

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN P. KORN,

Plaintiff- Appellant/Cross-Appellee,

v

SOUTHFIELD CITY CLERK,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

July 27, 2004

No. 251827

Oakland Circuit Court

LC No. 2001-035929-CZ

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders denying his motions for trial and an order to show cause, and granting defendant's motion for confirmation of final order in this Freedom of Information Act (FOIA) case. Defendant cross appeals. We affirm.

Plaintiff claims that the trial court erred in denying his motion for trial, dismissing the bulk of his case, and subsequently granting defendant's motion for final judgment.¹ We disagree.

The primary reason the trial court denied the motion for trial and dismissed plaintiff's case is because he failed to make any progress on this side of the case. Defendant made a significant amount of information available to plaintiff. According to defendant's response, this material was everything plaintiff asked for except the absentee ballots and the ballot jackets. Despite over a year and a half passing, plaintiff never bothered to look at the material and determine what materials were provided. Dismissal of a suit for want of prosecution is a question left to the sound discretion of the trial court. "Appellate review is restricted to

¹ The central issue of the case is whether certain absentee ballots and ballot jackets can be released by defendant pursuant to plaintiff's FOIA request. The trial court dealt with this issue in a motion for judicial guidance brought by defendant. The second issue involves the release of collateral material to the ballots sought in the FOIA request. It is the second issue that the court dismissed. The court dismissed plaintiff's case on all issues except those dealt with in the motion for judicial guidance.

determining whether there is any justification in the record for the trial court's ruling.” *Eliason Corp, Inc v Dept of Labor*, 133 Mich App 200, 203; 348 NW2d 315 (1984). Given these facts, justification existed for the trial court’s ruling, and the trial court did not abuse its discretion in dismissing plaintiff’s claim.

Further, dismissal was appropriate in light of a previous court order that directed defendant to issue a new response to plaintiff’s FOIA request. The order also indicated that if plaintiff was not satisfied with this response, he was to amend his complaint removing defendant as a party and replacing her with the City of Southfield. Plaintiff failed to amend his complaint as mandated by this order. Although the trial court waited longer than the time allotted by the order, the dismissal was still proper and consistent with the order. Therefore, the trial court did not abuse its discretion in dismissing plaintiff’s claims and subsequently did not err in denying plaintiff’s motion for trial and granting defendant’s motion for final judgment.

Next, plaintiff claims that the trial court erred in denying his motion to show cause why defendant should not be held in contempt of court. We disagree. The decision whether to issue an order of contempt is left to the sound discretion of the trial court and is reviewed for an abuse of discretion. *Schoensee v Bennett*, 228 Mich App 305, 316; 577 NW2d 915 (1998).

Plaintiff brought the show cause motion alleging defendant had violated a court order prohibiting the destruction of the absentee ballots and ballot jackets at issue in this case. MCR 3.606 governs the initiation of contempt proceedings for occurrences outside the immediate presence of the court and provides that proceedings can only be initiated “on a proper showing on ex parte motion supported by affidavits.” MCR 3.606. MCR 2.119(B) requires affidavits to be made on personal knowledge and state with particularity facts admissible as evidence. The material offered by plaintiff was not sufficient since it was not based on personal knowledge and was likely inadmissible double hearsay. Therefore, the trial court did not abuse its discretion with regard to the contempt proceedings. See *Schoensee, supra*.

Plaintiff next claims that the trial court’s ruling that the absentee ballot jackets were exempt from disclosure under the FOIA was erroneous. We disagree. Whether a public record is exempt from disclosure pursuant to the FOIA is a question of law reviewed de novo. *Larry S Baker PC v Westland*, 245 Mich App 90, 93; 627 NW2d 27 (2001).

MCL 15.243(1) states, in pertinent part:

A public body may exempt from disclosure as a public record under this act:

(a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.

Thus there is a two-part analysis; first, whether the information would be personal in nature and, second, whether disclosure of it is a clearly unwarranted invasion of an individual’s privacy. *Larry S Baker PC, supra*, at 94. Information is personal in nature if it reveals intimate or

embarrassing details of an individual's private life. *Id.* at 95. The information contained on the ballot jackets themselves does not seem to rise to the level of intimate or embarrassing since it merely includes the voter's name, address, signature, and the signature of any person who assisted him or her—not embarrassing or intimate facts. And defendant does not contend otherwise.

But this Court cannot consider the information contained on the ballot jackets in isolation, we must also consider release of the ballots. The Michigan Constitution, Const 1963, art 2, § 4, guarantees the right to a secret ballot in all elections. Such a right cannot be abrogated absent a showing that the voter acted fraudulently. *Schellenberg v Rochester Lodge No 2225 of the Benevolent & Protective Order of Elks*, 228 Mich App 20, 29; 577 NW2d 163 (1998), quoting *Belcher v Ann Arbor Mayor*, 402 Mich 132, 134; 262 NW2d 1 (1978). How a person voted is certainly intimate; therefore, the information qualifies under the first prong of the test. In fact, release of the person's name along with their ballot and vote may be unconstitutional in the State of Michigan. Const 1963, art 2, § 4; *Schellenberg, supra*.

In evaluating whether information falls within the second part of the exemption, this Court must balance the public interest in disclosure against the interest the Legislature intended the exemption to protect. *Kocher v Dep't of Treasury*, 241 Mich App 378, 382; 615 NW2d 767 (2000). The only relevant public interest in disclosure that this Court may weigh is the extent to which disclosure would contribute significantly to the public understanding of the operations and activities of government (which is the core purpose of FOIA). *Id.*, quoting *United States Dep't of Defense v Federal Labor Relations Authority*, 510 US 487, 495; 114 S Ct 1006; 127 L Ed 2d 325 (1994). This important purpose “is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct.” *Kocher, supra*, quoting *Mager v Dep't of State Police*, 460 Mich 134, 144-146; 595 NW2d 142 (1999). In the typical case where one private citizen is attempting to discover information about another private citizen through the FOIA, the requestor is not truly seeking to shed light on the agency's activities. *Kocher, supra* (further citation omitted).

Plaintiff's inquiry seems to be an attempt to obtain personal information on third parties and not a proper inquest to shed light on governmental activities. This Court has stated that such an attempt is improper. *Id.* at 382-383. The disclosure of this information would constitute an unwarranted invasion of an individual's privacy. *Id.* Although the ballot jacket information absent the voting record may not fall within the exemption to the FOIA, the release of the information with the individual's vote, as plaintiff requested, would fall within the exemption. The trial court dealt with this issue by limiting the access to one of the two items. The trial court's decision is not contrary to MCL 15.243(1)(a). We find no error in this solution to the potential problem.

Finally, plaintiff claims that the trial court's decision to dismiss and not release the ballot jackets is contrary to Michigan Election Law. Specifically, plaintiff claims that defendant has violated MCL 168.760 and 168.931(1)(h) by not turning over the information. First, MCL 168.760 does not require defendant to turn over the absentee ballot jackets as plaintiff claims. It

merely requires defendant to keep a list of absentee ballot applications and such things as the date the ballot was received. Plaintiff does not contend that defendant refused him access to such a list. Therefore, MCL 168.760 does not apply to this case.

Next, MCL 168.931(1)(h) states:

A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election.

There is no contention that defendant disobeyed an instruction of any of the individuals listed in the statute. Plaintiff only claims that defendant failed to perform a duty under the act by not turning over the ballot jackets. But as concluded above, the trial court's decision was not erroneous. Therefore, defendant did not fail to perform a duty and MCL 168.931(1)(h) does not apply.

Plaintiff asserts on appeal that if the ballots and the ballot jackets cannot be released together, he would prefer the ballot jackets rather than the ballots. Plaintiff did not raise this issue below and did not ask for such relief from the trial court. This Court need not address an issue raised for the first time on appeal, as it is not properly preserved for appellate review. *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998).

Defendant raises two issues on cross appeal, both related to the trial court's ruling in its order of judicial guidance that the absentee ballots, in and of themselves and not in conjunction with the ballot jackets, are not exempt from disclosure under the FOIA. First, defendant contends that the ballots are exempt from disclosure pursuant to MCL 15.243(1)(d). We disagree.

MCL 15.243(1)(d) states:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

* * *

(d) Records or information specifically described and exempted from disclosure by statute.

Defendant first cites MCL 168.764a(5), which states that it is a violation of election law for a person other than the absent voter to be in possession of a voted or un-voted absent voter ballot. Defendant also cites MCL 168.932(f), which makes it a felony for anyone other than the absent voter to "Possess an absent voter ballot mailed or delivered to another person, regardless of whether the ballot has been voted." The parties dispute whether plaintiff's review of the ballots would constitute possession.

Possession is not defined in either statute. The primary task in statutory construction is to give effect to the Legislature's intent. This Court achieves this purpose by applying the plain and unambiguous meaning of the words of the statute as written. *Staton v Battle Creek*, 466 Mich 611, 615; 647 NW2d 508 (2002). Consulting a dictionary is appropriate in determining the plain or ordinary meaning of a word. *Id.* at 617. Random House Webster's College Dictionary (1997) defines "possess" as: "to have as belonging to one; have as property; own." Although plaintiff will have the ballots or a copy of them in his hands, inspection under the FOIA does not seem to connote actual possession of the ballots. Plaintiff will not have ownership, dominion, or control over the ballots. He will merely be allowed to inspect them. Therefore, releasing the ballots would not violate the plain language of MCL 168.764a(5) or MCL 168.932(f).

Defendant next cites MCL 168.932(e)(i) which makes it a felony for a person not involved in the counting of ballots, and who has possession of an absent voter ballot mailed or delivered to another person, to open the envelope containing the ballot. Again, this statute uses the term possession and, as discussed above, plaintiff's inspection does not equate to possession of the ballots. Further, plaintiff would not be required to open the envelopes as discussed in the statute. In fact, the court's ruling that the ballot jackets were exempt would require defendant to open the envelopes and remove the ballots in order for plaintiff to inspect them. Defendant does not deny that she is a person involved in the counting of ballots. Therefore, turning over the ballots independent of the ballot jackets would not violate MCL 168.932(e)(i).

Defendant also cites MCL 168.932(d), which states:

A person shall neither disclose to any other person the name of any candidate voted for by any elector, the contents of whose ballots were seen by the person, nor in any manner obstruct or attempt to obstruct any elector in the exercise of his or her duties as an elector under this act.

Defendant's argument implies that she will have to violate this statute if she turns over the ballots. We disagree. Defendant will not have to disclose the name of a candidate voted for by any elector/voter because the voter's name will remain secret. Defendant will not be informing plaintiff or anyone else whom an individual voter voted for as contemplated by the statute. But she will simply be turning over the ballots without the voter names. The statute does not cover this situation. To hold otherwise would mean that a person would be guilty of a felony for saying to another person the name of any candidate who received a vote. This interpretation would be absurd. Statutes are construed in harmony with the spirit or intent of the statute. This Court will avoid interpretations that lead to absurd or unreasonable results. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994). Disclosure of the ballots is not contrary to MCL 168.932(d) unless such an absurd result is reached.

Finally, defendant claims that the ballots are exempt pursuant to MCL 15.243(1)(a). We disagree. As stated above, the threshold question is whether the information falls within the "personal" privacy exemption. *Larry S Baker PC, supra* at 94. Information is personal in nature if it reveals intimate or embarrassing details of an individual's private life. *Id.* Here, if the ballot were released with the voter's name, the information would be personal in nature. But

separating the ballot from the ballot jacket would alleviate the privacy concerns. The ballots would only reveal the names of the candidate voted for and the office for which he or she ran, not the name of the voter. Thus, no matter the circumstance, each voter's vote would remain secret. There would be no chance of voter intimidation or reprisal because the individual voters would remain anonymous; thus, such information should be released. See *id.* The trial court correctly ruled that the ballots separated from the ballot jackets were not exempt from disclosure under FOIA.

Affirmed.

/s/ Richard Allen Griffin

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood