IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 12, 2017 Session

KENNETH L. JAKES v. SUMNER COUNTY BOARD OF EDUCATION

Appeal from the Chancery Court for Sumner County
No. 2014CV53 Dee David Gay, Judge[1]

No. M2015-02471-COA-R3-CV

This appeal involves a request to inspect public records pursuant to the Tennessee Public Records Act, codified at Tennessee Code Annotated section 10-7-101, et seq. The plaintiff filed suit when his request to inspect the records policy for the Sumner County Board of Education was denied because he failed to make his request by mail or in person. The plaintiff sought attorney fees and requested a show cause hearing and a declaratory judgment, requiring the defendant to accept requests to inspect public records made by email, facsimile, telephone, or other similar methods. The defendant moved for summary judgment. The court denied summary judgment. Following a hearing, the court held that the request, made by email and again by telephone, was compliant with the Tennessee Public Records Act and that the defendant's refusal to provide said records was unlawful. The court further found the defendant's policy for accepting public record requests in violation of the Tennessee Public Records Act. The court denied the request for attorney fees. The defendant appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., joined, and W. NEAL MCBRAYER, J., joined, and filed a separate concurring opinion.

Edmund Scott Sauer, Eric Todd Presnell, and Kristi W. Arth, Nashville, Tennessee, for the Sumner County Board of Education.

Kirk L. Clements, Goodlettsville, Tennessee, for the appellee, Kenneth L. Jakes.

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[1]Sitting by interchange.

Keith C. Dennen, Nashville, Tennessee, for the Amicus Curiae, Tennessee Risk Management Trust.
Jennifer S. White and Randall G. Bennett, Nashville, Tennessee, for the Amicus Curiae, Tennessee School Boards Association.

Charles W. Cagle and Laura H. Alrutz, Nashville, Tennessee, for the Amicus Curiae, the Tennessee Organization of School Superintendents and the Association of Independent and Municipal Schools.

Robyn Beale Williams and Aaron S. Guin, Nashville, Tennessee, for the Amicus Curiae, Tennessee Municipal League Risk Management Pool, Inc.

John P. Williams, Nashville, Tennessee, and Richard L. Hollow, Knoxville, Tennessee, for the Amicus Curiae, Tennessee Coalition for Open Government, Inc.

OPINION

I. BACKGROUND

On Friday, March 21, 2014, Kenneth L. Jakes ("Plaintiff") sent the following email to Jeremy Johnson, the Sumner County Board of Education's ("Defendant" or "the BOE") Supervisor of Board and Community Relations:

> Mr. Johnson as a public record request to inspect and review, please provide the following for my inspection[:]
>
> The records policy for the [BOE]. If the records policy is online you can simply provide the link. If not contact me when ready for my review.

The request was made pursuant to the Tennessee Public Records Act ("TPRA"), codified at Tennessee Code Annotated section 10-7-101, et seq. The information requested was available online through Defendant's website. At that time, Defendant's practice was to accept public record requests by mail *or* in person. However, the Board Policy Manual provided as follows:

> Requests for inspection or copies of public documents shall be made to the Director's Office under the supervision of the Supervisor of Board and Community Relations. Requests for inspection or copies of public documents shall be made *in writing* on the "Inspection/Duplication of Records Request" form provided by the Office of Open Records Counsel of the Comptroller's Office of the State of Tennessee.

(Emphasis added.). The policy manual was later updated on February 19, 2015, to reflect Defendant's actual practice.[2]

Before Mr. Johnson could respond, Plaintiff telephoned and left a voicemail requesting the same information and then sent another email, requesting the contact information for Defendant's legal counsel. Mr. Johnson responded to the initial request on Monday, March 24, 2014, by email, in pertinent part, as follows:

> In keeping with our practice regarding open records requests, you'll need either to submit your request in person or via the postal service.

Plaintiff then sent three additional emails, threatening litigation if he did not receive the information as requested. Plaintiff alleged:

> You[] are about to find out the true meaning of being challenged on an issue. There's no way on earth the Court will rule on your behalf. Opinions are one thing and established legal [precedents] is another. Are you ready to make history? I am.

He later stated:

> Mr. Johnson, you left out another way I could obtain your records policy, That method is called DISCOVERY.

Meanwhile, Mr. Johnson contacted Defendant's general counsel, Jim Fuqua, who advised him that he was not required to comply with electronic requests to inspect public records.

On March 31, 2014, Plaintiff sent a second public record request by email in which he sought to inspect and review "[a]ny and all communications between [Mr. Johnson] and any other party or parties concerning [his] first Public Record request for [Defendant's records policy]."[3] Plaintiff then filed suit against Defendant on April 9, 2014. Plaintiff sought attorney fees and requested a show cause hearing and a

[2] The updated policy provided that the BOE would accept requests to inspect public records made in person or by email and specifically prohibited "advanced request forms for personal inspection of records via email, text message, facsimile, telephone, or other method of communication." Further, the policy provided that documents found on the BOE website or on the Internet were not be subject to the response requirements specified under the TPRA but would be provided in response to a request that is sufficient detailed.

[3] This request was denied by the BOE on February 23, 2015.

declaratory judgment, requiring Defendant to accept requests made by email, facsimile, telephone, or other similar methods. At some point, Plaintiff was provided with the requested information.

Defendant responded by denying wrongdoing and by filing a motion for summary judgment, which was denied. Plaintiff sought to depose Mr. Johnson and other employees of the BOE. Defendant filed a motion for a protective order to prohibit discovery by deposition. The court entered a protective order prohibiting discovery by deposition, and the case proceeded to a hearing at which several witnesses testified.

Mr. Johnson testified that he has served as the board and community relations supervisor for the BOE since January 2008. He operates as a secretary to the BOE and is responsible for preparing agendas for school board meetings, keeping minutes at said meetings, coordinating with the media, and acting as a liaison between the director of schools and the professional staff and between the director of schools and the principals and members of the school board. He stated that he has overseen the implementation of open government initiatives as part of his employment. He assisted the BOE in implementing an online meeting system and placing the school board meeting videos online for public access. He also provides online access to certain documents of importance, e.g., the budget and monthly expenditure statements. He stated that the BOE's records policy is online and has been accessible to the public since August 2011. He acknowledged that transcript requests are made online through a different office.

Mr. Johnson testified that he is also responsible for responding to all public record requests. He stated that the BOE requires citizens to make requests to inspect public records in person or by mail. He agreed that the policy in place at the time of the request at issue required citizens to make requests to inspect in writing. He asserted that he also permitted citizens to make a request to inspect in person and that the policy was revised to reflect his actual practice. He explained that once he receives a request, he locates the requested documents and then provides them for inspection to the requesting citizen. He provided that he does not have immediate access to all documents because some documents are housed in other offices. He noted that school records may be housed at 1 of the 46 individual schools. He agreed that a citizen electing to make a request in person may have to return at a later date to inspect the requested records. He estimated that he receives approximately 12 to 15 requests per year and that he is the sole person in charge of responding to said requests.

Mr. Johnson testified that the BOE chose not to accept requests to inspect made by electronic communication because the current system allows for a more formal process that is easily manageable. He noted that a request to inspect made by email could be neglected while he is away from the office on vacation, while a request to inspect by mail

or in person would be responded to in a timely fashion by other assistants in the office. He further explained that requests made by mail or in person allowed him to keep a record of the documents requested and his response. He provided that he responds to requests made by mail with certified mail, thereby allowing him to keep a record of when his response was received. He stated that it cost approximately $6 to respond by certified mail and that the citizen could not receive the response unless he or she was present at home to sign for certified mail. He acknowledged that he had responded to requests for public records by email on occasion. He explained that these requests were different from a "formal records request" that invoked the TPRA.

Relative to the request at issue, Mr. Johnson testified that he forwarded Plaintiff's emails that threatened litigation to Mr. Fuqua, the attorney for the BOE. He recalled that Mr. Fuqua advised him that he was not required to respond to requests made by email. He also believed that information provided on the website for the Office of Open Records confirmed Mr. Fuqua's advice. He agreed that he fulfilled Plaintiff's initial records request on February 23, 2015, in an attempt to resolve the litigation.

Mr. Fuqua testified that he has been a licensed attorney in Tennessee since 1968, that he served as a board member for the BOE from 1996 through 2000, and that he has served as an attorney for the BOE since 2005. He is responsible for attending school board meetings and advising the BOE on legal issues. He stated that he was a board member when the public records policy was revised in 1997. He believed that the 1997 policy complied with the law in place at the time but agreed that policy was in violation of the TPRA as amended in 2008. He explained that he and the other attorneys simply failed to recognize the unlawfulness of the policy but asserted that the actual practice followed by the BOE was compliant with the TPRA as amended. He claimed that he spoke with Elisha Hodge, general counsel for the Office of Open Records Counsel, in response to Plaintiff's inquiry and was advised that the BOE was not required to accept a request to inspect public records made by email. He noted that Ms. Hodge recommended that the BOE change its policy to specifically provide as such. He recalled advising Mr. Johnson in accordance with his conversation with Ms. Hodge.

Chris Brown, the assistant to the director of information services for Sumner County Schools, testified that he is responsible for managing the day-to-day operations of the technology department in the Sumner County school system, assisting the finance director in setting the budget, and overseeing the business operations within the school system. He provided that he is also responsible for managing 18 employees in the department. He alleged that technology is not in place to ensure that an email message is received by the recipient or that it is not mishandled by a message rule or flagged by the spam filter. He noted that it may take a recipient "a day or more" to discover an email in his or her inbox. He explained that the school system's email addresses were delisted

from the website three years ago because employee emails were being added to spam lists or cold call email lists. He provided that accepting public record requests by email could pose a potential security risk because it would require Mr. Johnson to open an email from an untrusted source. He noted that employee's voicemail inboxes had also been limited to store approximately 50 voicemails. He provided that their email and telephone systems had experienced approximately 30 outages in the past year. He estimated that it could cost approximately $40,000 to implement the security and storage capacity necessary to accommodate public records requests made by telephone or email because he would have to update the entire system, not just Mr. Johnson's.

Neil Siders, a journalist, recalled speaking with Mr. Johnson on March 6, 2015. He claimed that Mr. Johnson informed him that the BOE did not have a specific open records request form but that he could access a generic form on the comptroller's website. He further advised him to "shoot him an email" requesting the information.

Plaintiff testified that he lives with his family in Davidson County, where he also operates his own produce company. He frequents Sumner County for business purposes and to visit family. He provided that he is running for an at-large seat for the Nashville Metro Council in Tennessee and has been engaged in making public record requests since 2006. He summarized his experience with the process of making record requests and claimed that he primarily made requests by email. He stated that he has advised other citizens regarding the process for making record requests and that he made the request at issue because a friend advised him that the BOE did not accept requests to inspect made by email. He recalled that he first contacted Mr. Johnson when he was unable to find the records policy for the BOE on the school system's website.[4] He explained that he ultimately sent several emails threatening litigation because he simply wanted the BOE to change its policy to comply with the TPRA.

Following the hearing, the court held that the March 21 request complied with the TPRA and was a "valid public records request for inspection." The court further held that Defendant's policy violated the TPRA. The court enjoined Defendant from using the current policy. However, the court held that the March 31 request was overly broad and insufficiently detailed to enable the records custodian to identify the records. The court further found that the March 31 request was not a public record request within the meaning of the TPRA. The court denied Plaintiff's attorney fee request, finding that the legal issues presented were unclear and that Defendant acted in good faith and in reliance on advice from counsel. The court also denied Plaintiff's request for discretionary costs and fees and Defendant's request for a stay pending appeal. This appeal followed. During the pendency of this appeal, the legislature amended Tennessee Code Annotated

[4]He claimed unfamiliarity with computers but later stated that he found Mr. Johnson's email address through a Google search on his mobile telephone.

section 10-7-503(a)(7)(A) to require acceptance of requests to inspect submitted in person or by telephone, fax, mail, or email.

II. ISSUES

We consolidate and restate the issues raised on appeal as follows:

A. Whether this appeal is moot.

B. Whether the court abused its discretion in issuing a protective order preventing discovery.

C. Whether the court erred in finding that the March 21 request complied with the TPRA.

D. Whether the court erred in finding that the March 31 request was overly broad and insufficiently detailed.

E. Whether the court abused its discretion in denying attorney fees.

III. STANDARD OF REVIEW

On appeal, the factual findings of the trial court are accorded a presumption of correctness and will not be overturned unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d). The trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Blackburn v. Blackburn*, 270 S.W.3d 42, 47 (Tenn. 2008); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

Decisions pertaining to discovery and whether to award attorney fees should not be overturned absent an abuse of discretion. Under the abuse of discretion standard, this court is bound by the principle that the trial court "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *Deakins v. Deakins*, E2008-00074-COA-R3-CV, 2009 WL 3126245, at *7 (Tenn. Ct. App. Sept. 30, 2009) (quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)). A trial court abuses its discretion when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (citation omitted).

IV. ANALYSIS

A.

As a threshold issue, we must consider whether this appeal is rendered moot by the amendment of Tennessee Code Annotated section 10-7-503(a)(7)(A), which provides, in pertinent part, as follows:

> (i) A governmental entity shall not require a written request or assess a charge to view a public record unless otherwise required by law. Requests to view public records may be submitted in person or by telephone, fax, mail, or email if the governmental entity uses such means of communication to transact official business, or via internet portal if the governmental entity maintains an internet portal that is used for accepting public records requests.

"An issue becomes moot if an event occurring after the commencement of the case extinguishes the legal controversy attached to the issue, or otherwise prevents the prevailing party from receiving meaningful relief in the event of a favorable judgment[.]" *City of Memphis v. Hargett,* 414 S.W.3d 88, 96 (Tenn. 2013) (citations omitted). Accordingly, "[t]o be justiciable, an issue must be cognizable not only at the inception of the litigation but also throughout its pendency." *Id.* (citation omitted).

The trial court held that the BOE's public records policy was unlawful but stopped short of issuing a declaratory judgment requiring acceptance of electronic requests to inspect. The amendment to the TPRA obviates the need for a declaratory judgment or permanent injunction as requested by Plaintiff. The amendment does not resolve the following issues: whether the court abused its discretion by prohibiting discovery, whether the court erred in finding the March 31 request overly broad and insufficiently detailed, or whether the court abused its discretion by denying attorney fees. In determining whether Plaintiff is entitled to attorney fees, we must first decide whether the trial court erred in finding that the BOE erroneously denied the first record request. Additionally, Plaintiff is entitled to "obtain judicial review of the actions taken to deny" his access to public records pursuant to Tennessee Code Annotated section 10-7-505(a).[5]

B.

Plaintiff challenges the trial court's discretionary decision to prohibit discovery by deposition. Citing *Commissioner of the Department of Transportation v. Hall*, 635

[5] In so holding, we also reject Defendant's argument that summary judgment dismissal was warranted when Plaintiff was eventually provided with the policy prior to trial.

S.W.2d 110 (1982), Defendant responds that Plaintiff waived any argument challenging the order prohibiting discovery because he failed to file an interlocutory appeal or preserve the issue for this appeal. We agree.

Here, Plaintiff sought deposition testimony from Mr. Johnson and Dr. Del Phillips, the Sumner County Director of Schools. Following the entry of the protective order, Plaintiff neither filed an interlocutory appeal nor raised the issue at trial by requesting an offer of proof to present the information he sought to recover through deposition. Plaintiff even failed to subpoena Mr. Johnson or Dr. Phillips for trial; instead, the BOE called Mr. Johnson as a witness. The record is simply incomplete to allow for review of any potential reversible error.

Moreover, in *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006), this court observed:

> Discovery requests require some tailoring. If parties go too far, the courts may whittle down their discovery requests when the discovery sought "is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Parties who desire relief from improper or overburdensome discovery are expected to request a protective order under Tenn. R. Civ. P. 26.03. . . . The courts understand that "there is a far greater cost in complying with a discovery request than in making the discovery request. As a result there [can be] a strong temptation to inflict harm on one's adversary by seeking additional information for which the adversary will have to incur the cost." Accordingly, the courts can and should actively discourage overburdensome discovery. . . .

209 S.W.3d at 615 (internal citations omitted). We must affirm the court's discretionary decision when discovery by deposition was unnecessary given the limited nature of the issues and the availability of Mr. Johnson to testify at trial.

C. & D.

Defendant asks this court to reverse the court's judgment that the BOE's public records policy violated the TPRA and hold that the March 21 request was properly denied in accordance with the BOE's policy. Defendant claims that the newly amended TPRA supports its argument that the prior version of the TPRA did not require entities to accept inspection requests in any particular format. Defendant further asserts that the General Assembly, not the judiciary "is the proper branch of government to weigh the various

policy considerations and decide under what circumstances entities must accept advance inspection requests." The BOE argues that its public records policy is supported by a variety of policy interests and concerns, namely the questionable security, reliability, and stability of communications made by email and the cost to ensure statutory compliance with electronic requests. These concerns are also shared by a number of entities that filed amici curiae briefs in support of the BOE's position. Plaintiff responds that the court did not err in finding the policy unlawful when neither the TPRA nor any precedent affords a governmental entity the right to deny a records request that is sufficiently definite. He alternatively argues that even if the BOE is permitted to promulgate rules regarding the form of inspection requests, the refusal to accept electronic requests is unreasonable. His argument is shared by the Tennessee Coalition for Open Government as evidenced by the filing of an amicus curiae brief in support of his position.

While the judiciary is admittedly not tasked with crafting legislation, we are tasked with interpreting such legislation while ascertaining and carrying out the General Assembly's intent. *Norma Faye Pyles Lynch Family Purpose, LLC v. Putnam Cnty.*, 301 S.W.3d 196, 213 (Tenn. 2009) (citing *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008)). Statutory construction is a question of law that we review de novo without any presumption of correctness. *In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009). As noted by our Supreme Court:

> The leading rule governing our construction of any statute is to ascertain and give effect to the legislature's intent. To that end, we start with an examination of the statute's language, presuming that the legislature intended that each word be given full effect. When the import of a statute is unambiguous, we discern legislative intent "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning."

Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 308 (Tenn. 2012). Where statutory language or a statute's meaning is ambiguous, we review the overall statutory scheme, the legislative history, and other sources. In construing multiple statutes, our goal is to choose the most reasonable construction "which avoids statutory conflict and provides harmonious operation of the laws." *Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC*, 433 S.W.3d 512, 517 (Tenn. 2014) (internal quotation marks omitted).

The TPRA provides that it "shall be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d). As such, "we interpret the terms of [the TPRA] liberally to enforce the public interest in open access to the records of state, county, and municipal governmental entities." *Memphis Publ'g Co.*

v. Cherokee Children & Family Servs., Inc., 87 S.W.3d 67, 74 (Tenn. 2002). While each governmental entity was tasked with crafting its own public records policy, the General Assembly specifically prohibited entities from imposing "requirements on those requesting records that are more burdensome than state law." Tenn. Code Ann. § 10-7-503(g).

As noted by the learned trial court, the General Assembly placed no restriction on the form or format of a request for inspection of public records other than: (1) any request for inspection shall be sufficiently detailed to enable the government entity to identify the specific records; (2) any citizen making a request to view a public record *may* be required to present photo identification but shall provide identifying information prior to inspection; and (3) a request for inspection cannot be required to be initiated by a written request. Tenn. Code Ann. § 10-7-503(a). Additionally, the courts in Tennessee have held policies requiring the citizen requesting inspection to appear in person unlawful. *Waller v. Bryan*, 16 S.W.3d 770, 774 (Tenn. Ct. App. 1999). *See also Friedmann v. Marshall Cnty.*, 471 S.W.3d 427, 434 (Tenn. Ct. App. 2015) (acknowledging *Waller* for its holding that a citizen need not make a personal appearance in order to make a valid public records request).

Here, Plaintiff was forced to either make his request by mail or in person. These requirements, considered individually, have been specifically held unlawful. Likewise, we hold that these requirements, even when considered together, do not provide the fullest possible access to public records in accordance with the TPRA in its prior form. With these considerations in mind, we uphold the trial court's ruling that the March 21 request was a "valid public records request for inspection" in accordance with the TPRA and that the BOE erroneously denied the request.

Next, we consider whether the trial court erred in finding the March 31 request invalid pursuant to the requirements of the TPRA. Plaintiff claims that the request was sufficiently detailed and specific but that the court was simply disturbed by the tone of the request. The BOE responds that the court did not err in finding the March 31 request overly broad and insufficiently detailed. The BOE alternatively responds that the requested information was privileged and not subject to a public records request.

Here, Plaintiff requested

> [a]ny and all communications between you and any other party or parties concerning my first public record request for the [BOE] to provide for my inspection the [BOE's] records policy. This is to include but not be limited to the following[:] All emails sent or received, all audible recordings and

> voice mail by all members, all letters, all memos, all text messages, [and] all text messaging.

We agree with the trial court that this request was not a valid public records request. A governmental entity is not required "to sort through files to compile information." Tenn. Code Ann. § 10-7-503(a)(4). A public record request must be "sufficiently detailed" to enable the custodian to identify the records sought. Tenn. Code Ann. § 10-7-503(a)(4). Here, the formatting of the email made the request unclear and overly broad. The email was also insufficiently detailed to enable Mr. Johnson to identify the records. Accordingly, we affirm the court's denial of relief.

E.

Plaintiff claims that the court abused its discretion by refusing to award attorney fees. Tennessee follows the American Rule which provides that "litigants pay their own attorney's fees absent a statute or an agreement providing otherwise." *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000); *accord Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005). "Under the American [R]ule, a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American [R]ule applies, allowing for recovery of such fees in a particular case." *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009). A right to recover attorney fees in cases filed pursuant to the TPRA was created by Tennessee Code Annotated 10-7-505(g), which provides,

> If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity. In determining whether the action was willful, the court may consider any guidance provided to the records custodian by the office of open records counsel as created in title 8, chapter 4.

The record reflects that Mr. Johnson acted in reliance upon advice from counsel and counsel for the Office of Open Records. We affirm the denial of attorney fees.

V. CONCLUSION

This judgment of the trial court is affirmed, and the case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, the Sumner County Board of Education.

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JOHN W. McCLARTY, JUDGE