IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

DAVID ESRATI, *PRO SE*	*	Case No. CA 028062
Plaintiff-Appellant,		Trial Ct. No. 2018 CV 00593
	*	Docket ID: 32388458
vs.		
DAYTON CITY COMMISSION	*	**APPLICATION FOR RECONSIDERATION**
and	*	**Per Appellate Rule 26 A 1**
JEFFREY J. MIMS, JR.	*	
Member, Dayton City Commission		
Co-Chairman, School Facilities Task Force	*	
and	*	
DAYTON BOARD OF EDUCATION	*	
and	*	
MOHAMED AL-HAMDANI	*	
Member, Dayton Board of Education		
Co-Chairman, School Facilities Task Force	*	

Defendants et. al.- Appellees.

Assignment of Errors: The appeals court erred in confirming the defendant's motion for summary judgment by ignoring the statutory construction of ORC 121.22. The appeals court based their decision on a factual error: the end/length of the bus tour. The cases cited by the court don't apply. The appeals court didn't apply Civ R 56 properly in that the moving party is responsible for the burden of proof. The claim that "pro se litigants are held to the same standards as other litigants" is not being applied in compliance with the 14th amendments equal protection clause.

STATEMENT OF THE CASE

This appeal was before the 2nd District Court of Appeals from the Montgomery County Common Pleas Court, ("trial court") from a decision and summary judgment entry made by the trial court on a motion of summary judgement for the defendants/appellees against the plaintiff/appellant David Esrati. The Appeals Court Affirmed the Action of the lower court placing the responsibility of proof of deliberations on the non-moving party.

MATERIAL CAUSES FOR RECONSIDERATION

This case is fundamentally about the "Open Meetings Act" which is very specific in what meetings can be held in private. It is not called the "Information Sessions Act."

This clearly falls under expressio unius est exclusio alterius. If the Statute had meant for there to be "information sessions" where it was possible to exclude the public, the legislature would have included the language.

The Appeals Court stated that after my injunction filing “At the end of the Valerie Elementary tour, Lolli learned that the trial judge had asked for the bus tour to be stopped. As a result, the rest of the stops were cancelled.”

Had any court examined the video evidence submitted by the plaintiff, saying the rest of the stops were “cancelled” is false. The tour continued for several hours, with the bus stopping outside Meadowdale Elementary, Meadowdale High School, Wogaman Middle School and the DPS Headquarters, all with the doors closed. In fact, in front of the DPS HQ the door was initially opened, but when I went over with my camera, they closed the door.

The court once again claimed it is the plaintiff’s responsibility to provide evidence that a school facilities task force engaged in deliberations as opposed to “information gathering” behind the closed doors.

If public bodies were indeed allowed to conduct “information sessions” without public scrutiny, they would be able to label every meeting an “information session” and exclude the public. That is why the General Assembly crafted very clear instructions in ORC 121.22 that there are very specific topics that can be covered in “Executive Session” for discussion and no other exceptions. The defendant never supported that exclusion.

121.22 also clearly says the public must be informed in advance of meetings of public bodies, that an agenda must be published, and that minutes must be kept. It clearly says that the failure to do these things is a violation of the law. Even if this was an “information session” the rules of notice, agenda, and minutes still apply. The law clearly states that even that the threat of not-doing these things constitutes a violation. Esrati submitted clear proof that these violations took place, and was

ready to argue them in court, had the trial court not limited the proceedings to the issue of the TRO for the bus tour only. This case was about multiple violations of 121.22, not just stopping the bus tour. The court said this case was only about two issues, "(1) whether the Dayton School Facilities Task Force was a public body as set forth in R.C. 121.22(B)(1)(a)(b); and if so, (2) whether it violated the Open Meetings Act." Doc. #44, p. 1."

If it didn't violate the Open Meetings act, why would the court cite the plaintiff's evidence of a clear violation?

> {¶ 30} As a final matter, we note that Ex. 3 includes a discussion between Dr. Lolli and the DPS Director of Media and Public Relations in which the Media Director stated that sending information to every task member by phone ("i.e., conference calls") would ensure that "there won't be any public records of that, either." To the extent this implies that the Open Meetings Act could be circumvented by this avenue, we note that the Supreme Court of Ohio made the following comments in White v. King, 147 Ohio St.3d 74, 2016-Ohio-2770, 60 N.E.3d 1234: Nothing in the plain language of R.C. 121.22(B)(2) expressly mandates that a "meeting" occur face to face. To the contrary, it provides that any prearranged discussion can qualify as a meeting. Accordingly, R.C. 121.22 prohibits any private prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication.
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> * * * Allowing public bodies to avoid the requirements of the Open Meetings Act by discussing public business via serial electronic communications subverts the purpose of the act. (Emphasis sic.) Id. at ¶ 15 and 18.

Isn't a private, prearranged bus tour circumventing the requirements of R.C. 121.22(B)(2)?

Furthermore, the two cases the courts cite for allowing "information-gathering" have no bearing on this case:

> {¶ 23} Courts have held that no violation of the Open Meetings Act occurs where a session is for information-gathering and no deliberations take place. See, e.g., Cincinnati Enquirer v. Cincinnati Bd. of Edn., 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032, ¶ 15 (1st Dist.); Holeski at 829.

In Cincinnati Enquirer v. Cincinnati Bd of Ed, the argument wasn't about an "information session" it was about the procedure used to enter into executive session, to discuss legal matters. The High Court said "So even though the nonpublic information-gathering session had occurred during a regular meeting of the public body, no violation of the OMA had occurred because the session was not a meeting as that term is defined by the act."

Yet, this task force was a public body, and holding a meeting, to discuss public business. The actions of not notifying, not providing an agenda, not providing minutes, and not allowing recording are ALL violations of the OMA, which by statutory construction attempts to stop meetings like this from happening because there is no way for the public to verify if deliberations took place or not. The courts accusatory tone that I failed to do depositions as to whether discussions took place is absurd and unnecessary- the people involved in breaking the law aren't going to self-incriminate themselves and I have proof that they were in violation by their failures of notification, agenda, minutes, and denials of admission as well as recording. Those are the violations punishable as violations, as well as the threat of holding the initial meeting on January 9, 2018 in private.

For the lower court to grant summary judgement based on Esrati's failure to prove that there were no deliberations conflicts with the 2nd District's ruling in BLEDSOE-BAKER v. CITY OF TROTWOOD 2019 Ohio 45 - Ohio: Court of Appeals, 2nd Appellate Dist., 2019 where the court said that it was the moving parties responsibility to prove that no deliberations took place:

> {¶ 19} We review trial court decisions under Civ.R. 56 de novo. Under the rule, "[s]ummary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law." Hubbell v. Xenia, 175 Ohio App.3d 99, 2008-Ohio-490, 885 N.E.2d 290, ¶ 15 (2d Dist.), citing Civ.R. 56. "The burden of showing that no genuine issue of material fact exists is on the moving party." Id., citing Harless v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 375 N.E.2d 46 (1978). Summary judgment may not be granted unless, construing the evidence most strongly in the nonmoving party's favor, reasonable minds must conclude adverse to the nonmoving party. Civ.R. 56(C).
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> {¶ 20} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." Dresher v. Burt, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). The trial court's decision must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ. R. 56(C). The nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. Id. at 293, 662 N.E.2d 264.

Yet, the Appeals court and the defendants cite Dr. Lolli; “Dr. Lolli, who testified that she could not address whether Task Force members talked among themselves while on the bus because she was in the front of the bus and it was very loud.”

This does not constitute “the absence of a genuine issue of fact on a material element of the nonmoving party's claim."

Again, this is called the Open Meetings Act, not the “Information Sessions Act” for a reason. If “deliberation” is only indicated by spoken questions, how does this court explain the fact that US Supreme Court Justice Clarence Thomas went ten years on the bench without asking a single one. Yet, he has obviously deliberated on issues greater than a school closing plan.

“Thomas, who hadn't asked a question since Feb. 22, 2006, broke 10 years of near silence during a case, Voisine v. U.S.,” citation: February 29, 2016 NPR

https://www.npr.org/sections/thetwo-way/2016/02/29/468576931/clarence-thomas-asks-1st-question-from-supreme-court-bench-in-10-years

For this court to cite Holeski v. Lawrence, 85 Ohio App.3d 824, 829, 621 N.E.2d 802 (11th Dist.1993) is also a misconstruction. Holeski says “there is no evidence whatsoever to indicate that the public was excluded from this "press conference." And “our review of the affidavits of Lawrence, Montague, Annie Kmiecik and Lammermeier supports appellees' assertions that the door to the trustees' office was left open while this "press conference" was taking place, and that no member of the public was excluded. Appellant has not shown that any member of the public or press attempted to gain admission to the trustees' office and was denied admission. In fact, that the trustees chose to reveal appellant's indiscretion to the press indicates their desire to make the matter one of public record.”

Esrati had multiple instances of proof, (including the unwatched video) that were never aired in the trial court, that he was denied admission, and denied the ability to record which are violations of ORC 121.22

The OMA is constructed to protect the right of the public to have the same information as the public body in evaluating public decisions with clear exemptions.

The purposes of the Ohio Open Meetings Act include: (i) ensuring openness and accountability in government; (ii) affording citizens the maximum opportunity to observe the conducting of public business by public bodies; and (iii) affording the accountability of public officials.

It is clear in this case, that the task force met in a way as to make sure the public had no way to review the process involved in the closing of Valerie School and the move of the District HQ across the street to HQ 2.

> "Democracies die behind closed doors . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."
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> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir.2002)

On the issue of Pro Se litigants being held to the same standard as attorneys, there must be some defective application of "same standard" in that litigants who pay an attorney are allowed to recoup legal fees from the body, often exceeding the "fine" that is awarded litigants. This fails the equal protection clause of the 14th amendment.

Pro Se plaintiffs have invested at least similar amounts of time as the defendant's attorneys, who are being paid for with the plaintiff's tax dollars. This wreaks of discrimination, suggesting lawyers are the only ones who benefit from the OMA. Should women lawyers be paid less than male

lawyers? Should white people be paid more than black people? If I'm expected to do comparable work as an attorney, I should be able to be reimbursed for my time at an equal rate.

Considering the filing fee of $360 is almost as much as the fine of $500, the system has already placed barriers stopping many Ohioans from filing any kind of challenge using the OMA, despite the vaunted "Yellow Book" which goes to great lengths to suggest that the average citizen should be able to stop violations of this law on their own, quoting it from my original filing:

62. Because the law can be difficult for common citizens to apply, the State of Ohio has provided a handbook in common language expressing the intent of the law and before they jump into legalistic lingo, quote the founders of our country who used clearer language: "The liberties of a people never were, nor ever will be, secure, when rulers may be concealed from them… [T}o cover with the veil of secrecy the common routines of business, is an abomination in the eyes of every intelligent man." Patrick Henry ~see State of Ohio Sunshine Laws Manual http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Legal/Sunshine-Law-Publications/Sunshine-Laws-Manual.aspx

And:

65. "If ***any person*** (emphasis added) believes that a public body has violated the Open Meetings Act, ***that person may file an action in a common pleas court to compel the public body to obey the Act.*** If an injunction is issued, the public body must correct its actions and pay court costs, a fine of $500, and reasonable attorney fees.

66. "the Open Meetings Act is intended to be read broadly in favor of openness."

67. And while the Sunshine Laws handbook includes this nonsense statement: “In evaluating whether particular gatherings of public officials constituted “meetings,” several courts of appeals have opined that the Open Meetings Act “is intended to apply to those situations where there has been actual formal action taken; to wit, formal *deliberations* concerning the public business.”941 Under this analysis, those courts have determined that gatherings strictly of an investigative and information-seeking nature that do not involve actual discussion or deliberation of public business are not “meetings” for purposes of the Open Meetings Act.942” The public has no way of telling that the meeting was in compliance if it was held in secret, thereby negating any and all semblance of being open.
68. In the duties section, the law clearly states:” A public body cannot prohibit the public from audio or video recording a public meeting. 970 A public body may, however, establish reasonable rules regulating the use of recording equipment, such as requiring equipment to be silent, unobtrusive, self-contained, and self-powered to limit interference with the ability of others to hear, see, and participate in the meeting. 971”

In the recent settlement against the Cincinnati City Council, STATE EX REL MARK MILLER vs. ALEXANDER PAUL GEORGE SITTENFELD, C 1800608 the City settled by paying Miller $1,000 in fines for filing for a violation of the Open Meetings Act, charged a defendant a $10,000 fine for deleting texts and paid $90,000 to the plaintiff’s attorney. It would seem that that the OMA is really constructed to mean that Only My Attorney wins.

ISSUES PRESENTED

First issue presented for review: The court factually misstated the stopping of the bus tour.

Second issue presented for review: The court clearly cited an actual violation of the OMA but failed to issue an injunction.

Third issue presented for review: Cases cited by the court were irrelevant in this case.

Fourth issue presented for review: Statutory Construction is being subverted by this decision. Expressio unius est exclusio alterius

Fifth issue presented for review: Civ.R. 56. "The burden of showing that no genuine issue of material fact exists is on the moving party." Not the appellant as the court claimed in this case.

Sixth issue presented for review: Pro Se litigants are not given the same rights by the court, and by denying their ability to be reimbursed for their time, they are being discriminated against in violation of the equal protection clause of the 14th amendment.

CONCLUSION

The court must reverse its decision and remand this case for adjudication in the court of common pleas.

Respectfully submitted,

/s/ David Esrati

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2019, I hand filed the foregoing request for reconsideration with the Clerk of Court in person, and mailed copies to:

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