STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE S. KATKOWSKY, Plaintiff-Appellant,	UNPUBLISHED April 24, 2012
v	No. 303246 Oakland Circuit Court
MICHIGAN STATE POLICE, Defendant-Appellee.	LC No. 10-108933-CZ

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

In this action under the Freedom of Information Act ("FOIA"), MCL 15.231 *et seq.*, plaintiff appeals as of right an order denying his motion for summary disposition and granting summary disposition, pursuant to MCR 2.116(I)(2), in favor of defendant. We affirm.

Plaintiff submitted a FOIA request to the Michigan State Police for "[a]ll records in your possession concerning the receipt by you of funds from the United States Department of Transportation" for specific years and, more specifically, for records relating to funding of a motorcycle safety program. Defendant denied plaintiff's request pursuant to MCL 15.243(1)(v), which exempts disclosure by a public body of "[r]ecords or information relating to a civil action in which the requesting party and the public body are parties." Specifically, the request was denied because plaintiff served as the attorney for the plaintiffs in a case against defendant that was then pending before the federal district court.[1]

[1] As summarized by the trial judge in the federal district court case, the plaintiffs sought

> to enjoin enforcement of the Michigan helmet law or, in the alternative, to enjoin the state troopers' practice of stopping and detaining anyone on the basis of wearing an allegedly illegal helmet, of utilizing the state police publication "How to Recognize a Novelty Helmet" for purposes of determining whether a helmet is illegal, and of detaining violators of the helmet law as a pretext for searching for evidence of other criminal or civil infractions.

Plaintiff then filed this FOIA action. While the FOIA action was pending, defendant was dismissed from the federal court case and, consequently, agreed to produce the requested documents. Nonetheless, plaintiff proceeded with a motion for summary disposition, arguing that he was entitled under the FOIA to attorney fees and costs, as well as actual, compensatory, and punitive damages.

Both parties indicated at the hearing on plaintiff's motion for summary disposition that the issue of document production had previously been resolved. The trial court determined that plaintiff was not entitled to the documents under the FOIA at the time of the initial request because of the pending federal lawsuit, that the records were turned over when defendant was dismissed from the federal lawsuit, and that the initial denial of the records was not arbitrary and capricious.

MCL 15.240(6)provides:

> If 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. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements…

However, an attorney cannot recover fees under the FOIA when proceeding pro se. *Laracey v Financial Institutions Bureau*, 163 Mich App 437, 444-446; 414 NW2d 909 (1987). Plaintiff was represented by a member of his law firm and argues that *Laracey* only applies where the attorney and litigant is the same individual. However, MCR 2.117(B)(3)(b), provides that the appearance by an attorney is deemed to be the appearance of every member of the law firm. While it does not follow that the rule applies in every situation in which one of the firm's members is a party,[2] in this case plaintiff requested the documents under the FOIA but made the request on his firm's letterhead. Thus, it is not even clear that his interests were divorced from those of the firm with respect to the FOIA request. Moreover, there is no proof in this case that any attorney fees were actually incurred. *Laracey*, 163 Mich App at 446.[3] Given the lack of evidence, the trial court properly concluded that plaintiff was not entitled to attorney fees.

Plaintiff also argues that defendant acted arbitrarily and capriciously in denying his FOIA request and that, as a result, he is entitled to punitive damages pursuant to MCL 15.240(7). The trial court disagreed. We review for clear error a trial court's determination as to whether denial of a FOIA request was arbitrary and capricious. *Yarbrough v Dep't of Corrections*, 199 Mich App 180, 185; 501 NW2d 207 (1993).

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[2] If, for instance, a lawyer had a personal dispute with a neighbor and had his or her law firm represent him in that dispute, there appears to be no reason why MCR 2.117(B)(3)(b) should necessarily preclude a potential award of fees.

[3] Plaintiff makes other arguments relative to attorney fees. However, since the above holding is dispositive of the issue, we decline to address the remaining arguments.

MCL 15.240(7) provides, in pertinent part:

> If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record.

As used in the FOIA, both "arbitrary" and "capricious" are assigned their generally accepted meanings. *Williams v Martimucci*, 88 Mich App 198, 201; 276 NW2d 876 (1979). As defined in *United States v Carmack*, 329 US 230, 243, n 14; 67 S Ct 252; 91 L Ed 209 (1946), "arbitrary" is "without adequate determining principle . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned" (internal citations and quotations omitted). "Capricious" is "apt to change suddenly; freakish; whimsical; humorsome." *Carmack*, 329 US at 243, n 14. Further, even where contrary to the statute, the actions of a public body are not arbitrary and capricious where the decision to act "was based on consideration of principles or circumstances and was reasonable, rather than 'whimsical.'" *Meredith Corp v Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003).

In this case, defendant's interpretation of the statute was reasonable. The exemption to production under MCL 15.243(1)(v) applies to "Records or information relating to a civil action in which the requesting party and the public body are parties." While we decline to decide whether the records sought related to the civil action or whether plaintiff, as the attorney of the plaintiffs in the federal court action, was a party, we conclude that defendant's determinations with respect to these questions was not arbitrary and capricious.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio