STATE OF MICHIGAN

COURT OF APPEALS

BARRY L. KING, Plaintiff-Appellant,	UNPUBLISHED July 31, 2014
v	No. 314779 Oakland Circuit Court
OAKLAND COUNTY PROSECUTOR, Defendant-Appellee.	LC No. 2012-125171-CZ

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the January 25, 2013, order granting summary disposition to defendant in this case involving the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. We affirm.

Plaintiff was the father of Timothy King, who, in March 1977, was 11 years old when he went missing after he made a trip to a drugstore in Birmingham. Timothy's body was later discovered and Timothy, along with three other young children, were suspected to have been victims of the "Oakland County Child Killer," who has yet to be identified and prosecuted. However, various agencies have continued to investigate leads in the matter over the decades.

In 2008, the police followed up on new leads and focused the investigation on Christopher Busch, who, in the 1970s, resided in Bloomfield Township. The police obtained search warrants for the house where Busch had been living, to search for trace evidence that could be connected to the murders. The search warrants were issued by the 48th District Court.[1] In 2010, defendant advised plaintiff that Busch was no longer considered a suspect in the murder of his son.

[1] The district court initially suppressed the files related to the warrants upon the ex parte request of the prosecutor. Eventually, however, the suppression orders expired and were not renewed.

Plaintiff filed FOIA actions against the various agencies involved, presumably to attempt to obtain answers to questions surrounding his child's death. The present case[2] involves the request for defendant to disclose certain categories of information, as discussed more fully *infra*, in the discussion of the individual issues on appeal. After defendant denied plaintiff's FOIA requests and plaintiff filed suit, defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (10). The trial court granted the motion, ruling that the information was exempt from disclosure under the work-product privilege.

We generally review de novo a summary-disposition ruling. *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012). However, both parties here recite the standards of review for FOIA cases. The Michigan Supreme Court discussed these standards in *Herald Co, Inc v Eastern Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006):

> [W]e continue to hold that legal determinations are reviewed under a de novo standard. Second, we also hold that the clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court. Finally, when an appellate court reviews a decision committed to the trial court's discretion, such as [a] balancing test . . ., we hold that the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes.

Plaintiff's first issue on appeal is difficult to understand, but he appears to be arguing that the 48th District Court erred by suppressing the files related to the search warrant. This issue is moot because, as plaintiff himself admits, he was given access to "the entire 48th District Court file" on April 1, 2013. "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Plaintiff frames the issue as whether "a crime victim [is] entitled to search warrant information"—and he has now been given that information.[3]

Plaintiff's next argument relates to his FOIA request for "[a]ny information relied upon by [defendant] before accusing me of notifying [news reporter] Kevin Dietz of Channel 4 of the existence of the Oakland County Grand Jury." Plaintiff claimed below that a representative of defendant accused him of notifying the news reporter about the grand jury and that this accusation was "absolutely false." Plaintiff claims on appeal that he is entitled to any documents or other information relied upon by defendant in making the alleged accusation. He contends

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[2] We note that plaintiff has filed numerous other lawsuits in this case involving various requests for information.

[3] In addition, to the extent that plaintiff is indeed arguing that the district court erred in making the suppression decision, we note that the present lawsuit, involving a FOIA request to defendant, is not the proper avenue for challenging that decision.

that the work-product privilege does not apply to this information. However, defendant stated the following in its Bill of Particulars, wherein it detailed its reasons for denying plaintiff's FOIA requests:

> With regard to Plaintiff's specific request, which sought any documents confirming Plaintiff's disclosure of [a] grand jury subpoena to the media, Defendant has previously stated that no such documents are in its possession, something that Plaintiff himself has conceded on page 7 of Plaintiff's Brief in Response to Defendant's Motion to Seal, wherein Plaintiff acknowledged that "[a representative of defendant] advised [one of plaintiff's attorneys] that the sole basis for this accusation was the fact that [plaintiff] was served with a subpoena to appear before the Grand Jury" followed by an immediate report of the existence of a Grand Jury by Kevin D[ie]tz of WDIV, Channel 4.
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> Through this pleading, Defendant will again state that there are no documents in Defendant's possession matching the [requested] item . . . .

Defendant accurately states plaintiff's concession contained in the response brief. Also, a representative from defendant's office filed an affidavit stating that "all of the documents sought through Plaintiff's FOIA request were exempt from mandatory FOIA production, for the reasons outlined in the attached Bill of Particulars." On the existing record, there is simply no basis from which to conclude that the requested information exists, and a court cannot order an agency to produce something that does not exist. Therefore, we find no basis on which to reverse the trial court's decision with regard to this request for information.[4]

Plaintiff next contends that defendant should have provided him with documents relating to defendant's decision that Busch and a companion, James Gunnels, were not involved in the murder of plaintiff's son. As noted, the trial court concluded that the work-product privilege entitled defendant to withhold this information. See MCL 15.243(1)(h) (exempting from the FOIA "[i]nformation or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule). We agree. The case of *People v Gilmore*, 222 Mich App 442; 564 NW2d 158 (1997), provides some instruction. In *Gilmore*, *id*. at 445-446, a prosecutor's office declined to file certain charges against Jeffrey Shade after the defendant claimed that Shade, a park ranger, had assaulted him. The defendant requested the "disposition record" relating to the failure to prosecute. *Id*. at 446, 454. This Court first concluded that the work-product privilege, see MCR 2.302(B)(3)(a),[5] "applies in the context of criminal

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[4] The trial court based its ruling on the work-product doctrine, but we do not reverse if the trial court reaches the correct result using reasoning that differs from ours. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

[5] This court rule states:

> Subject to the provisions of subrule (B)(4) [dealing with expert witnesses], a party may obtain discovery of documents and tangible things otherwise

proceedings to the work product of the prosecutor." *Gilmore*, 452 Mich App at 453. The Court then stated:

> After examining the evidence regarding the actions of Ranger Shade, the prosecutor created the disposition record in order to determine whether to issue a warrant against him for assault and malicious destruction of property. It is generally understood that litigation need not be commenced or threatened before materials may be considered "'prepared in anticipation of litigation.'" *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 654, n 2; 385 NW2d 296 (1986) (citation omitted). It is generally sufficient if the prospect of litigation is identifiable, either because of the facts of the situation or the existence of pending claims. *Id*. Although the disposition record in this case was prepared to articulate the reasons for the decision *not* to prosecute, at the time the assistant prosecutor created the record, the course of action that the prosecutor's office would take regarding whether to charge Ranger Shade remained uncertain. The purpose in articulating the rationale for denial of a requested warrant was to enable the assistant prosecutor's supervisor or the prosecutor himself to review the propriety of the assistant prosecutor's charging decision. Therefore, although the disposition record formally preceded the final charging decision, it was undertaken when litigation remained a genuine possibility. Accordingly, we find that the document was prepared in anticipation of litigation.
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> Further, the prosecutor's disposition record is also protected from discovery under the work-product privilege because it reflects the "mental impressions, conclusions, opinions, or legal theories" of the assistant prosecutor leading to the ultimate decision not to issue a warrant. The disposition record consists of the "evaluative considerations" of the prosecutor. Accordingly, the prosecutor's disposition record is privileged from discovery under the work-product privilege on this basis . . . . [*Gilmore*, 222 Mich App at 455-457.]

In *Messenger v Ingham County Prosecutor*, 232 Mich App 633, 638-639; 591 NW2d 393 (1998), the Court discussed the common-law work-product privilege and the work-product privilege codified in MCR 2.302(B)(3)(a). In that case, the plaintiff sought the prosecutor's case file under the FOIA after the plaintiff was acquitted of manslaughter. *Messenger*, 232 Mich App

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> discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

at 636. The trial court had ruled that a FOIA exemption for work product did not apply to certain "factual" materials in the case file because "the prosecution of plaintiff was concluded and the parties were involved in no actual or contemplated litigation other than the controversy over the FOIA." *Id*. at 640. The trial court did, however, conclude that certain "deliberative" materials were entitled to nondisclosure. *Id*. This Court stated, "We hold that a prosecutor's entire work product is privileged from disclosure under the FOIA." *Id*. at 641.[6] The Court of Appeals made this ruling despite the fact that the plaintiff was no longer a party to the litigation, essentially stating that it was irrelevant that the plaintiff was not a litigant. See *id*. at 644 n 4.

We find that, under *Gilmore* and *Messenger*, the trial court correctly ruled that the information requested by plaintiff was exempt from the FOIA under the work-product privilege because it involved materials prepared in contemplation of litigation.

Plaintiff's next issue on appeal relates to his FOIA request for "[a]ll internal directives and procedures for responding to crime victims." Defendant, in its Bill of Particulars, stated that it does not have internal directives or procedures for responding to crime victims. Again, a representative from defendant's office filed an affidavit stating that "all of the documents sought through Plaintiff's FOIA request were exempt from mandatory FOIA production, for the reasons outlined in the attached Bill of Particulars." As noted, the trial court could not order the production of something that does not exist.[7]

Plaintiff frames his fifth appellate argument as follows: "In Freedom of Information Act cases, can the Oakland County Prosecutor file a verified Bill of Particulars and avoid discovery when the Bill of Particulars contradicts previous court filings of the Oakland County Prosecutor and an affidavit of the victim's family?" In the body of his argument, however, he fails to elaborate upon the specifics of this argument. "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 only cursory treatment of an issue with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, we find nothing

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[6] Significantly, the Court stated in a footnote:

> Because defendant did not choose to appeal the trial court's decision to order the release of defendant's factual work product, we do not disturb that aspect of the court's judgment. However, *we caution against reading this opinion as stating that only deliberative materials are exempt from disclosure under the FOIA under the privilege for attorney work product*. [*Id*. at 641, n 2 (emphasis added).]

We thus read *Messenger* as exempting both factual and deliberative materials, especially in light of the Court's statement that "a prosecutor's entire work product is privileged from disclosure under the FOIA." *Id*. at 641.

[7] See footnote 4, *supra*.

erroneous in defendant's following the circuit court's ruling by filing the Bill of Particulars and we find nothing erroneous in the Bill of Particulars itself.

Plaintiff frames his sixth appellate argument as follows: "Were the trial court rulings denying the plaintiff discovery valid rulings under the circumstances in this case?" However, in the body of his argument he does not specify to what "rulings" he is referring. He has inadequately briefed this issue and thus we need not review it. *Id*. At one point, he appears to be arguing that the trial court should have granted him discovery regarding (1) the alleged accusation by defendant that plaintiff revealed the existence of a grand jury and (2) defendant's alleged internal directives concerning dealing with crime victims. However, as noted, defendant sufficiently established that no such information existed regarding these items and plaintiff has not sufficiently countered defendant's facts as presented.

Plaintiff lastly argues that the trial court erred in using the work-product privilege to justify nondisclosure of all the requested information. In the body of his argument, plaintiff does not address his requests for information individually but instead makes a general argument that the work-product privilege does not apply in this case because Busch has not been and will not be prosecuted for the murder and because plaintiff was not a party to any possible litigation involving Busch. We resolved this issue above and decline to revisit it. Plaintiff also asserts that "the trial court did not indicate how or why the 'work product' privilege applied to certain documents that had nothing to do with the prosecution of anyone related to the [child killer]." As noted, we affirm the trial court's decision with regard to the alleged accusation about the grand jury and with regard to the alleged internal directives *on alternative grounds*, but this is entirely allowable. *Zimmerman*, 221 Mich App at 264.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto