STATE OF MICHIGAN

SUPREME COURT

SUSAN BISIO,

Plaintiff-Appellant,

v

THE CITY OF THE VILLAGE OF CLARKSTON,

Defendant-Appellee.

/

Supreme Court No. 158240

Court of Appeals No. 335422

Oakland County Circuit Court
Case No. 2015-150462-CZ

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PLAINTIFF-APPELLANT'S ANSWER TO DEFENDANT'S MOTION TO REVIEW TAXATION OF COSTS

Plaintiff-appellant Susan Bisio responds as follows to defendant-appellee city's Motion for Review of Taxation of Costs: This Court reversed the Circuit Court and Court of Appeals and held the records at issue are "public records" subject to the Freedom of Information Act (FOIA). Plaintiff is the prevailing party entitled to tax costs under MCL 600.2445(1)-(2) and MCR 7.319 because she improved her position on appeal, obtaining reversal of the lower courts' holdings that the records were not "public records." The clerk was correct in taxing costs in plaintiff's favor.

In answer to the specific allegations of the city's motion, plaintiff states:

1. Admit that plaintiff submitted a routine Bill of Costs for a minimal amount, as provided by statute and court rule.

2. Admit that the city objected to the Bill of Costs, arguing that, even though plaintiff obtained a ruling in her favor reversing the courts below, she is not the prevailing party. The city's objections did not set out the standard for determining when a party is the prevailing party—that the party "improves his position on appeal." MCL 600.2445(2). And the Court accepted plaintiff's principal argument—that the contested records were "public records" under FOIA: The Court held: "the documents at issue are 'public records'" under FOIA. *Bisio v City of the Village of Clarkston,* __ Mich __; __ NW2d __ (2020) (docket no. 158240); slip op at 14 (referred to below as "Opinion").

The city wants to ignore plaintiff's success by arguing the Court reached that result by a different course of statutory interpretation than plaintiff advocated. That is not relevant to determining that plaintiff is the prevailing party. Plaintiff won. The city lost. The Court said its interpretation was consistent with plaintiff's argument "throughout this case that the documents at issue constitute 'public records' because, among other reasons, the city attorney holds an 'office' within defendant and therefore the documents were retained 'in the performance of an official function.'" *Id.,* slip op at 8 n 7.

3. The city mischaracterizes plaintiff's appeal arguments. Plaintiff conceded the city attorney, as an individual, is not a public body under

MCL 15.232(h)(iii), which defines municipal public bodies and does not include municipal officers or employees. But plaintiff's arguments did not exclude the possibility that the office of city attorney (as distinguished from the individual holding that office) is a public body because it is an office created by local authority under MCL 15.232(h)(iv). Plaintiff supported that alternative statutory interpretation, briefed by the press amici, and saw no need for plaintiff to submit further briefing on the issue after the amici filed their brief, particularly because the city did not seek to address this argument. Thus plaintiff's concession that the city attorney as an individual is not a public body under MCL 15.232(h)(iii) was not inconsistent with and did not preclude a holding that the office of city attorney is a public body under MCL 15.232(h)(iv). This is the ground on which the Court decided the case.

4. Admit that the city argued costs should not be taxed because the case involves a public question. The case the city cited in its objections[1] is not a FOIA case, summarily denied costs in a five-word sentence, and did not state criteria for denying costs in a case involving a public question. By statute, a court must *always* award costs to a FOIA plaintiff whose lawsuit results in disclosure of public records.

[1] *Charles Featherly Constr Co v Prop Dev Group, Inc*, 400 Mich 198, 207; 253 NW2d 643 (1977).

MCL 15.240(6) (the court "*shall* award … costs" to a prevailing FOIA plaintiff; emphasis added).[2] Because the statute mandates a cost award, a public question exception cannot apply in FOIA cases. "In all cases brought under the FOIA a public question will necessarily be involved since the public's right of access to public records will be at stake. The Legislature has enacted a statutory exception to the public question/no costs rule." *Penokie v Michigan Technological Univ*, 93 Mich App 650, 665; 287 NW2d 304 (1979).

5. The assistant clerk properly taxed costs, citing the statutory definition of a prevailing party as one "who improved her position on appeal." 8/5/20 letter from Assistant Clerk Julie Clement.[3]

6. (a) The standard for taxing costs is not, as the city argues, whether a party's *argument* led to an improvement of her position. It is simply whether the

[2] The city continues to refuse to disclose the records this Court held were public records. Apparently further proceedings below will be needed to order the city to comply with this Court's opinion. Nonetheless, the Court should treat this as a case in which the plaintiff successfully compelled disclosure of public records, since the contested records are public records and the city offered no other reason for concealing them. Chief Justice McCormack noted: "The City has not, even in the alternative, argued in this Court that the records fall within an exemption." *Bisio v City of the Village of Clarkston,* __ Mich __; __ NW2d __ (2020) (docket no. 158240) (McCormack, CJ, concurring), at 2 n 1. The city itself concedes "the result in favor of FOIA disclosure." City brief, p 3. Thus, for purposes of taxing costs, the Court should treat this case as one in which plaintiff succeeded in obtaining disclosure of public records.

[3] The clerk reduced plaintiff's requested costs by not taxing costs for the exhibits to plaintiff's application for leave to appeal and reducing the costs for the application and reply on the application from $2 per page to $1 per page. Although it is the Court's policy to allow $1 per page for applications, that is not embodied in MCR 7.319(B), which refers only to "$2 per original page."

party "improves his position on appeal." MCL 600.2445(2). The statute does not provide for parsing arguments of a successful appellant. The Court of Appeals rejected this argument in *Penokie*. There plaintiffs sought disclosure of records under both FOIA and a common law theory of access to public records. 93 Mich App at 656-657. The trial court rejected the common law theory, holding that FOIA preempted the common law. *Id.* at 657. The Court rejected an argument that plaintiffs only partially prevailed and that a cost and fee award was discretionary rather than mandatory.[4] The Court of Appeals held an award was mandatory—that plaintiffs prevailed completely:

> That the court rejected plaintiffs' common-law theory did not transform plaintiffs' victory into a partial one. Plaintiffs were granted their requested relief. Because they prevailed in their challenge to the university's denial of their request, they were statutorily entitled to an award of reasonable attorneys' fees, costs and disbursements.

Id. at 666.

(b) The city is wrong in stating: "Six Justices declined to adopt the arguments offered by Ms. Bisio." Six justices held the contested records are "public records" under FOIA. The lead opinion adopted a statutory interpretation different from the one plaintiff offered, but the result was what plaintiff always argued: The contested records are "public records." Chief Justice McCormack's concurring opinion adopted plaintiff's argument—that the city attorney, as an officer of the city, acts on

[4] MCL 15.240(6) makes an award mandatory if a FOIA plaintiff prevails and discretionary if the plaintiff prevails in part.

behalf of the city in performing his official functions and that his records regarding that work are therefore the city's "public records."

7. Although an amicus raised the statutory interpretation argument that the lead opinion adopted, that does not make it any less appropriate. In approaching this statutory interpretation issue, the Court noted that the statute "defines the term 'public body' in a somewhat unorthodox fashion." Opinion at 7. Plaintiff supported the amicus argument and saw no reason to further brief it. Plaintiff still fully supports the Court's decision based on that argument and will brief that in response to the city's pending motion for rehearing, filed August 14, 2020.

The Court should reject the city's complaint that "neither party had an opportunity to respond to the argument raised by amicus." City brief, p 1. The press amici filed their brief on January 31, 2020. The Court held oral argument on March 5, 2020 and issued its opinion on July 24, 2020. The city could have sought leave to file a reply to the amicus brief any time during the over five months before this Court issued its opinion. The Court often grants such requests. The city is not a stranger to this possibility, since the Court of Appeals granted a motion for leave to file a reply to an amicus brief while the case was pending there. COA order 9/6/17. Or the city could have raised the issue at oral argument. The city had ample opportunity to argue this issue and chose not to.

8. (a) The city's objections to the Bill of Costs did not raise the "good faith" argument the city now offers in paragraph 8 of its motion. The Court should not consider it. "[O]n review [of the clerk's taxation of costs] only those affidavits or

objections which were previously filed with the clerk may be considered by the court." MCR 7.219(E), applicable in the Supreme Court under MCR 7.319(A). The city waived this argument by failing to raise it in its objections.

(b) Even if the Court were to consider the city's "good faith" argument, the Court should reject it.

First, not one of the six cases the city cites is a FOIA case.

Second, as shown in paragraph 4 above, costs are mandatory to a prevailing FOIA plaintiff. MCL 15.240(6).

Third, the cases the city cites don't apply here. Unlike this case, there was no applicable statute in *Harvey v Lewis*, 10 Mich App 23, 29; 158 NW2d 809 (1968). The argument was about the public policy exception to taxation of costs. The court considered whether there was "immunity from taxation of costs because of public policy." *Id.,* at 33. As discussed in paragraph 4 above, the public policy exception does not apply in FOIA cases and costs are mandatory under MCL 15.240(6); *Penokie*, 93 Mich App at 665. For the same reason, *Case v Saginaw*, 291 Mich 130, 151; 288 NW 357 (1939), and *White v Welsh*, 291 Mich 636, 641; 289 NW 279 (1939), don't apply because they summarily denied costs because a public question was involved. *Lewick v Glazier*, 116 Mich 493, 501; 74 NW 717 (1898), awarded costs to one defendant and denied them to another, without clear explanation. *Sch Dist No 13 v Dean,* 17 Mich 223, 232 (1868), denied costs without clear explanation. Thus no case the city cites for its so-called "good faith" exception applies here.

Finally, it is questionable that the city proceeded in good faith in arguing that it can keep records of the conduct of city business secret by the device of having separate off-premises files held by officers and employees—a theory directly contrary to the public policy of FOIA that "all persons … are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees." MCL 15.231(2). The city persists in referring to the city attorney as a "private attorney" (city brief, p 1) when in fact he was formally appointed to an office created by the city charter. Opinion at 11-12.

9. See the answers above to paragraphs 4 and 8 regarding the statutory mandate to award costs in a FOIA case. The single case the city cites, *Charles Featherly Constr Co v Prop Dev Group, Inc*, 400 Mich 198, 207; 253 NW2d 643 (1977), is not a FOIA case, denied costs in a single five-word sentence, and did not contain any explanation of criteria for denying costs in a case involving a public question.

10. The city has not stated a cogent reason for denying costs. Even if one ignored the statutory mandate for costs in FOIA cases, MCL 15.240(6), the city's theory would ignore the statutory definition of "prevailing party" in MCL 600.2445(2) and enmesh court clerks and courts in dissecting arguments in a case to evaluate which argument prevailed and which did not. It would introduce a complicating factor into what should be a simple procedure expeditiously handled by court clerks rather than argued before appellate judges and justices. Determining the prevailing party should focus on results, not parsing legal arguments.

Additional Response and Argument

One must wonder why the city decided to take the unusual course of asking the full Court to review taxation of $1146 in costs, since the city is undoubtedly incurring more in attorney fees than the amount at issue. We speculate the city thinks a favorable ruling on this issue will give it leverage for opposing what will be a significant fee liability on remand under MCL 15.240(6), which provides for an award of fees to a prevailing FOIA plaintiff.[5]

The Court should not allow this. The standards for taxation of costs and a FOIA fee award are different. A prevailing party is entitled to tax costs under MCL 600.2445(1) and MCR 7.319. For that purpose, a prevailing party is one who "improves his position on appeal." MCL 600.2445(2). A party prevails for purposes of a FOIA fee award if the action was reasonably necessary to compel the disclosure of

[5] Another possibility is that the city wants to make a cautionary example of plaintiff to deter anyone else who may have the temerity to challenge the city's practice of concealing public documents. The city has certainly done that here, litigating the matter for more than four-and-a-half years, fighting every inch of the way (refusing to accept service of the summons and complaint; opposing summary disposition when the facts needed to decide the case were uncontested; insisting on discovery and then resisting discovery, requiring a motion for discovery sanctions and subpoenas to city witnesses who refused to voluntarily appear for deposition; refusing to stipulate to producing just the relevant transcripts for appeal; now opposing a modest request for costs and escalating the matter to consideration by the full Court; and filing a motion for rehearing of the Court's 6-1 decision in plaintiff's favor). The sad fact is that a recalcitrant municipality such as the city here can tie a person up in years of litigation and liability for tens of thousands of dollars of fees even when, as here, the city is wrong. Anyone else contemplating challenging the city's refusal to disclose public records will certainly be deterred by this object lesson.

public records and it had a substantial causative effect on disclosure. *Amberg v Dearborn*, 497 Mich 28, 34; 859 NW2d 674 (2014). Because these are different standards, a ruling on costs here will not be precedent for consideration of plaintiff's fee motion on remand, except to the extent the Court recognizes and relies on the mandatory requirement for costs to a prevailing FOIA plaintiff in MCL 15.240(6).

These different standards are yet another reason why the Court should deny this motion. The Court should reject the city's attempt to leverage a ruling on costs to use as a defense against a fee award. As discussed above, there is no legal basis for the Court to deny taxation of costs to this prevailing plaintiff.

The Court should not only deny the city's motion but should also order immediate payment of the costs. MCR 7.316(A)(7) (Court may "enter other and further orders and grant relief as the case may require"). Given the city's penchant for resisting every inch of the way and its insistence on continuing to hide the documents this Court held are public records, it is appropriate to put an end to this part of the city's litigation crusade by making clear that the city must pay the costs now. The city's conduct here brings to mind one judge's lament that, after six-and-a-half years of litigation, "Enough is enough." *People v Whalen*, 65 Mich App 687, 690; 238 NW2d 376 (1975).

For these reasons, plaintiff asks the Court to deny the city's motion to review taxation of costs, affirm the award of costs to plaintiff, and order the city to pay those costs immediately.

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