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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

KEVIN MCDUGLE and JUSTIN)
HUMPHREY, as individuals,)
)
Plaintiffs/Appellants,)
)
vs.)
)
JASON HICKS, as District Attorney for)
Caddo, Grady, Jefferson, and Stephens)
Counties,)
)
Defendant/Appellee.)

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Case No. 122,866

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APPEAL FROM THE DISTRICT COURT OF
STEPHENS COUNTY, OKLAHOMA

HONORABLE BRENT G. RUSSELL, TRIAL JUDGE

REVERSED

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For Plaintiffs/Appellants,

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For Defendant/Appellee.

OPINION BY BARBARA G. SWINTON, JUDGE:

¶1 Plaintiffs/Appellants Kevin McDugle and Justin Humphrey appeal from an order granting summary judgment in favor of Defendant/Appellee Jason Hicks, as District Attorney for Caddo, Grady, Jefferson and Stephens Counties in an Open Records Act case regarding Defendant's involvement in the April 26, 2013 clemency hearing of Richard Glossip before the Oklahoma Pardon and Parole Board. We reverse and remand for further review of discovery matters.

¶2 In May and July 2023, Plaintiffs Kevin McDugle and Justin Humphrey submitted an open records request related to Defendant's attendance at the April 26, 2023 hearing before the Oklahoma Pardon and Parole Board involving the clemency request of Richard Glossip. Plaintiffs requested the records of Defendant along with other elected district attorneys who had attended the hearing. Defendant refused to produce text message communications because he claimed they were personal and not open records.

¶3 On December 20, 2023, Plaintiffs filed a petition in Stephens County for relief pursuant to 51 O.S. § 24A.17 (B), under the Oklahoma Open Records Act, 51 O.S. §§ 24A, *et seq.* concerning the records requested from Defendant. Defendant produced several records in response, including emails and text messages. Plaintiffs submitted discovery requests to Defendant on May 28, 2024, indicating not all requested information was provided to Plaintiffs. Defendant then filed a motion for

summary judgment on June 7, 2024. In the motion, Defendant asserted that he voluntarily disclosed all records responsive to Plaintiff's open records request; that he performed a diligent, good faith search for responsive records and has complied with all legal requirements of the Open Records Act; and that Plaintiffs seek to expand the scope of a cause of action brought under the Open Records Act beyond the purpose of the statute. In the motion, Defendant detailed the search he performed in response to the requests in May and July 2023. Defendant asserted that the only documents originally withheld in response to the requests were his personal text messages, but that text messages were eventually provided in April 2024. Defendant also filed a motion to stay discovery on the same day, arguing that the motion for summary judgment is dispositive, and should the court grant the motion, the discovery would be unnecessary.

¶4 In the response to the motion for summary judgment, Plaintiffs argued that Defendant withheld other records that were not text messages; that Defendant has not demonstrated he produced all responsive records; and that a post-petition production of documents does not moot Plaintiffs' request for a declaratory judgment. Plaintiffs also argued that the pre-petition denial still warrants an award of attorney fees, even though Defendant produced selected documents after the petition was filed. Finally, Plaintiffs argued that a motion for summary judgment is

premature given that discovery was pending and necessary to fully resolve the claims.

¶5 Plaintiffs then filed a motion for discovery, requesting that the court deny Defendant's motion for summary judgment until discovery is fully responded to, and further requesting the completion of discovery issued. The trial court granted Defendant's motion to temporarily stay discovery until a ruling is issued on Defendant's motion for summary judgment. Defendant's reply in support of his motion for summary judgment argued applicable law supports the presumption that Defendant complied with his statutory obligations to retain records, and that his production satisfied Plaintiffs' requests.

¶6 No hearing was held on the matter. On July 18, 2024, the trial court issued a "letter order" stating that Defendant's motion is granted, and that all other pending matters are moot. The trial court directed Defendant to prepare an order with the court's findings. Following Plaintiffs' motion to settle the journal entry, the trial court entered an order on January 16, 2025, finding that Defendant "asserted unequivocally that he has produced all materials" requested by Plaintiffs, and that Plaintiffs' response is insufficient to create a genuine issue of fact. Plaintiffs appeal from this order.

¶7 This appeal is governed by the procedure set forth in Okla.Sup.Ct.R. 1.36, presented without appellate briefing. The appellate standard of review for a trial

court's grant of summary judgment is *de novo*. *Barker v. State Insurance Fund*, 2001 OK 94, ¶ 7, 40 P.3d 463. "In a *de novo* review, we have plenary, independent and non-deferential authority to determine whether the trial court erred in its application of the law and whether there is any genuine issue of material fact." *Id.* "Like the trial court, we examine the pleadings and summary judgment evidentiary materials submitted by the parties to determine if there is a genuine issue of material fact." *Id.* "This Court will reverse the grant of summary judgment when it appears from the evidentiary materials that the material facts concerning issues raised in the case are conflicting or, if the material facts are disputed, reasonable persons in the exercise of fair and impartial judgment might reach a different conclusion from those facts." *City of Tulsa v. Bank of Oklahoma, N.A.*, 2011 OK 83, ¶ 17, 280 P.3d 314. This Court will review a trial court's grant or denial of discovery for an abuse of discretion. *Malloy v. Caldwell*, 2011 OK CIV ALL 26, ¶ 12, 251 P.3d 183.

