STATE OF MICHIGAN

COURT OF APPEALS

TONI SWIGER and TOM ROTTA, Plaintiffs/Counter-Defendants-Appellants,	UNPUBLISHED October 17, 2013
v	No. 313081 Mason Circuit Court
CITY OF LUDINGTON, Defendant/Counter-Plaintiff-Appellee.	LC No. 11-000415-CZ

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs, Toni Swiger and Tom Rotta, appeal as of right the trial court's order granting summary disposition to defendant, City of Ludington, and ordering plaintiffs to pay fees associated with their Freedom of Information Act (FOIA) requests. We affirm in part but remand for a determination of plaintiffs' costs.

I. FACTUAL BACKGROUND

Plaintiffs were news reporters for the blog, The Ludington Torch. They submitted numerous FOIA requests to defendant, including one on September 7, 2011.[1] Defendant denied this request on the basis that it was duplicative of previous FOIA requests that plaintiffs had submitted. Eventually plaintiffs filed a complaint for injunctive relief, requesting that defendant produce the records requested in their September 7th request.

Defendant filed an answer and counterclaim, requesting, *interia alia*, that the court order plaintiffs to pay for the FOIA requests that they had submitted but declined to pay. Both parties filed motions for summary disposition. Defendant attached to its motion an exhibit that purported to satisfy plaintiffs' September 7th request, thereby arguing that plaintiffs' complaint was moot. Plaintiffs filed a prehearing brief, asserting that the records defendant provided did

[1] The nature of the FOIA requests in this case is not relevant for this appeal.

not satisfy the September 7th request fully. Thereafter, defendant provided the outstanding records that plaintiffs sought and reasserted that plaintiffs' complaint was moot.

While the case initially was assigned to Judge Richard Cooper, he informed the litigants at the beginning of the summary disposition hearing that his son worked two days a week at defendant's law firm, so plaintiffs could request a different judge if they so desired. Plaintiffs did so, and the case was assigned to Judge Mark Wickens. At the subsequent summary disposition hearing, plaintiffs acknowledged that they had received all of the records requested on September 7th. Thus, the trial court granted summary disposition to defendant regarding plaintiffs' complaint, and conducted a bench trial on defendant's counterclaim.

The trial court ultimately ruled in favor of defendant's counterclaim. The court ordered plaintiff Swiger to pay defendant $380 and plaintiff Rotta to pay defendant $316.85 for unpaid FOIA fees. Plaintiffs now appeal on several grounds.

II. COSTS AND FEES

A. Standard of Review

On appeal, plaintiffs argue that the trial court erred in declining to award them reasonable attorney fees, costs, and punitive damages. Plaintiffs requested attorney fees and costs in their complaint, and costs and expenses in their supplemental motion for summary disposition brief. They also requested punitive damages in their prehearing brief and supplemental motion for summary disposition brief.[2] "Although this issue was not decided below, a party should not be punished for the omission of the trial court." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (quotation marks and citation omitted).[3]

A trial court's factual findings are reviewed for clear error, which occurs when we are left with the definite and firm conviction that a mistake has been made. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). We review questions of law de novo. *Id.* at 305.

B. Plaintiffs' Attorney Fees and Costs

The FOIA "provides in part that, '[i]f a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements.'" *Prins v Michigan State Police*, 299 Mich App 634, 640; 831 NW2d 867 (2013), quoting MCL 15.240(6). "A party prevails in the context of an FOIA action when the action was reasonably necessary to

[2] Because plaintiffs raised these issues beyond their complaint, including in their supplemental motion for summary disposition brief, we find the instant case distinguishable from *Prins v Michigan State Police*, 299 Mich App 634, 640; 831 NW2d 867 (2013).

[3] While defendant argues that plaintiffs did not follow MCR 2.625(F) in filing a bill of costs, that court rules states that a party entitled to costs must submit a bill, and the trial court failed to determine whether plaintiffs were entitled to costs.

compel the disclosure, and the action had a substantial causative effect on the delivery of the information to the plaintiff." *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002) (emphasis omitted). Moreover, "the disclosure of the records after plaintiff commenced the circuit court action rendering the FOIA claim moot as to the late-disclosed items does not void plaintiff's entitlement to fees and costs under § 10(6)." *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004).

In this case, plaintiffs acted *in propria persona* at all times during the case. Thus, they were not entitled to any attorney fees under MCL 15.240(6). *Thomas v City of New Baltimore*, 254 Mich App 196, 206 n 1; 657 NW2d 530 (2002) (a party acting *in propria persona* is not entitled to attorney fees); *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 721; 591 NW2d 676 (1998) ("pro se parties, including attorneys representing themselves, may not obtain attorney fees under the Michigan Freedom of Information Act[.]").

However, parties proceeding *in propria persona* may be entitled to court costs under MCL 15.240(6) if they are the prevailing parties in a FOIA action. See *Thomas*, 254 Mich App at 205-206, 206 n 1; see also *Haskins v Oronoko Twp Supervisor*, 172 Mich App 73, 79; 431 NW2d 210 (1988). As noted above, plaintiffs are prevailing parties if the action was reasonably necessary to compel the disclosure, and the action had a substantial causative effect on the delivery of the information to plaintiffs. *Scharret*, 249 Mich App at 414. Here, the record demonstrates that defendant only produced some of the requested documents after plaintiffs initiated this litigation. Moreover, it took further filings by plaintiffs before defendant fully produced the requested documents. Thus, we agree with plaintiffs that they were the prevailing party in terms of costs, as the action was reasonably necessary to compel the disclosure and it had a substantial causative effect on the delivery. *Scharret*, 249 Mich App at 414. We therefore remand for a determination of plaintiffs' actual costs.

C. Punitive Damages

Plaintiffs also argue that the trial court erred in declining to award them punitive damages under MCL 15.240(7). However, an award of punitive damages under FOIA is permitted only when the trial court has ordered a disclosure, and defendant acted arbitrarily and capriciously in refusing to provide the requested information. *Local Area Watch*, 262 Mich App at 151-153; *Michigan Council of Trout Unlimited v Dep't of Military Affairs*, 213 Mich App 203, 221; 539 NW2d 745 (1995); see also MCL 15.235(3); MCL 15.240(7). Here, defendant gave plaintiffs the requested records before the trial court's first substantive hearing on the matter. Thus, the trial court never ordered the disclosure of any public record. Therefore, an award of punitive damages is not warranted. See *Local Area Watch*, 262 Mich App at 153 ("[B]ecause the trial court here did not order disclosure, plaintiffs' argument for punitive damages fails."). Moreover, the evidence does not support a finding that defendant acted arbitrarily or capriciously in failing to provide the requested records, as the only evidence presented was that defendant denied the September 7th request because it thought it was duplicative of previous requests. Plaintiffs presented no evidence to counter this testimony. Thus, plaintiffs have not demonstrated that they are entitled to punitive damages.

D. Defendant's Fees

Plaintiffs also argue that the trial court erred in granting defendant's counterclaim and ordering plaintiffs to pay FOIA fees under MCL 15.234. We disagree.

"The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature." *In re Townsend Conservatorship*, 293 Mich App 182, 187; 809 NW2d 424, 427 (2011). If the statutory language is unambiguous, we will enforce the statute as written. *Id.* We read the statute as a whole and avoid a construction that renders any part of the statute surplusage or nugatory. *Michigan Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012).

Under FOIA, while a public body must disclose all public records not specifically exempt, it may charge a fee for such a service. Pursuant to MCL 15.234:

> (1) A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. Subject to subsections (3) and (4), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. . . .
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> (3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act. . . . A public body shall utilize the most economical means available for making copies of public records. . . .

In the instant case, plaintiffs contend that the trial court erred in ordering them to pay fees for FOIA information that they requested. While plaintiffs admit that they made the requests and refused to pay the assessed costs, they contend that because they refused to accept the documents, the court erred in ordering them to pay for the requests. Plaintiffs cite no authority for the proposition that only upon acceptance of the documents, even after inspection, can a public body charge fees. This Court has recognized that the purpose of MCL 15.234 is to reimburse a public body for the cost incurred fulfilling a record request. *Tallman v Cheboygan Area Schs*, 183 Mich App 123, 130; 454 NW2d 171 (1990) ("The statute [MCL 15.234] contemplates only a reimbursement to the public body for the cost incurred in honoring a given request—nothing more, nothing less."). Defendant's FOIA coordinator testified that the reimbursement defendant was seeking was for costs that it actually incurred, and plaintiffs offered no evidence to dispute this testimony. Thus, defendant was requesting reimbursement for costs actually incurred, consistent with *Tallman, supra*.

Moreover, a plain reading of the statute does not support plaintiffs' interpretation. According to MCL 15.234(1), fees may be charged for labor and actual costs, including searching for and retrieving the requested information, examining and reviewing the information, duplicating the information, and deleting and separating the exempt from the nonexempt

information. Thus, the statute contemplates that generally the costs associated with FOIA requests will be incurred before delivery. Yet, the statutory language of MCL 15.234 does not limit the public body's authority to charge fees only upon delivery, and "[i]t is a well-established rule of statutory construction that this Court will not read words into a statute." *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002).

Furthermore, plaintiffs' interpretation of the statute would undermine the Legislative intent that a public body be reimbursed for its expenses, MCL 15.234. A requesting party could cause a public body to incur fees and then refuse to pay, even after inspecting the documents, simply by stating that they refused to accept the requested documents. Given the lack of statutory language consistent with plaintiffs' argument, and in light of the stated purpose of reimbursing a public body for the costs of responding to FOIA requests, we find no error in the trial court's ruling.[4]

Plaintiffs also argue that they should not be required to pay fees because the information was provided in a different format than what they requested. MCL 15.233(3) provides:

> A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions. A public body shall protect public records from loss, unauthorized alteration, mutilation, or destruction.

Thus, pursuant to MCL 15.233(3), defendant can make reasonable rules necessary to protect the requested records and to prevent excessive and unreasonable interference in discharging its functions. Defendant's FOIA coordinator testified that defendant produced plaintiffs' requested records in the most cost effective manner while still protecting the original records and minimizing the interference with defendant's operations. Plaintiffs failed to contradict this testimony, or identify any authority for the proposition that defendant was required to make the records available only in the requested format. Given that MCL 15.233(3) authorizes a public body to make the information available in a format that protects the records and prevents excessive and unreasonable interference, which is what occurred in this case, we find that the trial court was not in error.[5]

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[4] Consistent with this ruling is an opinion of the Attorney General, which states that "[o]nce copies of documents have been prepared pursuant to the FOIA, a public body may require that its fees be paid in full prior to actual delivery of the copies." OAG, 1997-1998, No. 6977 (April 1, 1998). "An opinion of the Attorney General, while not precedentially binding, can be persuasive authority." *Indenbaum v Michigan Bd of Med*, 213 Mich App 263, 274; 539 NW2d 574 (1995).

[5] To the extent that plaintiffs challenge the fees assessed, they presented no evidence at the bench trial contesting these fees. Moreover, while plaintiffs argue that they did not have the

III. JUDICIAL CONDUCT

A. Standard of Review

Plaintiffs also argue that, irrespective of Judge Cooper's disqualification, there was an appearance of impropriety. They also contend that the trial court erred in failing to expedite the judicial process. Because plaintiffs did not advance these specific arguments below and the trial court did not rule on them, they are unpreserved. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Unpreserved claims are reviewed for plain error affecting substantial rights. *FMB-First Mich Bank*, 232 Mich App at 718.

B. Appearance of Impropriety

While due process requires that an unbiased and impartial decision-maker hear and decide a case, a trial judge is presumed unbiased, and the party asserting otherwise bears a heavy burden of proof. *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012).

Plaintiffs assert that Judge Cooper created an appearance of impropriety because he waited four months to inform plaintiffs that his son worked for defense counsel's law firm. Yet, nothing in the record indicates when Judge Cooper's son began working for defense counsel's firm or how long Judge Cooper waited before disclosing that information. More importantly, Judge Cooper offered plaintiffs the opportunity to disqualify him to ensure that there was no appearance of impropriety, and plaintiffs did so. Judge Cooper did not preside over any substantive hearing or enter any substantive order in this case. Thus, there is no evidence of any error requiring reversal or that Judge Cooper's involvement in the case denied plaintiffs their due process rights. *Mitchell*, 296 Mich App at 523.

Plaintiffs also contend that because Judge Wickens was from the same circuit court as Judge Cooper, his involvement in the case likewise was inappropriate. Plaintiffs assert that the 51st circuit "court's administrative members were fully aware of the appearance of impropriety" concerning Judge Cooper, and that Judge Wickens "was likely aware that [plaintiffs] had initiated an investigation by the Judicial Tenure Commission into some of the problems [plaintiffs] had with [Judge Cooper] and the 51st Circuit Court . . . and [was] familiar with why his fellow judge was being investigated."

Nothing in the record gives credence to these allegations. Significantly, plaintiffs never opposed Judge Wickens' assignment or moved to disqualify him. Thus, they have proffered nothing but mere speculation, which is insufficient to meet the "heavy burden" of establishing that Judge Wickens was not "fair and impartial." *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). Accordingly, plaintiffs are not entitled to relief on the basis of the trial court's purported appearance of impropriety.

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opportunity to research the unpaid FOIA requests, defendant asserted in its counterclaim that they were seeking unpaid fees, and included a chronological timeline of the unpaid fees.

C. Expediting and Severing

Plaintiffs further argue that the trial court erred in failing to expedite the case. FOIA provides that "[a]n action commenced under this section . . . shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way." MCL 15.240(5).

Plaintiffs claim that Judge Wickens failed to properly expedite the case, as "the final judgment [came] over a half year" after he was assigned the case. "However, this issue is moot. In light of our conclusion that [plaintiffs have] not established any error in the substance of the trial court's decision, it would be impossible for us to fashion an appropriate remedy for any arguably undue delay by the trial court in reaching that decision." *Herald Co, Inc v City of Kalamazoo*, 229 Mich App 376, 392; 581 NW2d 295 (1998). Moreover, "six months was not an unreasonable amount of time for the trial court to take to issue a decision" in this case. *Id.*

Plaintiffs also claim that the trial court erred in failing to sever the counterclaim. While plaintiffs requested in their motion for summary disposition that the trial court "[a]llow an expedited summary judgment on the merits of [plaintiffs'] original claim, separating that claim from the defendant's counterclaim," they never actually filed a motion to sever defendant's counterclaim. Further, trial courts have discretion to consolidate actions or order a joint hearing when the issues involve "a substantial and controlling common question of law or fact." MCR 2.505(A); see also *Chen v Wayne State Univ*, 284 Mich App 172, 196; 771 NW2d 820 (2009). Plaintiffs also fail to articulate why severing the counterclaim would have had any effect on the outcome. MCR 2.613. Thus, considering the pervasive overlap in plaintiffs' claims and defendant's counterclaims, we find no error in the trial court's decision.

IV. SANCTIONS

Lastly, plaintiffs contend that defendant and defense counsel should be sanctioned because they repeatedly used unethical and unlawful schemes to deprive the public of public information. Yet, plaintiffs merely assert numerous unpreserved and unsupported claims, as well as factual assertions beyond the record before us. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000) ("A party is not permitted to enlarge the record on appeal by asserting numerous facts that were not presented at the trial court."). Furthermore, plaintiffs provide no citations to the record, and scant legal authority to support their conclusory claims for sanctions. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. . . . An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (quotation marks and citation omitted).[6] Therefore, these issues are abandoned.

[6] This ruling also applies to plaintiffs' vague references that discovery was overly burdensome.

The only cognizable claim plaintiffs assert in this issue is that defense counsel knowingly assisted Judge Cooper in waiting four months to disclose his son's connection to defendant's law firm. However, as discussed above, the record does not indicate when Judge Cooper's son began working for defense counsel's law firm, how long this information was withheld from plaintiffs, or that Judge Cooper violated "the Code of Judicial Conduct or other law," contrary to MRPC 8.4(e). Thus, plaintiffs' claim is meritless.

V. CONCLUSION

While we affirm the grant of summary disposition to defendant and the order requiring plaintiffs to pay their FOIA fees, we remand to the trial court for determination of plaintiffs' actual costs under MCL 15.240(6). We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly