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SLIP OPINION NO. 2023-OHIO-2266

THE STATE EX REL. ATAKPU, APPELLANT, *v.* SHULER, APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Atakpu v. Shuler*, Slip Opinion No. 2023-Ohio-2266.]

Mandamus—Public-records requests—Court of appeals did not abuse discretion by finding that prison employee's actions met requirements for declining to award damages pursuant to R.C. 149.43(C)(2)(a) and (b)—Court of appeals did not err in determining that R.C. 149.43(C)(3)(a)(i) did not apply and did not abuse discretion in determining that prison employee did not act in bad faith when inadvertently providing the wrong documents to inmate—Court of appeals' denial of inmate's requests for statutory damages and court costs affirmed.

(No. 2022-1337—Submitted April 4, 2023—Decided July 6, 2023.)

APPEAL from the Court of Appeals for Marion County, No. 9-21-33.

Per Curiam.

{¶ 1} Appellant, Peter J. Atakpu, filed a petition for a writ of mandamus in the Third District Court of Appeals, seeking to compel appellee, Lorri Shuler, to produce records in response to a request made under R.C. 149.43, Ohio's Public Records Act. The Third District granted the writ but denied Atakpu's requests for statutory damages and court costs. Atakpu appealed. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} Atakpu is an inmate at the North Central Correctional Complex ("NCCC"). Management & Training Corporation is a private company that contracts with the state of Ohio to house state prisoners. Shuler is an employee of Management & Training Corporation whose title is "institutional inspector."

{¶ 3} Although this appeal arises from a public-records request Atakpu sent to Shuler, the appeal also involves a civil suit Atakpu filed against the Montgomery County Auditor. In that case, on May 10, 2021, Atakpu issued a Civ.R. 45 subpoena to Shuler demanding copies of NCCC's legal-mail logs for March 5, 6, 9 through 13, 16, 17, and 18, 2020. Legal-mail logs list information about legal mail sent to inmates, including dates of receipt by the institution and by the inmate. The subpoena requested redacted copies of the logs.

{¶ 4} On June 4, 2021, before receiving a response to the subpoena, Atakpu sent an electronic kite to Shuler. In the kite, Atakpu requested redacted and certified copies of the legal-mail logs for March 5, 6, 9 through 13, 16, 17, 18, 21, 23, and 25, 2020 and for August 1, 11, 13, 14, 20, and 28, 2018. Atakpu had requested the logs for many of these dates in his subpoena, but the March 21, 23, and 25, 2020 logs and all the August 2018 logs had not been requested in the subpoena. Atakpu did not refer to the subpoena in his June 4 kite. Atakpu's kite specified that he was requesting the logs even for dates on which he did not receive any legal mail.

{¶ 5} On June 7, Shuler replied to Atakpu by kite, stating, "You are not going to receive copies of legal mail logs if you did not have legal mail that day. You have been told this numerous times. If the information does not pertain to you and your name is not there you will not receive that, these logs have other inmates [sic] names on them that is no concern of yours." The record does not contain any other response to Atakpu's June 4 public-records request.

{¶ 6} On June 11, counsel for NCCC sent Atakpu a response to his May 10 subpoena. For each date requested in the subpoena, the response contained either the corresponding legal-mail log or a note stating that there was no log for that day except that the logs provided were from the wrong year—2021 instead of 2020. Information related to other inmates was redacted from the logs provided, and the cover letter stated that "all documents have been redacted to protect the privacy rights of other inmates." The subpoena response did not include logs for any of the dates Atakpu had requested in his June 4 kite but did not request in the subpoena. The record does not contain any other communication between Atakpu and NCCC regarding the subpoena or the June 4 kite.

{¶ 7} On October 6, 2021, Atakpu filed the current action in the Third District. Atakpu asked for a writ of mandamus ordering Shuler to produce the records requested in his June 4 public-records request. He also requested court costs and statutory damages. Atakpu's complaint does not mention his subpoena or that the records produced in response to the subpoena were from the wrong year.

{¶ 8} Shuler filed an answer, and the court issued an alternative writ and scheduled briefing. The brief Atakpu filed in the court of appeals did not mention that NCCC produced some documents in response to the subpoena, nor did it mention that the documents that were produced were from the wrong year. Shuler's brief stated that "counsel for NCCC inadvertently responded to the May 10, 2021 subpoena" by providing log entries for the year 2021.

{¶ 9} In a March 21, 2022 affidavit attached to her court-of-appeals brief, Shuler averred that Atakpu had been provided all existing legal-mail logs for all dates specified in his subpoena and in his public-records request. Shuler further stated that entries relating to other inmates had been redacted from the logs provided.

{¶ 10} On May 5, 2022, after the close of briefing in the court of appeals, Atakpu filed a document titled "Brief of Relator Peter J. Atakpu." In the filing, Atakpu stated that the legal-mail logs he received from NCCC were improperly formatted, with certain columns cut off. He suggested that the logs were provided in a "portrait" format but should have been provided in a "landscape" format.

{¶ 11} The Third District found that "[Shuler] believed that she had complied with [Atakpu's] public record request" and that "it was not until [Atakpu] filed this action that she discovered the wrong records had been provided to [him]." Shuler, the court further found, "then provided to [Atakpu] the correct records, in redacted form, as specified in the request." The court also addressed the formatting issue, finding that "there is no indication that any discrepancy in the formatting of the copies was intentional" but that Atakpu "is entitled to a legibly formatted copy of the redacted records." The court granted the writ "to the limited extent that [Atakpu] be provided with redacted copies of the logs formatted in a manner so that all the columns of information can be viewed." The court denied Atakpu's requests for statutory damages and court costs.

{¶ 12} Atakpu has appealed, challenging the Third District's denial of his requests for court costs and statutory damages; his appeal does not challenge the limited nature of the writ. He also argues that the Third District violated App.R. 12(A)(1)(c) by failing to rule on a motion to strike Shuler's brief and failing to address an argument he asserted in his brief.

II. LEGAL ANALYSIS

A. Statutory damages

{¶ 13} Statutory damages shall be awarded if a requester of public records transmits a written request to a public office by hand delivery, electronic submission, or certified mail and the public office or person responsible for public records fails to comply with its obligations under R.C. 149.43(B). R.C. 149.43(C)(2). The court may reduce, or not award, statutory damages if it determines both that (1) based on the law as it existed at the time of the request, a well-informed person responsible for the requested public records reasonably would have believed that the person's conduct did not constitute a failure to comply with an obligation under R.C. 149.43(B), and (2) a well-informed person responsible for the requested public records reasonably would have believed that the person's conduct would serve the public policy that underlies the authority asserted as permitting that conduct. R.C. 149.43(C)(2).

{¶ 14} In general, we review de novo a court's determination whether a public-records requester is eligible for statutory damages for a public office's failure to comply with an obligation under R.C. 149.43(B). *State ex rel. Ellis v. Cleveland Police Forensic Laboratory*, 167 Ohio St.3d 193, 2021-Ohio-4487, 190 N.E.3d 605, ¶ 9. However, a court's subsequent decision under R.C. 149.43(C)(2)(a) and (b) to reduce or ultimately not award statutory damages is reviewed for an abuse of discretion. *Id.* at ¶ 11.

{¶ 15} Here, Atakpu transmitted his public-records request through NCCC's electronic "JPay" kite system, which qualifies as an electronic submission for purposes of R.C. 149.43(C)(2), *State ex rel. Griffin v. Sehlmeyer*, 165 Ohio St.3d 315, 2021-Ohio-1419, 179 N.E.3d 60, ¶ 21. The Third District found that "[Shuler] promptly responded to [Atakpu's] June 4, 2021 request and provided records that she believed were responsive to the request." The Third District thus believed that Shuler responded promptly to the June 4 public-records request when on June 11

she responded to the subpoena but that the production was inadvertently incomplete and for the wrong dates. "Even assuming that [Atakpu] has established that the statutory-damage provisions of R.C. 149.43(C)(2) were triggered," the court concluded, "appropriate conditions were met under R.C. 149.43(C)(2)(a) and (b) to authorize an abatement of the award of statutory damages."

{¶ 16} Here, Atakpu sent Shuler a subpoena demanding certain records and subsequently sent a public-records request asking for the same records as additional similar ones. The Third District found that Shuler had promptly produced the documents previously demanded in the subpoena but had inadvertently produced documents from the wrong year, and Atakpu did not notify Shuler that the production was incomplete or for the wrong dates before filing his mandamus action. Under these circumstances, the Third District did not abuse its discretion by finding that Shuler's actions met the requirements for declining to award damages pursuant to R.C. 149.43(C)(2)(a) and (b). Because Shuler believed that she had provided Atakpu the documents he had requested, Shuler could have reasonably believed that she had complied with the requirements of R.C. 149.43(B), *see* R.C. 149.43(C)(2)(a), and that her conduct was serving the public policy of providing access to public records, *see* R.C. 149.43(C)(2)(b).

{¶ 17} Atakpu also argues that he is entitled to statutory damages because Shuler had improperly redacted information relating to other inmates from the copies she produced. Atakpu, however, had requested redacted copies of the legal-mail logs. In addition, he had stated in an affidavit, "I was consciously aware that other inmate's [sic] information may be on the incoming legal mail logs, therefore, because of security concerns, I requested the logs to be redacted if I did not receive incoming legal mail for those specific days." Thus, Shuler complied with Atakpu's public-records request when she provided redacted logs.

{¶ 18} Therefore, we affirm the Third District's denial of Atakpu's request for statutory damages.

B. Court costs

{¶ 19} Court costs may be awarded in a public-records mandamus action for either of two reasons. *See* R.C. 149.43(C)(3).

{¶ 20} First, an award of court costs is mandatory when "the court orders the public office or the person responsible for the public record to comply with [R.C. 149.43(B)]." R.C. 149.43(C)(3)(a)(i); *accord State ex rel. Hedenberg v. N. Cent. Corr. Complex*, 162 Ohio St.3d 85, 2020-Ohio-3815, 164 N.E.3d 358, ¶ 13. The Third District determined that this provision does not apply here. We review de novo lower-court determinations concerning mandatory statutory damages in public-records cases, *State ex rel. Armatas v. Plain Twp. Bd. of Trustees*, 163 Ohio St.3d 304, 2021-Ohio-1176, 170 N.E.3d 19, ¶ 12, and will do so for mandatory court costs as well.

{¶ 21} The Third District found that Atakpu "has been provided with the records, with redaction, as specified by the request." However, the court granted a writ of mandamus "to the limited extent that [Shuler] shall provide to [Atakpu] copies of the requested redacted records in the same 'landscape' format as the copies [Shuler] provided to the [court of appeals]." This writ, on its face, may appear to constitute an order requiring Shuler to comply with the Public Records Act. However, the Third District's decision never explicitly states a finding that Shuler provided the records to Atakpu in portrait rather than landscape format. And more importantly, the Third District never found that Shuler failed to comply with R.C. 149.43(B) by failing to provide records in landscape format. Under these circumstances, we discern no error in the Third District's determination that R.C. 149.43(C)(3)(a)(i) does not apply here.

{¶ 22} A second basis for a mandatory award of court costs exists when a court determines that the public office acted in bad faith when it made requested records available after a mandamus action was filed but before relief was ordered. R.C. 149.43(C)(3)(a)(ii); *Hedenberg* at ¶ 13. We apply an abuse-of-discretion

standard when reviewing a lower court's determination whether to award attorney fees in a public-records action based on a claim of bad faith, *see State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 35-36, and will do so for court costs as well.

{¶ 23} Here, the Third District found that Shuler inadvertently provided the wrong documents and did not act in bad faith when doing so. The Third District did not abuse its discretion in making this determination under R.C. 149.43(C)(3)(a)(ii).

{¶ 24} We therefore affirm the Third District's denial of court costs.

C. Alleged violations of App.R. 12(A)(1)(c)

{¶ 25} Finally, Atakpu argues that the Third District violated App.R. 12(A)(1)(c) by failing to rule on all of his motions and failing to address all of the arguments he asserted in his court-of-appeals brief. In particular, Atakpu contends that the Third District failed to rule on a motion to strike Shuler's court-of-appeals brief based on the brief's alleged violation of a local rule. Atakpu also contends that the Third District failed to address an argument he made in his court-of-appeals brief that Shuler improperly amended her pleadings. Even assuming these were colorable arguments, App.R. 12(A)(1)(c) applies only to *appeals*. *See* App.R. 12(A)(1) ("On an undismissed appeal from a trial court, a court of appeals shall * * * decide each assignment of error and give reasons in writing"). It has no applicability to a court exercising original jurisdiction, which the Third District did in this case.

III. CONCLUSION

{¶ 26} We affirm the court of appeals' denial of statutory damages and court costs.

Judgment affirmed.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, BRUNNER, and DETERS, JJ., concur.

Peter J. Atakpu, pro se.

Mansour Gavin, L.P.A., Michael P. Quinlan, and Malek A. Khawam, for appellee.