motorsports Park, along with any documents or minutes of meetings where discussion of the easement took place; (3) a copy of an avigation easement agreement

between Huron County and Summit Motorsports Park; (4) tape recordings of all Airport Authority meetings for the last 15 years; (5) printed “Veeder Root” reports and reports of fuel sales; (6) audio tapes of all Huron County Board of County Commissioners meetings held between 2004 and 2006; (7) fax logs from 2002; and (8) all emails concerning the airport or the Airport Authority between 2008 and October 26, 2010.

The Board responded to Wagner’s requests in a letter dated November 3, 2010. In that letter, the Board’s administrative clerk, Cheryl Nolan, informed Wagner that the retention record policy and the easement were available for pick-up. Concerning the Airport Authority’s avigation easement agreement, the tape recordings of Airport Authority meetings, and the Veeder Root reports, Nolan directed Wagner to make his requests to the Airport Authority, since the Board of County Commissioners had no responsive records. In addition, Nolan informed Wagner that the audio tapes were located and would be available for his review during normal office hours with two business days’ notice. Finally, the letter stated that three emails were available for Wagner to pick up at the Board of County Commissioners’ office.

Wagner also sent a public records request to the Airport Authority. In his request, Wagner demanded copies of the Veeder Root records dating back as far as March 1, 1998, along with a copy of the avigation easement

agreement, and tape recordings of Airport Authority meetings. In response, Sokol wrote a letter, dated November 5, 2010, explaining that certain documents were available for Wagner's review, but that the audio tapes of the Airport Authority's meetings were unavailable because Gordley recorded over them once she reduced the content to writing. Regarding the Veeder Root reports, Sokol stated that the Airport Authority was unable to make copies as requested due to the voluminous nature of the records. Instead, Sokol offered to provide Wagner with access to the records for his review and the ability to copy those records he found pertinent. Sokol also provided copies of the Airport Authority's meeting minutes from 2007. Further, Sokol informed Wagner that the Airport Authority was not in possession of the avigation easement agreement.

On November 8, 2010, Wagner responded to Nolan's letter, informing her that he would pick up the records and review the audio tapes in person. Wagner was subsequently permitted to review the requested audio tapes for 2004 and 2005, but Nolan had not yet been able to locate the tapes from 2006. She subsequently located the 2006 tapes. After locating the 2006 tapes, Nolan sent Wagner an email at the email address listed on his letterhead informing him that the tapes were available for his review.

Unsatisfied with the responses he received from the Board of County Commissioners and the Airport Authority, Wagner proceeded to file a complaint for a writ of mandamus and injunctive relief, alleging that appellees unlawfully delayed the production of public records and destroyed certain public records. Following the filing of Wagner's complaint, Nolan discovered additional emails that were responsive to Wagner's request, and forwarded them to him.

On December 30, 2011, appellees filed their motion for summary judgment. Prior to responding, Wagner filed his own motion for summary judgment. The trial court heard arguments on the cross motions on January 19, 2012. Ultimately, the court denied Wagner's motion for summary judgment, and granted appellees' motion for summary judgment, in part. A two-day trial began on February 9, 2012, to dispose of the remaining issues concerning the audio tapes of Airport Authority meetings, the Board of County Commissioners' audio tapes from 2006, and several emails regarding the airport that Wagner alleged the Board of County Commissioners had unlawfully failed to produce. Following trial, the court issued its order denying Wagner's request for a writ of mandamus and entered judgment in appellees' favor. Wagner's timely appeal followed. *Id.* at ¶ 2-9.

{¶ 3} On appeal, we determined that the trial court erroneously denied Wagner’s motion for summary judgment where the record clearly demonstrated that the Airport Authority wrongfully destroyed the Veeder Root reports. *Id.* at ¶ 17. Further, we found that Wagner had, in fact, filed a records request with the Airport Authority concerning the audio tapes. Thus, we held that the trial court’s determination to the contrary was against the manifest weight of the evidence. *Id.* at ¶ 26. In so holding, we noted that our holding concerning the audio tapes was limited to a determination that Wagner made his request to the proper party; we declined to determine the merits of his request or whether he should prevail in his action under R.C. 149.351. *Id.* at ¶ 26, fn. 3. In light of our findings, we remanded this case to the trial court to do the following: “(1) determine the extent of Wagner’s damages, including the appropriate amount of attorney’s fees, as to his claims regarding the Veeder Root reports; and (2) conduct further proceedings with respect to Wagner’s claims regarding the Airport Authority audio tapes consistent with our determination that Wagner did, in fact, request the records from the appropriate entity.” *Id.* at ¶ 28.

{¶ 4} Following remand, the trial court held a hearing on February 28, 2014. At the hearing, Wagner provided his reasoning behind requesting the records. Wagner testified that he wanted to obtain the requested documents in order to build a case for continuing the operations of the Huron County Airport. Because he was a patron of the airport, Wagner wanted the facility to remain operational. In his estimation, some were attempting to close the airport, claiming that it was not operating at a profit. Wagner

disagreed with this claim, stating that any revenue shortfalls were attributed to poor monitoring of fuel inventories (the chief source of income for the airport). In particular, Wagner testified that he witnessed Airport Authority board members stealing fuel on several occasions. Moreover, based on his past experience with the operations of the airport, including attendance at the majority of the Airport Authority's meetings, Wagner believed that the facility was actually operating at a profit. Thus, Wagner indicated that he wanted the requested records so that he could show that fuel sales were being understated.

{¶ 5} In addition to explaining his purpose behind making the public records requests, Wagner also testified concerning the number of records that were unlawfully withheld and the damages he was entitled to as a result of appellees' actions. Specifically, Wagner stated that 2,890 Veeder Root Reports were not provided to him. He arrived at his conclusion by multiplying the number of days for which no records were provided (3,387 days) by the average number of reports per day (.853 reports per day). Since the version of R.C. 149.351 that was in existence at the time this action was filed provided for statutory damages in the amount of \$1,000 per violation, Wagner reasoned that he was entitled to \$2,980,000, plus attorney's fees.

{¶ 6} Concerning attorney's fees, Wagner acknowledged that he signed a contingent fee agreement on October 6, 2010, wherein Wagner's attorney was entitled to 40 percent of the total amount recovered from the subsequent forfeiture suit. Notably, Wagner entered into the agreement with his attorney prior to making the public records

requests that are at issue in this case. Nonetheless, Wagner insisted that he had already made prior requests for records before soliciting the help of an attorney.

{¶ 7} As his next witness, Wagner called Steven Okey. Okey, who is an attorney who practices throughout Ohio, opined that a 40 percent contingent fee was “not unusual given the required amount of work and the length of time of the representation.” He went on to indicate that the fee was fair and reasonable.

{¶ 8} Following the foregoing testimony, the Airport Authority called John Allton to the stand. Allton, an attorney with a law practice in Huron County, testified as to the standard rate for legal services in the area, indicating that an hourly rate of \$175 to \$200 was reasonable for an attorney with the same amount of experience as Wagner’s attorney.

{¶ 9} At the conclusion of the hearing, the trial court ordered briefing on the issues before it, and the matter was continued. On May 9, 2014, the trial court issued its decision, concluding that Wagner was not entitled to damages pursuant to his forfeiture action. In its decision, the court found that Wagner was not “aggrieved” by appellees’ failure to produce the requested documents, because he was merely “feigning an intent to access public records.” The court further found that the audio tapes that Wagner requested from the Airport Authority were not public records because “the Airport Authority does not tape each meeting, the recordings are used as a convenience to the preparer of written meeting minutes, not kept by or relied upon by the Airport Authority, and not reviewed for accuracy.”

{¶ 10} Following the trial court's decision, Wagner filed his timely notice of appeal.

B. Assignments of Error

{¶ 11} Wagner assigns the following errors for our review:

1. The trial court erred and/or committed reversible error when it failed to award damages for the wrongfully destroyed Veeder Root Reports.
2. The trial court erred and/or committed reversible error when it failed to award damages to the Appellant for the Wrongfully Destroyed Tapes Public Records.
3. The trial court erred and/or committed reversible error when it failed to award Attorney [sic] fees to Appellant.

II. Analysis

{¶ 12} In his first assignment of error, Wagner argues that the trial court erred in failing to award him damages for the Airport Authority's wrongful destruction of the Veeder Root reports. Likewise, in his second assignment of error, Wagner asserts that the trial court erroneously denied him damages for the Airport Authority's wrongful destruction of the audio tapes. Finally, in his third assignment of error, Wagner contends that the trial court erred in failing to award him attorney's fees. Because Wagner's assignments of error are interrelated, we will address them simultaneously.

{¶ 13} At the outset, we note that the trial court’s denial of damages and attorney’s fees in this case was based upon its finding that Wagner was not an “aggrieved” party under R.C. 149.351(B).

{¶ 14} The former version of R.C. 149.351(B), which was in effect on the date this action was filed, states, in relevant part:

(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:

* * *

(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.)

{¶ 15} Under the clear language of the statute, a party must be “aggrieved” in order to recover a forfeiture. We have previously held that a party is “only considered to be aggrieved if he or she made a request with the goal of actually accessing the public records.” *State ex rel. Verhovec v. Northwood*, 6th Dist. Wood No. WD-13-002, 2013-

Ohio-5074, ¶ 18, citing *Rhodes v. City of New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 24. Here, the trial court found that Wagner was not aggrieved because

1) he retained counsel and entered into a contingency fee agreement then subsequently made nineteen (19) requests for public records of several public agencies;

2) after receiving several years of Veeder Root reports, [Wagner] never compared them to the other records of fuel sales to determine fuel had been stolen from the airport (as he claimed occurred).

The record further establishes that [Wagner's] spouse was a 12 year member of the Airport Authority board and [Wagner was] a plane owner and tenant of the airport.

{¶ 16} In addition to its determination that Wagner was not an aggrieved party with respect to the Veeder Root reports, the trial court went on to find that Wagner was not aggrieved by the Airport Authority's destruction of the audio tapes.

{¶ 17} We review the trial court's finding that Wagner was not aggrieved by the destruction of Veeder Root reports and audio tapes under a manifest weight standard. *See Reinbolt v. Kern*, 183 Ohio App.3d 287, 2009-Ohio-3492, 916 N.E.2d 1100, ¶ 28 (6th Dist.) ("The determination of the damage award is a factual determination that must be supported by the evidence and, therefore, will not be overturned on appeal unless it is contrary to the manifest weight of the evidence."). Under that standard, when reviewing

the lower court's decision, we must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20. In so doing, we "must always be mindful of the presumption in favor of the finder of fact." *Id.* at ¶ 21.

[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * * If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Id.*, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3.

{¶ 18} In responding to the trial court's determination that he was not an aggrieved party under R.C. 149.351(B), Wagner contends that we already made such a determination in *Wagner, supra*. Thus, Wagner asserts that the trial court failed to follow our prior decision on remand. Moreover, Wagner argues that the trial court's finding that he requested the records in order to obtain damages was not supported by the record and was against the manifest weight of the evidence.

{¶ 19} As to Wagner’s assertion that the issue of whether he was an aggrieved party was not before the trial court on remand, we must disagree. In *Wagner, supra*, we held that the Airport Authority unlawfully destroyed the Veeder Root reports. Regarding the audio tapes, we found that the trial court’s judgment in favor of the Airport Authority was against the manifest weight of the evidence because it was based on the false premise that Wagner failed to request such records from the Airport Authority when, in fact, the record did contain such a request. Our decision left open the question of whether Wagner was actually aggrieved by the Airport Authority’s destruction of the requested records. Consequently, we find that the trial court did not err in addressing that issue on remand as a predicate to awarding damages and attorney’s fees to Wagner. *See Rhodes*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782 at ¶ 16 (concluding that a plaintiff in a forfeiture suit under R.C. 149.351 must demonstrate that he requested public records to which he was entitled, the public office was required to honor that request, the records were disposed of in violation of R.C. 149.351(A), *and* he was aggrieved by the improper disposal).

{¶ 20} In addition to the foregoing, Wagner argues that the trial court’s finding that he was not an aggrieved party was against the manifest weight of the evidence. Specifically, Wagner states that the record demonstrates that his goal in requesting the Veeder Root reports and audio tapes was to “get proof of the financial affairs of the Airport.” He asserts that he was aggrieved because “he is now unable to determine the intent of the Appellees regarding the Airport or prove the continued economic viability of

the Airport.” He goes on to indicate that the Veeder Root reports were requested in order to allow him to demonstrate the airport’s profitability by computing the amount of revenue that the Airport was receiving from fuel sales.

{¶ 21} Having reviewed the record in its entirety, we cannot agree with Wagner that the trial court’s decision was against the manifest weight of the evidence. We recognize that Wagner consistently stated his desire to demonstrate the profitability of the airport through the information he obtained pursuant to the public records requests. However, the record also supports the trial court’s finding that Wagner, upon receiving a portion of the records he requested, failed to actually perform the computations that would allow him to prove the airport’s profitability through fuel sales. Further, Wagner retained counsel under a contingent fee agreement *prior* to making public records requests in late-October 2010, a fact that belies his assertion that he made the requests with the goal of actually receiving the information in order to prove the airport’s profitability.

{¶ 22} Although the evidence in this case is susceptible to more than one construction, we remain mindful of the presumption in favor of the finder of fact and our obligation to interpret the evidence in a manner that is consistent with the trial court’s judgment. *Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, at ¶ 21. As a result, we conclude that the trial court’s determination that Wagner was not an aggrieved party was not against the manifest weight of the evidence. Since Wagner was

not an aggrieved party, the trial court did not err in failing to award him damages or attorney's fees under R.C. 149.351.

{¶ 23} Accordingly, appellant's assignments of error are not well-taken.

III. Conclusion

{¶ 24} For the foregoing reasons, the judgment of the Huron County Court of Common Pleas is affirmed. Costs are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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