

STATE OF MICHIGAN  
COURT OF APPEALS

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JOSEPH HALEY and EMILY HALEY,

Plaintiffs-Appellants,

v

NUNDA TOWNSHIP,

Defendant-Appellee.

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UNPUBLISHED

September 17, 1999

No. 211648

Cheboygan Circuit Court

LC No. 97-006081 CZ

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

This is an action brought pursuant to the Freedom of Information Act, MCL 15.231 *et seq.*; MSA 4.1801 *et seq.* Following a bench trial, the trial court found that defendant township released all documents requested by plaintiffs that existed and were in defendant's possession before being served with this lawsuit. Plaintiffs appeal as of right arguing that the trial court erred in failing to award them attorney fees and punitive damages under the act. We affirm.

Initially, plaintiffs argue that the trial court erred by failing to award them attorney fees. The trial court's decision regarding an award of attorney fees to the prevailing party in an FOIA action is reviewed for an abuse of discretion. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 647; 591 NW2d 393 (1998). The trial court in this case did not abuse its discretion in refusing to award attorney fees. While the township was untimely with two of three responses to the FOIA requests, plaintiffs' lawsuit was neither necessary to their receipt of the documents nor caused defendant to release the documents. Rather, all the items were received by plaintiffs before service of the lawsuit on the township.

Pursuant to MCL 15.240(6); MSA 4.1801(10)(6), a plaintiff who prevails in an FOIA action is entitled to attorney fees and costs. While an award of reasonable attorney fees is mandatory when the plaintiff has prevailed entirely in an FOIA action, the award of attorney fees is discretionary with the court when a plaintiff has only partially prevailed. *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 131; 454 NW2d 171 (1990). Conceding that they did not entirely prevail, plaintiffs contend

that the court's determination that the township was late in responding to two out of three FOIA requests requires an award of at least those fees allocable to the successful portion of their case.

To be considered the prevailing party for the purposes of an attorney fee award in an FOIA case, a plaintiff is required to show more than a judgment in his or her favor. "A plaintiff prevails in an action brought under the FOIA when the action was reasonably necessary to compel the disclosure and the action had a substantial causative effect on the delivery of the information to plaintiff." *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 663; 564 NW2d 922 (1997), citing *Yarbrough v Dep't of Corrections*, 199 Mich App 180, 186; 501 NW2d 207 (1993). Pursuant to this standard, despite the trial court's favorable ruling plaintiffs needed to demonstrate that their lawsuit was necessary to effect the release of the documents. Finding that all available documents were released to plaintiffs prior to the service of the lawsuit on defendant, the court did not find that the township wrongfully withheld documents and it did not order the release of documents. Plaintiffs' action, consequently, was not necessary to compel the disclosure and had no causative effect on the delivery of the requested documents. As such, plaintiffs are not prevailing parties for the purposes of attorney fees under the act. See *Wilson v Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1992).

Plaintiffs additionally support their claim for attorney fees with a citation to MCL 15.235(3); MSA 4.1801(5)(3), which provides that the public body's failure to respond to a request in the time or manner required by the FOIA constitutes a final determination to deny the request. That provision does not explicitly state that if a public body misses the deadline any subsequent release of information is moot. We decline to so interpret the statute because it would render nugatory the necessity and causation requirements for an award of attorney fees under the statute. Finally, plaintiffs argue that they are entitled to attorney fees in part because the township's first and second responses did not include an explanation of plaintiffs' review rights. While the FOIA requires an explanation of a requesting party's right to seek review when a request is denied by a written notice, MCL 15.235(4)(d); MSA 4.1801(5)(4)(d), this portion of the statute is inapplicable because defendant provided plaintiffs all documents in the township's possession and never issued a denial.

Next, plaintiffs argue that the trial court erred in finding defendant's acts were not "arbitrary and capricious," and therefore not meriting an award of punitive damages. The trial court's finding that a public body is not subject to the FOIA's punitive damages provision because its actions were neither arbitrary nor capricious is reviewed for clear error. *Yarbrough, supra* at 185; *Tallman, supra* at 126. An award of punitive damages under the FOIA is only permissible when the trial court has ordered disclosure. *Michigan Council of Trout Unlimited v Dep't of Military Affairs*, 213 Mich App 203, 221; 539 NW2d 745 (1995). Here, the trial court did not order disclosure because the requested documents had been released by the township. Plaintiffs are not entitled to statutory punitive damages.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder