STATE OF MICHIGAN

COURT OF APPEALS

PETER BORMUTH,

Plaintiff-Appellant/Cross-Appellee,

v

CITY OF JACKSON,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
October 15, 2019

No. 347449
Jackson Circuit Court
LC No. 18-001387-CZ

Before: REDFORD, P.J., and JANSEN and LETICA, JJ.

PER CURIAM.

In this action brought pursuant to Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff, Peter Bormuth, acting *in propria persona*, appeals the order granting summary disposition in favor of defendant, the City of Jackson, under MCR 2.116(C)(10). Defendant cross-appeals, arguing that the trial court erred by denying defendant's request for costs and attorney fees on account of the frivolous nature of plaintiff's civil action. We affirm.

I. RELEVANT FACTUAL BACKGROUND

This case arose out of a complaint filed by plaintiff where he claimed that defendant violated the FOIA when it failed to produce text messages allegedly sent between Mayor Derek Dobies and Nikki Joly, a local community activist, in response to plaintiff's FOIA request for "[a]ll text messages" between those two individuals. In a written response, defendant's FOIA manager explained that "Mayor Dobies determined that he has no text messages that qualify as a public record" and that he "did not communicate with Ms. Joly in his official capacity as a City Councilmember or Mayor via text message." Defendant provided a Certification of Nonexistence stating that defendant's attorney attempted to locate the requested documents and that "such does not exist or cannot be located using the description provided." Plaintiff appealed defendant's determination to the city manager. Defendant's city manager explained in another written response that defendant "has no choice but to deny your appeal as we do not have records that match your request under the Freedom of Information Act." The city manager further explained, "[a]s you suggested in your appeal, emails and text messages that are personal in

nature and do not involved work related function by a public official, do not qualify as public records and are not required to be remitted to the City."

Plaintiff filed a complaint in the circuit court claiming defendant violated the FOIA by failing to produce the text messages between Mayor Dobies and Joly in response to his February 22, 2018 FOIA request. In claiming that defendant violated the FOIA, plaintiff asserted that he "does not believe Derek Dobies when he states that none of his text messages with Nikki Joly involve public business" and asked that the trial court review *in camera* any text messages between the two individuals to ascertain whether any of the messages constituted public records subject to FOIA. In support of his claim that text messages sent on private electronic devices are nevertheless subject to disclosure under state public record laws if they pertained to public business, plaintiff cited cases from California and Washington, as well as an opinion of the Illinois Attorney General's Public Access Bureau.[1]

Defendant moved for summary disposition under MCR 2.116(C)(10), asserting that it did timely, appropriately, and completely respond to plaintiff's FOIA request. Defendant sought dismissal of plaintiff's complaint with prejudice, as well as attorney fees and costs. In support of its motion, defendant attached an affidavit by Mayor Dobies, where Mayor Dobies averred, in relevant part:

> 4. While I do not retain personal text messages, I conducted a thorough and diligent search of my saved text messages. I have checked all of my backups to locate any text messages that may have been saved, however, I did not locate any texts from Nikki Joly in those backups.
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> 5. Further, on November 2, 2017 I was the victim of automobile theft and my old phone, its accessories, and some other personal effects were stolen at that time as they were contained within my vehicle. I filed a police report and the incident number was 497-34157-17. Any text messages or other public records contained physically on that device are no longer in my possession.
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> 6. As I understand Plaintiff's lawsuit, he has taken issue with the fact that no text messages have been produced. I have made diligent search, and I do not have any official text messages between myself and Nikki Joly in my possession.

[1] For additional context, we note that plaintiff's complaint raised the possibility that Mayor Dobies, a former councilperson, was involved in some form of conspiracy with Joly to win his election as mayor. The theory related to the mayor's support for the enactment of a nondiscrimination ordinance following an "outpouring of community support" after a fire destroyed Joly's home. According to plaintiff, both Joly and Mayor Dobies, working together, initially claimed that the fire was a hate crime. Subsequently, law enforcement determined that Joly herself was responsible for the fire and charged her with first-degree arson. Although he admits that there is no direct evidence supporting such a claim, it is plaintiff's position that the text messages he seeks "could show a conspiracy" between Mayor Dobies and Joly.

In response, plaintiff continued to assert that the trial court had the authority to order that defendant produce the text messages so that it could review for itself the text messages for references to the nondiscrimination ordinance or "other matters of City business subject to FOIA." Further, plaintiff argued that Mayor Dobies's affidavit "clearly shows a lack of good faith" and that under the FOIA, Mayor Dobies "had a responsibility to contact the former server for his stolen phone and retrieve any text messages between [him] and Nikki Joly that are public records."

Ultimately, the trial court determined that plaintiff should not "just have to accept" defendant's certification of nonexistence and that plaintiff was "entitled to know some answer, develop a little bit of discovery about that in the courtroom or by way of deposition." Defendant agreed to make Mayor Dobies available for an evidentiary hearing in lieu of a deposition. Accordingly, the trial court permitted plaintiff "to at least be able to explore" the issue of the stolen phone and the ability to recover any data.

