In the Supreme Court of Ohio

State of Ohio ex rel. Brian M. AMES	:	
Relator-Appellant.	:	CASE NO. 2024-1160
vs.	:	On Appeal from the Lake County Court of
CONCORD TOWNSHIP BOARD OF TRUSTEES.	:	Appeals, Eleventh Appellate District
Respondents-Appellees	:	Court of Appeals Case No. 2024-L-036
	:	

BRIEF OF BRIAN M. AMES, RELATOR-APPELLANT

Brian M. Ames
2632 Ranfield Rd
Mogadore, OH 44260
330-354-3701
bmames00@gmail.com
Relator-Appellant Pro Se

Brandon D. R. Dynes (#0068246) 7 |
Bridey Matheney (#0070998)
THRASHER DISNMORE & DOLAN LPA
100 Seventh Avenue, Suite 150
Chardon, Ohio 44024
T: 440-285-2242; F: 440-285-9423
bdynes@tddlaw.com
bmatheney@tddlaw.com
Counsel for Respondent
Concord Township Board of Trustees

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STATEMENT OF FACTS

One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions were reached. There is great historical significance to this basic foundation of popular government, and our founding fathers keenly understood this principle. *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 420 (1996). The Public Records Act reflects the state's policy that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20.

A. Nature of the case

This case arises from the refusal of the Concord Township Board of Trustees ("Concord") to properly respond to a public records request. Appellant Brian M. Ames ("Mr. Ames") had noticed that the pagination in the minutes for Concord's regular meetings posted on Concord's website left no gap wherein minutes of Concord's staff meetings would fall. Concluding that no official minutes exist for Concord's staff meetings, Mr. Ames requested the official records[1] for the staff meetings held in the years 2023 and 2024 by the Concord Township Board of Trustees. Rather than respond "no responsive records" which would have fulfilled the request, Concord chose to provide unapproved, unsigned, unofficial documents that can scarcely be characterized as a record of the proceedings in those staff meetings.

If Concord had simply responded, "no responsive records", the response to the public records request would have been complete and Mr. Ames could have moved forward with an action to enforce R.C. 121.22 in the court of common pleas. Indeed, Mr. Ames has initiated Lake C.P. case no. 24CV001405 of which Count 1 alleges Failure to Keep Full and Accurate Minutes. The

1 Evid.R. 902(4) Certified copies of public records identifies "an official record" as evidence that, if certified, is self-authenticating.

question of whether the so-called “minutes” are full and accurate is properly before Lake Common Pleas and need not be considered here. The question before this Court is whether the so-called minutes are responsive to a request for “the minutes for the staff meetings held in the years 2023 and 2024”.

Faced with the evasive response to his public records request, Mr. Ames was forced to seek relief in mandamus. Due to the 11th District’s departure from the Ohio Rule of Civil Procedure, Mr. Ames has filed this appeal as a matter of right.

A. Undisputed facts.

Since Concord has yet to file an answer in this action, the following material facts stated in the Petition are undisputed:

Jurisdiction and Venue

The Court of Appeals for the Eleventh Appellate District (the “11th District”) has original jurisdiction of this action under Article IV: §3(B)(1)(b) and R.C. 2731.02. (Petition ¶1, APPX_016.)

The activity that gave rise to this claim for relief was conducted in Lake County, Ohio. Therefore, venue is proper in Lake County pursuant to Civ.R. 3(C)(3). (Petition ¶2, APPX_016.)

Parties

Relator Brian M. Ames (“Mr. Ames”) is a resident Randolph Township, in Portage County, Ohio. (Petition ¶3, APPX_016.)

Respondent Concord Township Board of Trustees (the “Board”) is the board of trustees established by R.C. 505.01 for Concord Township (the “Township”) in Lake County. (Petition ¶4, APPX_016.)

Other Facts

At all periods of time relevant to this Petition, the Board consisted of three members: Amy L. Lucci[2], Morgan R. McIntosh, and Carl H. Dondorfer IV. (Petition ¶5, APPX_017.)

Andy Rose currently serves as administrator (the "Administrator") for Concord Township. (Petition ¶6, APPX_017.)

On May 6, 2024 at 12:43am, Mr. Ames, using a pseudonym, submitted by email the following public records request (the "Request"): (Exhibit 1.) (Petition ¶7, APPX_017.)

> Pursuant to R.C. 149.43, the Public Records Act, I hereby request authentic copies of the following official records of the Concord Township Board of Trustees:
>
> 1. the rule(s) for notification of meetings required by R.C. 121.22(F) in effect for the years 2023 and 2024.
>
> 2. the minutes for the staff meetings held in the years 2023 and 2024.
>
> 3. the current records retention schedule (RC-2).

On May 7, 2024 at 1:40pm, the Administrator responded (the "Response") to the Request by an email with 15 attachments. A true and accurate copy of the response is attached hereto as Exhibit 2. (Petition ¶8, APPX_017.)

Attached to the Response were the following 15 documents: (Petition ¶9, APPX_017.)

1. 2018 RC-2 Concord Twp Records Retention Schedule-APPROVED.pdf,

2. 07312023.pdf,

3. 08282023.pdf,

4. 09252023.pdf,

5. 10302023.pdf,

6. 12042023.pdf,

7. 12272023.pdf,

2 Wife of Judge Eugene A. Lucci of the 11th District Court of Appeals

8. 06052023.pdf,

9. 06262023.pdf,

10. 03042024.pdf,

11. 04012024.pdf,

12. 01292024.pdf,

13. 04292024.pdf,

14. 01032024 Minutes.pdf, and

15. 01042023 Minutes.pdf.

Attachments 2 through 13 purport to be minutes for the staff meetings held on June 5, 2023, June 26, 2023, July 31, 2023, August 28, 2023, September 25, 2023, October 30, 2023, December 4, 2023, December 27, 2023, January 29, 2024, March 4, 2024, April 1, 2024, and April 29, 2024, respectively. (Petition ¶10, APPX_018.)

True and accurate copies of Attachments 2 through 13 are attached hereto as Exhibits 3 through 14 respectively. (Petition ¶11, APPX_018.)

No minutes were attached to the Response for the staff meetings held on January 30, 2023, February 27, 2023, April 3, 2023, and May 2, 2023. (Petition ¶12, APPX_018.)

The so-called minutes are not signed or approved and hence not official. (Petition ¶13, APPX_018.)

On May 6, 2024 at 12:43am, Mr. Ames electronically submitted a valid request for public records of the Board. (Petition ¶15, APPX_018.)

Respondent is obligated under R.C. 149.43(B)(1), the Public Records Act, to promptly prepare such records and make them available for inspection and copying upon request. (Petition ¶16, APPX_018.)

The Board has failed to provide documents fully responsive to the Request. (Petition ¶17,

APPX_018.)

The Board has not asserted that the Request is ambiguous or overly broad. (Petition ¶18, APPX_018.)

The Board has not asserted that it cannot reasonably identify what public records are being requested. (Petition ¶19, APPX_019.)

The Board has not provided an explanation, including legal authority, setting forth why the Request was denied as required by R.C. 149.43(B)(3). (Petition ¶20, APPX_019.)

Mr. Ames is a person aggrieved by the failure of the Board to promptly prepare the public records requested and provide copies to him as required by R.C. 149.43(B)(1). (Petition ¶21, APPX_019.)

B. Procedural Posture.

On Friday, May 10, 2024, Mr. Ames filed his Verified Petition in Mandamus (the "Petition") against alleging that he was denied public records he requested under R.C. 149.43 and seeking the relief for such denials under the law. (Appendix 3, APPX_16) Service of process was perfected on Friday, May 24, 2024 by Sheriff's Deputy W. A. Leonello #35. (Appendix 5, APPX_047.) On Wednesday, May 29, 2024 the 11th District issued an alternative writ (the "Alternative Writ"): "Respondent shall move, plead, or otherwise respond to the petition within twenty-eight (28) days of service of the petition, to wit: June 10, 2024."[3] (Appendix 6, APPX_049.) On Thursday, May 30, 2024, a Postal Certificate of Mailing of the Alternative Writ was filed by the Lake County Clerk of Courts (the "Clerk"). On Monday, June 3, 2024, Concord filed its so-called "Motion to Dismiss Relator's Petition for Writ of Mandamus" ("Concord's Motion") to which it attached 75 pages of evidence including a three page Affidavit[4] of Andrew Rose, Concord Township Administrator. (Appendix 7, APPX_050.) Concord's Motion sets forth

3 June 10, 2024 is 11 days after May 24, 2024 when the petition was served.
4 Concord has offered no theory that would allow this Court to take judicial notice of the Rose Affidavit.

a “Standard of Review of a Civ.R. 12(B)(6) Motion to Dismiss”. (Appendix 7, APPX_055.) Concord’s Motion does not set forth the Summary Judgment Legal Standard. (Appendix 7, passim.) In Paragraph C of Concord’s Motion titled “Relator’s Claim for a Writ of Mandamus Fails to State a Claim against Respondent Board for Which Relief May be Granted”, Concord sets forth an argument concluding "Relator’s claim for a writ of mandamus fails to state a claim against Respondent Board for which relief may be granted.” This paragraph clearly attacks the sufficiency of the Petition as would be expected in a motion to dismiss Civ.R. 12(B)(6). Concord then argues that it has “provided *all* of the requested records”, presumably meaning the so-called “minutes” that it has meticulously dressed in the Emperor’s clothes. At this point Mr. Ames dares to point out that Exhibits 3 though 6 and 8 through 14 are titled “MEETING AGENDA” rather than minutes. (APPX_027-033,035-044.) The Emperor has no clothes!

On Tuesday, June 4, 2024, the 11th District issued a judgment entry:

> This court hereby sua sponte converts respondent's motion to a motion for summary judgment. Accordingly, relator shall file a response to the respondent's motion for summary judgment no later than July 2, 2024. Respondent may file a reply brief in accordance with Civ.R. 6(C)(1).

(Appendix 8, APPX_140.)

On July 1, 2024, Mr. Ames filed Relator’s Motion for Default Civ.R. 55(A) and for Summary Judgment pursuant to Civ.R. 56(C) as a single motion (“Motion for Default”) under two rules. Mr. Ames joined his Opposition to Respondent’s Converted Motion to his Motion for Default. (Appendix 9, APPX_141).

On July 2, 2024, Concord filed a Motion for Order of Court Enlarging the Time to File a Reply. (Appendix 10, APPX_153). The next day an extension of time until July 12, 2024 was granted. (Appendix 11, APPX_156). On July 11, 2024, Concord filed its Reply Brief in Support of its Motion for Summary Judgment and Brief in Opposition to Relator’s Motions (sic) for

Default and Summary Judments (sic.). (Appendix 12, APPX_157).

ARGUMENT

A. Motions

Motions are are applications to the court for an order. Civ.R. 7(B)(1). "A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Civ.R. 7(B)(1). The relief and order sought in Concord's Motion was "this Honorable Court should dismiss Relator's Petition in favor of the Respondent Board". At no time did Concord's Motion seek summary judgment.

B. Mandamus Legal Standard

"Mandamus is an appropriate remedy to compel compliance with Ohio's Public Records Act." *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 5. To be entitled to a writ of mandamus, a party must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Cleveland Right to Life v. State Controlling Bd.*, 138 Ohio St.3d 57, 2013-Ohio-5632, 3 N.E.3d 185, ¶ 2.

C. Motion to Dismiss Legal Standard

A motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). A trial court may not rely on allegations or evidence outside the complaint, but can only review the complaint and dismiss the case if it appears beyond a doubt that the plaintiff can prove no set of facts entitling it to recover. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 680 N.E.2d 985 (1997). In order to dismiss a complaint for failure to state a claim upon which relief can be granted under Civ.R. 12(B)(6), it must appear beyond doubt that plaintiff or relator can prove no set of facts warranting relief, after all factual allegations of the

complaint are presumed true and all reasonable inferences are made in relator's favor. State ex rel. *Fuqua*, citing *Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490, 633 N.E.2d 1128, 1129. However, a court should not accept as true any unsupported legal conclusions in the complaint. *Eichenberger v. Petree*, 76 Ohio App.3d 779, 782, 603 N.E.2d 366 (10th Dist.1992); *Morrow v. Reminger & Reminger Co. LPA*, 183 Ohio App.3d 40, 2009-Ohio-2665, 915 N.E.2d 696, ¶ 7 (10th Dist.).

D. Summary Judgment for party seeking affirmative relief

A plaintiff or relator may not proceed in summary judgment until after an answer has been filed, Civ.R. 56(A) provides in pertinent part:

> A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party.

Accepting the 11th District's argument that it did not deny the motion to dismiss as true, the time for Concord to file an answer had not expired when it entered judgment. Nor has Mr. Ames been served with a motion for summary judgment by the adverse party, Concord.

Furthermore, summary judgment may not be rendered until the pleadings are closed. Civ.R. 56(C) provides in pertinent part:

> Summary judgment shall be rendered forthwith if the *pleadings*, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Emphasis added.)

Since there is only a single pleading, the Petition, summary judgment was inappropriate at the time the 11th District entered judgment.

E. Time: motions, generally

Civ.R. 6(C)(1) prescribes the time for motion responses and movants' replies generally. Civ.R. 6(C)(1) provides in its entirety:

> Responses to a written motion, other than motions for summary judgment, may be served within fourteen days after service of the motion. Responses to motions for summary judgment may be served within twenty-eight days after service of the motion. A movant's reply to a response to any written motion may be served within seven days after service of the response to the motion.

The Ohio Civil Rules distinguish a motion for summary judgment from other motions, allowing twenty-eight days after *service* of the motion to respond. Mr. Ames has never been served with a motion for summary judgment in this case.

F. Summary Judgment Legal Standard

Summary judgment is a favored "procedural device to terminate litigation and to avoid a formal trial where there is nothing to try." *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1,2- 3, 433 N.E.2d 615, 616 (1982). Indeed, the Supreme Court of Ohio has instructed that the granting of summary judgment "should be encouraged in proper cases." *North v. Pennsylvania R.R. Co.*, 9 Ohio St.2d 169, 171, 224 N.E.2d 757, 760 (1967). A party should be granted summary judgment pursuant to Civ.R. 56(C) when a review of the pleadings, deposition testimony, and other evidentiary materials demonstrate that:

> 1. No genuine issue as to any material fact remains to be litigated;
>
> 2. The moving party is entitled to judgment as a matter of law; and
>
> 3. It appears from the evidence that reasonable minds can come to but one conclusion, in viewing [the] evidence most strongly in favor of the party against whom the motion for summary judgment is made, and the conclusion is adverse to that party. *Temple v. Wean United Co.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267, 273-4 (1977).

To prevail on a motion for summary judgment, "the movant need not necessarily support its motion with evidentiary materials which directly negate its opponent's claim." *Johnson v. Great American Ins. Co.*, 44 Ohio App.3d 71, 73, 541 N.E.2d 100, 102 (1988) (citing, *Celotex Corp. v Catrett*, 477 U.S. at 323). Rather, the movant may meet its burden by pointing out to the trial

judge those portions of the record which demonstrate that there is an absence of evidence to support the non-moving party's case. *Johnson*, 44 Ohio App.3d at 73. The burden of proof then shifts to the non-moving party to set forth specific facts showing a genuine issue of material fact. The Supreme Court of Ohio adopted this standard and the holding of *Celotex* in *Wing v. Anchor Media Ltd. Of Texas*., 59 Ohio St. 3d 108, 111, 570 N.E.2d 1095, 1099 (1991).

In responding to a motion for summary judgment, the non-moving party may not rest on "unsupported allegations in the pleadings." *Harless v. Willis Day Warehousing Co*., 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47 (1978). Instead, Civil Rule 56 requires the non-moving party to respond with competent evidence that demonstrates the existence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St. 3d 293, 662 N.E.2d 264 (1996). To create a genuine issue of material fact, however, the non-moving party must do more than merely present some evidence to dispute a material, factual issue. As the United States Supreme Court has stated:

> There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the [non-movant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.* (1986),477 U.S. 242, 249-250.

This Court exercises de novo review in an appeal from a grant of summary judgment. *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 8. Summary judgment may be granted only when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) upon viewing the evidence in the light most favorable to the nonmoving party, reasonable minds can reach only a conclusion adverse to the nonmoving party. *Id.*

G. Appellant's Proposition of Law No. 1:

> **If a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading, such matters are not excluded by the court, and the motion is treated as a motion for summary judgment to be disposed of as provided in Rule 56, such motion is implicitly denied as a motion to dismiss and an answer must be served.**

It is axiomatic that a motion to dismiss Civ.R. 12(B)(6) seeks dismissal of a complaint for failure to state a claim. That is quite distinct from a motion for summary judgment Civ.R. 56(C) that seeks judgment if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No single motion can be both.

The 11th District argues that it "converted [respondent's motion to dismiss] to a motion for summary judgment." It cited dicta in *Park v. Acierno*, 160 Ohio App.3d 117, 2005-Ohio-1332, (7th District) ¶30 as authority permitting such a conversion. It did not cite any case in the 11th District although there is one where the respondent filed an answer after the trial court issued an order and journal entry converting its motion to dismiss to a motion for summary judgment. *State ex rel. Ames v. Portage Cty. Bd. of Commrs.*, 2019-Ohio-3730, ¶¶21, 23.

There was no "conversion" in Park. "There is no evidence of such conversion or notification in the record of this case as required by the Ohio Supreme Court and the Ohio Rules of Civil Procedure." *Park*, ¶32.

Park includes to a Staff Note stating a preference for denial over conversion:[5]

> The Staff Note to Civ.R. 12 prefers denial over conversion when a Civ.R. 12(B)(6) motion attempts to rely on evidence outside of the complaint. This preference is because an answer and formal summary judgment motion is more procedurally normal and allows more time for development of various discovery matters that may be necessary for use in defending a summary judgment motion.

Park, ¶33. The *Park* court attempted to do what a court of appeals may not do, add the the Civil Rules.

Rule 2.2 and Terminology of the Ohio Code of Judicial Conduct provide in pertinent parts:

> A judge shall uphold and apply the *law*, and shall perform all duties of judicial

5 It may be that the "treated as" provision of Civ.R. 12(B) has become a relict from times before the widespread availability word-processing software that no longer serves a useful purpose.

> office fairly and *impartially*. (Emphasis sic.)
>
> "Law" encompasses court rules, including this code and the Ohio Rules of Professional Conduct, statutes, constitutional provisions, and decisional law.
>
> "Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

Park is clearly decisional law but the use of case law to modify or augment the Civil Rules is offensive to Article IV, Section 5(B) of the Ohio Constitution. Said section provides in pertinent parts:

> The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing from *Park* or any other case law has been included in proposed civil rules filed by the court with the clerk of each house of the General Assembly during a regular session thereof. This court has submitted amendments to the civil rules on 36 occasions since Park was decided, to wit: April 20, 2005; January 12, 2006; January 11, 2007; April 30, 2007; January 14, 2008; April 28, 2008; January 14, 2009; April 30, 2009; January 5, 2011; April 21, 2011; January 13, 2012; April 30, 2012; January 15, 2013; April 29, 2013; January 15, 2014; April 30, 2014; January 15, 2015; April 30, 2015; January 13, 2016; April 29, 2016; January 6, 2017; April 26, 2017; January 9, 2018; April 24, 2018; January 9, 2019; April 24, 2019; January 15, 2020; March 12, 2020; January 13, 2021; April 29, 2021; January 12, 2022; April 26, 2022; January 10, 2023; April 27, 2023; January 10, 2024; and May 1, 2024. If this Court had ever intended to add a procedure allowing a court to "convert" a motion to dismiss to a motion for summary judgment,

it most certainly could have done so on any of those 36 occasions. This Court has chosen not to do so. No other court possesses the constitutional authority to amend the Civil Rules.

The 11th District has employed a novel legal standard in deciding the case that might be fairly call the "Summary Dismissal Legal Standard"[6]. This standard is unlike the Motion to Dismiss Legal Standard as it does not test the adequacy of the complaint but rather the merits of the complaint. It is also unlike the Summary Judgment Legal Standard, which requires the court to consider the pleadings. Civ.R. 56(C) provides in pertinent parts:

> Summary judgment shall be rendered forthwith if the *pleadings*[7], depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Emphasis added.)

It is undisputed that Concord has filed no answer. There was only a single pleading for the 11th District to consider. The 11th District's "conversion" of Concord's Motion to Dismiss did not result in an answer appearing on the record.

Since no answer has been filed on the case and an answer is "material[] made pertinent to such a motion by Rule 56", the 11th District failed to give Mr. Ames a reasonable opportunity to present all pertinent materials as required by Civ.R. 12(B). Mr. Ames could not present a non-existent answer.

Mr. Ames has been prejudiced by the application of the Summary Dismissal Legal Standard because discovery that would result in depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact were not available to him to proceed in summary judgment.

The 11th District committed reversible error by granting summary "judgment" to Concord.

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6 Mr. Ames provides a name for this novel standard in recognition that no reasonable defense attorney would fail to attach some sort of evidence to a motion to dismiss to qualify for the more favor treatment afforded under the Summary Dismissal Legal Standard

7 The 1997 amendment to division (C) changed the word "pleading" to "pleadings".

The judgment of the 11th District must be reversed.

H. Appellant's Proposition of Law No. 2:

> **Before a court may "convert" a motion to dismiss to a motion for summary judgment, there must be a predefined procedure to be followed that results in a bona fide motion for summary judgment.**

The Civil Rules provide no procedure to be followed when a court "converts" a motion to dismiss to a motion for summary judgment. Courts have held that certain minimal procedural requirements exist which include notice. See *Petrey v. Simon*, 4 Ohio St. 3d 154 (1983):

> Civ. R. 12(B) provides, in part: "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56." In this case, the court of common pleas expressly relied on appellee's affidavit. The court of appeals, therefore, correctly concluded that the disposition of this case had actually been a summary judgment rather than a dismissal.
>
> Civ. R. 12(B) further provides: "All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." Appellant argues, however, that he did not have a "reasonable opportunity to present" pertinent materials, because the court of common pleas did not notify him that it would convert appellee's motion to dismiss into a motion for summary judgment. We agree. "If the conversion occurs unexpectedly, the non-moving party is left at the disadvantage of being unprepared to respond; hence notice is required. * * * The primary vice of unexpected conversion to summary judgment is that it denies the surprised party sufficient opportunity to discover and bring forward factual matters which may become relevant only in the summary judgment, and not the dismissal, context." (Citation omitted.) *Portland Retail Druggists Assn. v. Kaiser Found. Health Plan* (C.A. 9, 1981), 662 F.2d 641, 645, analyzing comparable provisions in Fed.R.Civ.P. 156 12(b).

One court has held that notice must be provided but that denial is preferrable because an answer and formal summary judgment motion is more procedurally normal. See *Park v. Acierno*, 160 Ohio App.3d 117, 2005-Ohio-1332 (7th Dist):

> {¶30} If a Civ.R. 12(B)(6) movant relies on evidence outside of the complaint and its attachments, then Civ.R. 12(B) specifies that the motion must either be denied or converted to a summary judgment motion, which would proceed under Civ.R. 56. *Petrey v. Simon* (1983), 4 Ohio St.3d 154, 156. See, also, *State ex rel. Boggs v. Springfield Local School Dist.* (1995), 72 Ohio St.3d 94, 96 (failure to notify the parties of conversion is itself reversible error). Accordingly, the trial court was

> required to convert appellees' motion to dismiss to a motion for summary judgment before it could consider the February 5, 2004 letter.
>
> {¶31} The Staff Note to Civ.R. 12 prefers denial over conversion when a Civ.R. 12(B)(6) motion attempts to rely on evidence outside of the complaint. This preference is because an answer and formal summary judgment motion is more procedurally normal and allows more time for development of various discovery matters that may be necessary for use in defending a summary judgment motion.
>
> {¶32} Regardless, if the trial court decided to convert the motion in this case, it was required to give at least 14 days' notice to appellant as the nonmovant. *Petrey*, 4 Ohio St.3d at 156-157. There is no evidence of such conversion or notification in the record of this case as required by the Ohio Supreme Court and the Ohio Rules of Civil Procedure.

At least one court has required an answer to be filed when a motion to dismiss is "converted". See *State ex rel. Ames v. Portage Cty. Bd. of Commrs.*, 2019-Ohio-3730:

> {¶21} The trial court issued an order and journal entry converting the Board's motion to dismiss to a motion for summary judgment and permitting the parties to submit evidence consistent with Civ.R. 56(C) and to file additional pleadings, if necessary.
>
> {¶23} The Board filed an answer to Mr. Ames' amended complaint generally denying his allegations. The Board also filed a renewed motion for a protective order and objection to discovery.
>
> {¶30} The Board filed a motion for summary judgment and a brief in opposition to Mr. Ames' previously filed motion for summary judgment. The Board admitted in briefing it held several meetings as indicated in Mr. Ames' amended complaint and it "read verbatim from R.C. 121.22(G)(1) to move into executive session," as corroborated by the minutes marked as Exhibit AA and the flash drive. The Board again argued that its practice complied with the OMA.

The "conversion" of Concord's Motion did not result in a bona fide motion for summary judgment. It still sought dismissal for failure to state a claim. Any arguments in support of summary judgment in favor of Concord remained unwritten and unspoken and hence unknown to Mr. Ames. For example, the argument that "this entire action could have been avoided through a follow up email" is clearly the 11th District's own. *Opinion* ¶45 (APPX_013.) Mr. Ames was never afforded any meaningful opportunity to respond to that argument.

I. Appellant's Proposition of Law No. 3:

The pleadings must be closed before summary judgment may be rendered.

Summary judgment may not be rendered until the pleadings are closed. Civ.R. 56(C) provides in pertinent part:

> Summary judgment shall be rendered forthwith if the *pleadings*[8], depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Emphasis and footnote added.)

There must be at least two pleadings, a complaint and an answer. Civ.R. 7(A). There may also be a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, or, if the court has ordered such, a reply to an answer or a third-party answer. Civ.R. 7(A). If all the pertinent pleadings have not yet been filed, the court may not render summary judgment. Civ.R. 56(C).

The 11th District committed reversible error by rendering a summary judgment when no answer had yet been filed. The judgment of the 11th District must be reversed.

J. Appellant's Proposition of Law No. 4:

R.C. 149.43 does not provide for the inclusion of non-responsive records in the response to a public records request. The inclusion of nonresponsive documents in stead of nonexistent responsive records constitutes a denial of a public records request.

It is improper for a public body or public office, upon realization that it has failed in its record-keeping duties, to provide nonresponsive records in stead of responsive records. R.C. 149.43(B)(1) states in pertinent parts:

> Upon request by any person and subject to division (B)(8) of this section, all public records *responsive* to the request shall be promptly prepared and made available for inspection to the requester at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request by any person, a public office or person responsible for public records shall make copies of the *requested* public record available to the requester at cost and within a reasonable period of time. (Emphasis added.)

8 The 1997 amendment to division (C) changed the word "pleading" to "pleadings".

Apparently fearing the bringing of an action to enforce R.C. 121.22, Concord attached nonresponsive records to its response to Mr. Ames' request for authentic official minutes for the staff meetings held in the years 2023 and 2024.

K. Appellant's Proposition of Law No. 5:

R.C. 149.43 does not require a relator to send followup email messages.

In it Opinion the 11th District states "this entire action could have been avoided through a follow up email", presumably requesting the "one document, which was omitted from the response inadvertently." Opinion ¶45. The 11th District apparently believes that a records requester must have a superior knowledge of Concord's records than the record keeper does, that inadvertence on the part of Concord is excusable while on the part of Mr. Ames it is not. Of course, this is both absurd and unworkable. What surely would have avoided "this entire action" is a response of "no responsive records".

The 11th District erred by presuming procedural requirements in a Public Records action that are absurd, unworkable, and unsupported by law.

CONCLUSION

For all the reasons discussed above, Appellant Brian M. Ames respectfully requests that this Court reverse the opinion and judgment entry granting Concord's motion to dismiss and overruling Mr. Ames' motion for default judgment issued by the 11th District on August 12, 2024, and to issue a writ of mandamus ordering Concord to either provide copies of official records of the staff meetings which, if certified, would be self-authenticating under Evid.R. 902 or state that no such records exist.

Respectfully Submitted,

Brian M. Ames
Relator-Appellant *pro se*

2632 Ranfield Rd
Mogadore, OH 44260
bmames00@gmail.com

PROOF OF SERVICE

I hereby certify that on the 27th day of September, 2024 a true copy of the foregoing was, in accordance with Civ.R. 5(B)(2)(f), sent by electronic mail to:

Brandon D. R. Dynes (#0068246) 7 |
Bridey Matheney (#0070998)
THRASHER DISNMORE & DOLAN LPA
100 Seventh Avenue, Suite 150
Chardon, Ohio 44024
T: 440-285-2242; F: 440-285-9423
bdynes@tddlaw.com
bmatheney@tddlaw.com
Counsel for Respondent
Concord Township Board of Trustees

Brian M. Ames
Relator-Appellant *pro se*