¶8 On appeal, Plaintiffs argue that the district court erred in determining that there was no genuine issue of material fact precluding summary judgment, that the court erred in denying Plaintiffs' request for declaratory relief, and that the trial court should not have granted summary judgment prior to allowing discovery to proceed in the case.

¶9 Pursuant to the Oklahoma Open Records Act (the Act), 51 O.S. § 24§ 24A.17 (B), a person who "requests and is denied access to records of a public body or public

official: 1. May bring a civil suit for declarative or injunctive relief, or both, but such civil suit shall be limited to records requested and denied prior to filing of the civil suit” and is also entitled to reasonable attorney fees, if successful. The parties do not dispute that Defendant is subject to the Open Records Act. *See* 51 O.S. § 24A.3 (4). The dispute centers around whether the requested records have been produced and whether Plaintiffs are entitled to relief under the Act.

¶10 In his motion for summary judgment, Defendant asserted that the case is moot because the requested records were produced, and therefore, the court is unable to provide meaningful relief under the Act. On appeal, Plaintiffs first argue that there is a genuine dispute of material fact as to whether Defendant produced all relevant records in response to Plaintiffs’ request, and that therefore, Defendant’s argument that the petition was moot is without merit. Related to this argument is whether substantial questions exist regarding the sufficiency of Defendant’s identification and retrieval methods in response to the requests. However, we need not reach these issues because of the outstanding discovery matters not resolved below.

¶11 Plaintiffs assert on appeal that the trial court should not have denied the request for discovery prior to granting summary judgment. We agree. Plaintiffs submitted discovery requests to Defendant prior to the filing of the motion for summary judgment. Defendant did not answer the discovery requests, but instead, filed a motion to stay discovery along with his motion for summary judgment. In

response to the motion for summary judgment, Plaintiffs submitted a declaration pursuant to Rule 13 (d) of the Rules for District Courts of Oklahoma, asserting that Plaintiffs' response could be supported by additional discovery. Under this rule, the trial court has discretion to deny the motion for summary judgment where it appears that a party cannot present evidentiary material to support its opposition to the motion. Under the circumstances presented herein, it was an abuse of discretion for the trial court to deny relief under Rule 13 (d). *See also, Bookout v. Great Plains Reg'l Med. Ctr.*, 1997 OK 38, ¶ 17, 939 P.2d 1131 (finding the refusal to grant a continuance for discovery is reversible error when an abuse of discretion is found). The order of summary judgment is therefore reversed. We note that the trial court has discretion in controlling discovery matters and therefore may issue orders limiting discovery as it deems necessary under the circumstances, including an *in camera* review of disputed materials. *See* 12 O.S. § 3226 (B) (2).

¶12 Plaintiffs also argue that the trial court erred in granting judgment in favor of Defendant on Plaintiffs' declaratory judgment claim when Defendant's motion solely addressed the injunctive relief claim. Because we reverse summary judgment and remand the matter for discovery, we need not address this issue on appeal.

¶13 Based upon our review of the record and applicable law, we find that the court's order granting summary judgment in favor of Defendant was premature and that the trial court abused its discretion in denying Plaintiffs' request for discovery

to proceed prior to the court's ruling on the issues before it. The order of the trial court is therefore REVERSED.

GOREE, P.J., concurs; PRINCE, J., dissents.

PRINCE, J., dissenting:

¶ 1 I respectfully dissent. The undisputed facts show that the District Attorney's Office has produced all the requested text messages, although they were not produced until after the lawsuit had been filed. The Plaintiffs are now attempting to expand the case from an action about whether the Plaintiffs are entitled to the requested text messages into an action about the adequacy of the search conducted by the DA's Office. On the issue of the adequacy of the search, the standard should be established as a reasonableness or good-faith efforts standard. *See* 51 O.S. § 24A.5(6) (“[a] public body must provide prompt, **reasonable access** to its records. . . .”) (emphasis added). In that context, the Declaration by the DA revealed the use of a reasonable methodology for the search conducted by his office and that good-faith efforts were expended to locate and provide access to the documents. The Plaintiffs' after-the-fact, bare allegation that additional documents exist should not be enough to reverse the trial court. *See Runyon v. Reid*, 1973 OK 25, ¶ 14, 510 P.2d 943, 946; *Weeks v. Wedgewood Vill., Inc.*, 1976 OK 72, ¶ 12, 554 P.2d 780, 784–85 (“Rule 13 is intended to permit a party to pierce the allegations of the pleadings to show that the facts are otherwise than as alleged.”). *Lawson v. Curnutt*, 2010 OK

CIV APP 78, 239 P.3d 192, also is distinguishing from this case. Thus, I would affirm the award of summary judgment based on the mootness doctrine, subject to the matter being remanded for a determination of the ancillary issue of attorneys' fees.