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

DAVID ESRATI	:	
Plaintiff-Appellant	:	Appellate Case No. 28062
v.	:	Trial Court Case No. 2018-CV-593
DAYTON CITY COMMISSION, et al.	:	
Defendants-Appellees	:	

DECISION AND ENTRY

Rendered on the 2nd day of May, 2019.

PER CURIAM:

This matter is before the court on an application for reconsideration filed by Appellant, David Esrati. In the application, Esrati asks us to reconsider our March 22, 2019 opinion in *Esrati v. Dayton City Commission*, 2d Dist. Montgomery No. 28062, 2019-Ohio-1021. Our opinion affirmed the trial court's decision, which concluded that Appellees did not violate the Open Meetings Act ("OMA") when a school facilities task force conducted a private bus tour of schools.[1]

An application for reconsideration is used to call the court's attention to obvious

[1] Appellees are the Dayton City Commission, Jeffrey Mims, Jr., the Dayton Board of Education ("Board"), and Mohamed Al Hamdani (collectively, "Appellees").

errors in a decision or to raise issues that the court either failed to consider or did not fully consider when the original decision was made. *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1981). Applications for reconsideration are "not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). Instead, "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *Id.*

Esrati has presented five grounds for reconsideration. After considering each ground, we conclude that there is no basis for reconsidering our opinion.

I. Video of the Bus Tour

Esrati's first contention is that we made an incorrect factual finding when we said that "[a]t 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." *Esrati*, 2d Dist. Montgomery No. 28062, 2019-Ohio-1021, at ¶ 8. Esrati contends that if "*any* court had examined the video evidence that the plaintiff submitted, saying that the rest of the stops were 'cancelled' was false." (Emphasis added.) Appellant's Application, p. 2. According to Esrati, his video evidence shows that the bus later stopped at other schools, with all the doors closed. (In other words, the bus may have pulled up outside other schools, but no one got off the bus.)

At the preliminary injunction hearing, Esrati offered two videos (Plaintiff's Exs. 1 and 2), which apparently were videos he took on February 6, 2018, during the bus tour.

Transcript of March 15, 2018 Preliminary Injunction Hearing ("Tr."), p. 29. While these exhibits were marked during the hearing, the defendants reserved the right to object to the videos because they had never seen them before. *Id.* at pp. 97-98. The trial court also said during the hearing that it did not know yet what it would do with Esrati's exhibits; however, the court did admit Appellees' defense exhibits A through E. This was based on Esrati's lack of objections. *Id.* at pp. 100 and 155. The videos were not played during the hearing.

Subsequently, when the Board filed a reply memorandum in support of its motion for summary judgment, the Board specifically objected to admission of the videos because Esrati failed to produce copies, and the defendants had "not been provided an opportunity to review the videos or produce responsive evidence to dispute them." Doc. #75, Board's June 22, 1028 Reply Memorandum in Support of Summary Judgment, p. 3.

The trial court never formally ruled on the admissibility of Esrati's exhibits, nor did it indicate that it had considered the videos, either in ruling on Esrati's injunction request or in granting summary judgment in the Board's favor. Under the circumstances, we assume that the trial judge declined to consider these exhibits. *See, e.g., Walsh v. Smith*, 2d Dist. Montgomery No. 25879, 2014-Ohio-1451, ¶ 17 ("[w]ithout some affirmative indication in the record to the contrary, an appellate court presumes that a trial court considers only relevant and competent evidence.")

More importantly, Esrati failed to raise error with respect to this issue. Instead, his single assignment of error was directed to three issues: (1) the court erred in not considering claims relating to the OMA; (2) the court erred in concluding that Esrati had the burden of proof to show that deliberations occurred in a meeting to which Esrati lacked

access; and (3) public officials should have burden of adhering to the OMA. Appellant's Brief, pp. 5-6. However, even if the court had admitted video evidence indicating that the bus ride also involved stops at other buildings – where task force members and the press did not exit the bus – it would have been irrelevant.

Our decision noted Esrati's assertions that "the trial court erred because it required him to prove that deliberations occurred during a meeting that was closed to the public," and that "this defies logic because individuals excluded from meetings have no ability to know what happened, i.e., to know whether discussions or deliberations occurred." *Esrati*, 2d Dist. Montgomery No. 28062, 2019-Ohio-1021, at ¶ 14. We further observed that:

> Consequently, the issue is whether the Task Force engaged in deliberations during the bus tour that would make any rule, resolution, or formal act of the Board resulting from the bus tour invalid under R.C. 121.22(H). As noted, the trial court denied the motion for preliminary injunction because Esrati failed to present evidence that deliberations occurred. The court applied the same reasoning in its summary judgment decision, noting that Esrati did not present any further evidence in opposing summary judgment. Doc. # 83, p. 1.

Esrati at ¶ 20.

In affirming the trial court's decision, we noted that Esrati failed to present any evidence about what occurred during the bus tour. *Id.* at ¶ 24. Thus, whether any discussion or events occurred while the bus was in transit, while it was stopped in front of a school or schools, or when a school tour was conducted, is basically irrelevant for

purposes of reconsideration. The reason is that Esrati failed to present *any evidence in the trial court to dispute the testimony that no discussions or deliberations occurred.* Our decision also stressed that:

> Concededly, one would not expect Esrati to testify about meetings to which he was not admitted. *However, that is the function of discovery.* Esrati could have taken depositions of any or all individuals who were present, including media observers.

(Emphasis added). *Esrati*, 2d Dist. Montgomery No. 28062, 2019-Ohio-1021, at ¶ 25.

Accordingly, we find no basis for reconsidering our opinion.

II. Alleged Actual Violation of the OMA

Esrati's second contention is that we found an OMA violation, but failed to issue an injunction. This concerns a comment we made about a discussion between the Dayton School Superintendent and the School's Media Director. During that discussion, the Media Director said 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.' " *Esrati*, 2d Dist. Montgomery No. 28062, 2019-Ohio-1021, at ¶ 30. We remarked that "[t]o the extent this implies that the Open Meetings Act could be circumvented by this avenue," the Supreme Court of Ohio had indicated otherwise. Specifically, the court said that " '*any* private prearranged discussion of public business by a majority of the members of a public body,' " even when done telephonically or electronically, could constitute a meeting for purposes of R.C. 121.22. (Emphasis sic.) *Id.*, quoting *White v. King*, 147 Ohio St.3d 74, 2016-Ohio-2770, 60 N.E.3d 1234, ¶ 15 and 18.

According to Esrati, this case was about "multiple violations" of R.C. 121.22, "not just stopping the bus tour." Appellant's Application at p. 3. Esrati, therefore, argues that we should reconsider our decision and find a violation of R.C. 121.22, based on the Media Director's statement. However, Esrati's testimony at the preliminary injunction hearing belies his claim of multiple violations.

Specifically, during Esrati's cross-examination, the following exchange occurred:

> Q. Okay. Am I to understand, I've heard some statement by you, * * * am I to understand that your lone objection, the lone reason you're bringing this case is because of the February 6th bus tour?
>
> A. That is the basis of the suit –
>
> Q. Okay.
>
> A. – primarily.
>
> Q. So –
>
> A. That is, that is the actionable issue.

Tr. at p. 102.

Furthermore, we did not say in paragraph 30 that the Media Director's suggestion was followed or that such conference calls were made. There was no evidence of this. We simply noted, as dicta, that such an approach would be impermissible under pertinent authority from the Ohio Supreme Court. Accordingly, we find no basis for granting reconsideration.

III. Alleged Irrelevant Cases

According to Esrati, we should also reconsider our opinion because we cited two irrelevant cases in paragraph 23 of our opinion. These cases are *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032 (1st Dist.), and *Holeski v. Lawrence*, 85 Ohio App.3d 824, 621 N.E.2d 802 (11th Dist.1993). Esrati argues that the facts in these cases differ from the case before us.

We cited these cases for the proposition that "[c]ourts have held that no violation of the Open Meetings Act occurs where a session is for information-gathering and no deliberations take place." *Esrati*, 2d Dist. Montgomery No. 28062, 2019-Ohio-1021, at ¶ 23, citing *Cincinnati Enquirer* at ¶ 15 and *Holeski* at 829. This is precisely what these courts held. Cases cited for general propositions do not need to have facts identical to the case in which the general proposition is being applied.

Furthermore, as Appellees note, many other cases have said that "deliberations" under the OMA " 'involve more than information-gathering, investigations, or fact-finding.' " Appellee's Joint Memorandum, p. 8, quoting *State ex rel. Huch v. Village of Bolivar*, 5th Dist. Tuscarawas No. 2018 AP 03 0013, 2018-Ohio-3460, ¶ 39, and citing cases from eight other Ohio appellate districts.

Courts have often stressed that "[t]he purpose of reconsideration is not to reargue one's appeal based on dissatisfaction with the logic used and conclusions reached by an appellate court." *State v. Smith*, 7th Dist. Mahoning No. 17 MA 0041, 2017-Ohio-9240, ¶ 4. *See also Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9 (noting that the court will not "grant reconsideration when a movant seeks merely to reargue the case at hand"). Because Esrati is simply attempting to reargue his appeal, there is no basis for reconsidering our

opinion.

IV. Burden of Proof

In his fourth argument, Esrati contends that our opinion conflicts with a prior case in which we said that a moving party is responsible for proving that no deliberations took place. Appellant's Application at p. 5, citing *Bledsoe-Baker v. City of Trotwood*, 2d Dist. Montgomery No. 28052, 2019-Ohio-45, ¶ 19-20. There is no such conflict. *Bledsoe-Baker* involved a city's immunity for an incident involving operation of its sewer system, and the part of the decision that Esrati cites simply outlines general summary judgment standards. *Id.* at ¶ 19-20.

Esrati's also contends that both our court and the trial court improperly imposed a burden on him to prove that deliberations occurred. A moving party does have " '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.' " *Bledsoe-Baker* at ¶ 20, quoting *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). However, * * * [t]he nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings.' " *Id.*, quoting *Dresher* at 293.

The trial court found, and we agreed, that Esrati failed to meet his burden. There is no dispute that parties bringing actions for OMA violations bear the burden of establishing the violations by a preponderance of evidence. *Esrati*, 2d Dist. Montgomery No. 28062, 2019-Ohio-1021, ¶ 15, citing *Steingass Mechanical Contracting, Inc. v. Warrensville Hts. Bd. of Edn.*, 151 Ohio App.3d 321, 2003-Ohio-28, 784 N.E.2d 118, ¶ 30,

and R.C. 121.22(I). In this regard, we note that well before summary judgment was granted, Esrati was aware that he needed to present evidence to support his claim.

The preliminary injunction hearing was held in mid-March 2018. At the end of Esrati's case, the Board made a Civ.R. 41(B)(2) motion to dismiss. Tr. at p. 107. Such a motion is based "on the ground that upon the facts and the law the plaintiff has shown no right to relief." Civ.R. 41(B)(2). The court discussed the motion at pp. 107-115 of the transcript, and ultimately declined to rule on the motion at that time. *Id.* at p. 115. Instead, the court asked the Board to present its case. *Id.*

However, during the discussion, the following exchange occurred:

> JUDGE SKELTON: If we are to assume that Sunshine Laws don't apply to where members of a committee engage solely in information gathering and fact finding, if that's the law, and you don't know what they did on that bus ride and that school, * * * how can this court make a determination as to what happened on that bus or what happened in that school?
>
> MR. ESRATI: That's the whole point of the Sunshine Laws, Your Honor. The point is that you cannot exclude members of the public who wish to observe the workings of how the sausage is made so that they ascertain --
>
> JUDGE SKELTON: But isn't it, isn't it your burden though to show me, by maybe calling a member or two of this task force and say, what happened during the bus tour, what happened in the school, isn't it your burden here? It's your -- you're bringing the case. You're saying to me that

> * * * this task force did x, y or z, but I haven't heard any evidence. The superintendent said the bus was too loud and she doesn't remember any questions and the maintenance guy was talking about what happened to the boiler and this, that and the other, but I haven't heard the evidence. I haven't heard the beef.

Tr. at pp. 110-111.

After this discussion, Esrati continued to argue that he did not have a burden because he "should have been given access. And that's all that R.C. 121.22" and the caselaw requires, that "you can't deviate from that process at all at any time * * *." *Id.* at p. 112.

A few days later, the court filed a decision denying Esrati's request for a preliminary injunction. In the decision, the court again stressed that Esrati did, in fact, have a burden, and had failed to meet it. In this regard, the court said that "Plaintiff's evidence fails to show that any deliberation or discussion of the closure issues occurred on the bus tour." Doc. #52 at p. 5.

As noted in our opinion, the court subsequently allowed Esrati to obtain answers to discovery requests even though the answers were due after the discovery deadline had expired. *Esrati,* 2d Dist. Montgomery No. 28062, 2019-Ohio-1021, at ¶ 25. The court also confirmed with Esrati that he did not need the requested discovery in order to respond to the pending motions for summary judgment. *Id.* at ¶ 26. Finally, the court said that Esrati could still take discovery depositions by showing good cause. *Id.* However, Esrati never tried to take any depositions at any time during the case.

According to Esrati, our comment about his failure to take depositions "is absurd

and unnecessary" because "the people involved in breaking the law aren't going to self-incriminate themselves." Appellant's Application at p. 4. However, while the Task Force had around 20 members, Esrati only sued the two chair-persons of the Task Force (one was on the Dayton School Board, and the other was on the Dayton City Commission). More importantly, various members of the media were on the bus, and could have testified about what was discussed. Esrati's argument, therefore, has no merit.

Again, "[t]he purpose of reconsideration is not to reargue one's appeal based on dissatisfaction with the logic used and conclusions reached by an appellate court." *Smith*, 7th Dist. Mahoning No. 17 MA 0041, 2017-Ohio-9240, at ¶ 4. Consequently, Esrati's fourth argument provides no basis for reconsidering our opinion.

V. Equal Protection

Esrati's final ground for reconsideration is that "[p]ro 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." Appellant's Application at p. 10. The allegation here is that a pro se party (or any party) who obtains an injunction will receive only a civil forfeiture fine of $500 from the enjoined public body, but a party who uses an attorney may also be awarded attorney fees, which can be significant. *See* R.C. 121.22(H)(2)(a). As an example, in *Maddox v. Greene Cty. Children Servs. Bd. of Dirs.*, 2014-Ohio-2312, 12 N.E.3d 476 (2d Dist.), we found that the trial court should have assessed the public body for seven $500 civil forfeitures (or $3,500), and that the plaintiff's attorney fee award of $77,604.20 should not

have been reduced by $22,232.50. *Id.* at ¶ 51, 56, and 71. Esrati's position is that his time is as valuable as that of an attorney, and he should be compensated accordingly.

Esrati did not raise this point during his appeal; he simply contended that the trial court should have been more lenient because the general public has the burden of bringing OMA cases. See Appellant's Brief at p. 11. The law is well-settled that reconsideration applications ordinarily may not raise issues that were not previously asserted. *Fenton v. Time Warner Entertainment Co.*, 2d Dist. Montgomery No. 19755, 2003-Ohio-6317, ¶ 2, citing Whiteside, *Ohio Appellate Practice*, Author's Comment at 700 (2003 Ed.). (Other citation omitted.) *See also Pailet v. Univ. of Cincinnati Hosp.*, 10th Dist. Franklin No. 82AP-952, 1983 WL 3635, *1 (Aug. 4, 1983) (rejecting reconsideration and noting that time for filing assignments of error under App.R. 18(A) had long since expired).

Based on the preceding discussion, this argument provides no reason to reconsider our opinion.

VI. Conclusion

Because all of Appellant's arguments in support of reconsideration are without merit, the application for reconsideration is overruled.

SO ORDERED.

JEFFREY M. WELBAUM, Presiding Judge

MICHAEL T. HALL, Judge

MICHAEL L. TUCKER, Judge

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