

STATE OF MICHIGAN
IN THE SUPREME COURT

SUSAN BISIO,

Plaintiff-Appellant,

v.

THE CITY OF THE VILLAGE OF
CLARKSTON,

Defendant-Appellee

Supreme Court Case No. 158240

Court of Appeals Docket No. 335422

Oakland County Circuit Court
Case No. 15-150462-CZ

**DEFENDANT-APPELLEE THE CITY OF THE VILLAGE OF CLARKSTON'S
MOTION FOR REVIEW OF TAXATION OF COSTS**

NOW COMES Defendant-Appellee The City of the Village of Clarkston, by its counsel Kerr, Russell and Weber, PLC, and for its Motion for Review of Taxation of Costs pursuant to MCR 7.319 and MCR 7.219(E) hereby state as follows:

1. On July 28, 2020, Plaintiff-Appellant Susan Bisio submitted her bill of costs, seeking \$1,761.00.
2. On August 4, 2020, Defendant-Appellee The City of the Village of Clarkston (“Clarkston”) filed an objection arguing Ms. Bisio was not a prevailing party because the Supreme Court majority did not accept Ms. Bisio’s argument regarding agency – her principal argument at each phase of this case.
3. Clarkston also argued that throughout the proceedings, Ms. Bisio conceded that the city attorney *is not* a public body while the dispositive basis for the majority opinion was that the city attorney *is* a public body.
4. Clarkston also requested, pursuant to MCR 7.319(B), that costs not be taxed because the appeal involved a matter of significant public interest.

5. On August 5, 2020, the Clerk taxed costs in the amount of \$1,146.00 because “it appears Plaintiff-Appellant has prevailed, that is, improved her position on appeal, and is therefore entitled to taxable costs.” However, the Clerk also noted “[t]he entire Court may review this taxation of costs[.]”

6. Review is appropriate. Ms. Bisio’s arguments did not lead to an improvement in her position. Six Justices declined to adopt the arguments offered by Ms. Bisio.

7. The “public body” argument that did prevail was raised in an amicus brief, not by Ms. Bisio.

8. Moreover, “[i]n equitable proceedings involving questions of public interest or public policy the Supreme Court denies costs where the matters for its consideration are apparently brought in good faith.” *Harvey v Lewis*, 10 Mich App 23, 33 (1968) (citing *Case v City of Saginaw*, 291 Mich 130 (1939); *White v Welsh*, 291 Mich 636 (1939); *Lewick v Glazier*, 116 Mich 493 (1898); *School District No. Thirteen v Dean*, 17 Mich 223 (1868); *People v. Auditors of Wayne County*, 5 Mich 223 (1858)).

9. Here, Ms. Bisio sought equitable relief by requesting an order that Clarkston produce the disputed documents. Further, the Freedom of Information Act arguments raised by Clarkston were made in good faith; those arguments were accepted by the Trial Court and the Court of Appeals. This Court should therefore exercise its discretion and decline to impose costs. See e.g., *Charles Featherly Construction Co v Property Development Group, Inc*, 400 Mich 198; 253 NW2d 643 (1977).

10. For these reasons, and as more fully stated in the attached Brief in Support, Clarkston requests an order that costs not be allowed.

WHEREFORE Defendant-Appellee The City of the Village of Clarkston respectfully asks that this Honorable Court grant this Motion, decline Plaintiff-Appellant's request for costs, enter an order that costs not be allowed, and award all other relief that is just and equitable.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

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**BRIEF IN SUPPORT OF
DEFENDANT-APPELLEE THE CITY OF THE VILLAGE OF CLARKSTON'S
MOTION FOR REVIEW OF TAXATION OF COSTS**

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STATEMENT OF FACTS

In this appeal, Ms. Bisio argued that Clarkston wrongfully denied her Freedom of Information Act (FOIA) request relating to certain documents in the file of the city attorney, a private attorney. Ms. Bisio conceded that the city attorney is not a public body and instead argued that the city attorney was an agent of Clarkston. According to Ms. Bisio, documents in the possession of the city attorney, as Clarkston's agent, were public records subject to disclosure under FOIA. Clarkston argued that common law agency principles did not apply to FOIA for the purpose of determining whether the documents of the city attorney were public records subject to disclosure by Clarkston.

The Supreme Court majority did not accept Ms. Bisio's argument regarding agency – her principal argument at each phase of this case. Contrary to Ms. Bisio's multiple concessions that the city attorney *is not* a public body, the Supreme Court majority concluded that the city attorney *is* a public body. The Supreme Court majority reached this result based on arguments raised in an amicus brief. The Court did not include this issue in the order granting leave, and neither party had an opportunity to respond to the argument raised by amicus. The majority opinion acknowledges that “plaintiff’s argument . . . focused on MCL 15.232(h)(iii) rather than MCL 15.232(h)(iv),” and that the majority was reviewing an unpreserved issue. [Sup Ct Op at 14, n 12].

On July 28, 2020, Ms. Bisio submitted a bill of costs seeking \$1,761.00. On August 4, 2020, Clarkston filed an objection for the reasons explained above. On August 5, 2020, the Clerk taxed costs in the amount of \$1,146.00 because “it appears Plaintiff-Appellant has prevailed, that is, improved her position on appeal, and is therefore entitled to taxable costs.” The Clerk noted “[t]he entire Court may review this taxation of costs[.]” Clarkston now requests that this Court review the Clerk's action, and issue an order that costs not be allowed.

STANDARD OF REVIEW

A prevailing party may submit a bill of costs. See MCL 600.2445(1); MCR 7.319(A). Any other party may object within seven days. See MCR 7.219(C). Once the Clerk takes action, the Court may review it upon a motion filed within seven days of the date of taxation. *Id* at (E). This Court’s review is limited to the issues raised in the objections. *Id*.

LEGAL ARGUMENT

This Court has discretion to decline to tax costs. MCL 600.2445(1); MCR 7.319(A); MCR 7.219(E). “The taxation of costs is neither a reward granted to the prevailing party nor a punishment imposed on the losing party, but rather a component of the burden of litigation presumed to be known by the affected party.” *North Pointe Ins Co v Steward (On Remand)*, 265 Mich App 603, 611; 697 NW2d 173 (2005) (citing *Harvey v Lewis*, 10 Mich App 23 (1968)). Generally, an “appellant may be awarded the costs on appeal if he improves his position on appeal.” MCL 600.2445(2). However, “[i]n equitable proceedings involving questions of public interest or public policy the Supreme Court denies costs where the matters for its consideration are apparently brought in good faith.” *Harvey*, 10 Mich App at 33 (citing *Case v City of Saginaw*, 291 Mich 130 (1939); *White v Welsh*, 291 Mich 636 (1939); *Lewick v Glazier*, 116 Mich 493 (1898); *School District No. Thirteen v Dean*, 17 Mich 223 (1868); *People v. Auditors of Wayne County*, 5 Mich 223 (1858)).

Here, Ms. Bisio submitted a Bill of Costs, Clarkston objected, but the Clerk nonetheless taxed costs based on the belief that Ms. Bisio “improved her position.” The Clerk lacked authority to evaluate whether Ms. Bisio was truly a prevailing party. Because this Court has discretion to consider whether Ms. Bisio is entitled to costs, and the facts show that costs are not appropriate, Clarkston requests an order declining to award costs to Ms. Bisio.

First, Ms. Bisio’s arguments did not lead to the result in favor of FOIA disclosure. Six of the seven Justices declined to adopt Ms. Bisio’s argument regarding agency – her only rationale for reversal of the Trial Court and Court of Appeals’ orders denying her FOIA request. The “public body” determination adopted by the majority was raised by amicus. Ms. Bisio had already conceded multiple times that the city attorney *is not* a public body. There can be no serious dispute that Ms. Bisio and her counsel were not responsible for formulating the argument that the majority adopted. The majority opinion acknowledged “plaintiff’s argument . . . focused on MCL 15.232(h)(iii) rather than MCL 15.232(h)(iv),” and noted it was reviewing an unpreserved issue. [Sup Ct Op at 14, n 12]. Under such circumstances, justice is not served by awarding costs to Ms. Bisio. Nor is it fair to tax costs against a party that never had an opportunity to address the unpreserved but winning argument of amicus.

Second, costs should not be awarded in this equitable proceeding involving matters of great public importance. Clarkston’s arguments were made in good faith. Ms. Bisio’s pleadings seek equitable relief: an order compelling Clarkston to produce the documents at issue. The Trial Court and the Court of Appeals denied that relief. The three separate opinions issued by this Court show there are genuine grounds for disagreement. The constellation of amicus participants and media attention further show that this case involves a matter of public importance. Because this is an equitable proceeding involving a FOIA question of great public interest and Clarkston’s arguments were made in good faith, this Court should exercise its discretion to deny costs. See *Harvey*, 10 Mich App at 33 (citing *Case v City of Saginaw*, 291 Mich 130 (1939); *White v Welsh*, 291 Mich 636 (1939); *Lewick v Glazier*, 116 Mich 493 (1898); *School District No. Thirteen v Dean*, 17 Mich 223 (1868); *People v. Auditors of Wayne County*, 5 Mich 223 (1858)); *Charles Featherly Construction Co v Property Development Group, Inc*, 400 Mich 198; 253 NW2d 643 (1977).

CONCLUSION

WHEREFORE Defendant-Appellee The City of the Village of Clarkston respectfully asks that this Honorable Court grant this Motion, decline Plaintiff-Appellant's request for costs, enter an order that costs not be allowed, and award all other relief that is just and equitable.

Respectfully submitted,

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