At the evidentiary hearing, Mayor Dobies testified consistent with his affidavit. Following his testimony, the trial court concluded that plaintiff had "a fair opportunity" to explore "the nature of the phone, whether it was public or private," and "what ultimately happened to the phone, whether there was any capability to even retrieve this information." The trial court concluded that the evidence established that the sought-after text messages did not exist. Accordingly, the trial court held that it did not "even have to make the ruling on the public versus the private phone" because it appeared that there was no genuine issue of material fact as to whether defendant could even produce the text messages for disclosure. The trial court denied defendant's request for attorney fees, concluding that attorney fees are "normally absorbed by each side" and that it did not believe that plaintiff was acting in bad faith. This appeal followed.

II. STANDARD OF REVIEW

"[T]he proper interpretation and application of [the] FOIA is a question of law that we review de novo." *Rataj v Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014). "[T]he clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). "Clear error exists only when the appellate court is left with the definite and firm conviction that a mistake has been made." *Id*. at 471 (quotation marks and citation omitted). This Court reviews a trial court's discretionary determination for an abuse of discretion and cannot overturn the trial court's decision unless it falls outside the range of principled outcomes. *Id*. at 472.

III. PLAINTIFF'S FOIA CLAIMS

Plaintiff argues on appeal that the trial court erroneously granted summary disposition in favor of defendant because Mayor Dobies could have recovered the missing text messages directly from Verizon, his service provider, and that text messages relating to public business remain subject to FOIA requests even if exchanged on a private cell phone.

Initially, we believe that plaintiff mischaracterizes the trial court's decision below. The trial court granted summary disposition only after concluding that plaintiff failed to create a

genuine issue of material fact as to whether defendant could produce any text messages responsive to his FOIA request. The trial court did not consider the relevance of Mayor Dobies' use of a private cell phone, or whether he ever conducted public business using that phone. Because the trial court did not address or decide the circumstances in which private text messages can constitute public records, we decline to consider that issue for the first time on appeal. See *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). We instead focus on the crux of plaintiff's argument; that the trial court erred by granting summary disposition because there was a genuine issue of fact concerning the recoverability of text messages responsive to plaintiff's FOIA request. Plaintiff argues that Mayor Dobies' testimony, that he "can't recall" whether he "back[ed] up" the data on his stolen phone was on iTunes or iCloud, created a genuine issue of disputed fact as to the existence of responsive public records. We disagree.

In *Coblentz v Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006), our Supreme Court held that where the public body denies the existence of any records and provides evidence supporting that position, the burden to avoid summary disposition shifts to the plaintiff to produce countering evidence. In this case, defendant attached an affidavit from Mayor Dobies stating that he "conducted a thorough and diligent search of [his] text messages" and "checked all of [his] backups to locate any text messages that may have been saved" but "did not locate any texts from Nikki Joly in those backups." Mayor Dobies further averred that he did "not have any official text messages between [himself] and Nikki Joly in [his] possession."

In the interest of fairness, the trial court gave plaintiff an opportunity to directly examine Mayor Dobies on this precise issue. During an evidentiary hearing, Mayor Dobies testified that his phone was stolen out of his truck, and that he went to an AT&T store, a Verizon store, and an Apple store in an attempt to transfer any data from his old phone to his new phone. However, sales clerks at all three stores "indicated that they couldn't do that." Moreover, Mayor Dobies testified that he completed "a diligent search of what [he had] on [his] computer and [that he did not] have any [text messages] that would be considered public documents" for the period in question. This testimony was consistent with his affidavit.

Despite having an opportunity to develop and introduce additional evidence, plaintiff was unable to present any proofs that defendant retained any text messages responsive to plaintiff's FOIA request. "If a record does not exist, it cannot be produced." *Coblentz*, 475 Mich at 568; *Easley v Univ of Mich*, 178 Mich App 723, 725; 444 NW2d 820 (1989) ("[L]ogic dictates that the public body have in its possession or control a copy of the document before it can be produced or before a court can order its production."). Notably, in his briefing on appeal, plaintiff even admits that he "does not know what information those lost text messages contain." Without any factual support contradicting Mayor Dobies's affidavit and testimony, we cannot conclude that the trial court erroneously granted summary disposition in favor of defendant. See *Coblentz*, 475 Mich at 570; *Hartzell v Mayville Comm Sch Dist*, 183 Mich App 782, 787; 455 NW2d 411 (1990) ("We would concede that the nonexistence of a record is a defense for the failure to produce or allow access to the record.").

IV. DEFENDANT'S CLAIM FOR ATTORNEY FEES AND COSTS

On cross-appeal, defendant argues that the trial court erred by refusing to award attorney fees and costs. We disagree.

As a general rule, "Michigan follows the 'American rule' with respect to the payment of attorney fees and costs." *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005). "Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Id*. at 707. In this case, defendant sought—and the trial court denied—an award of attorney fees pursuant to MCL 15.240(6), MCL 600.2591, and MCR 2.114.[2]

A. MCL 15.240(6)

MCL 15.240(6), which is part of FOIA, 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.* The award shall be assessed against the public body liable for damages under subsection (7). [Emphasis added.]

The decision to award reasonable attorney fees and costs in a FOIA action where the plaintiff does not fully prevail "is entrusted to the sound discretion of the trial court." See *Estate of Nash by Nash*, 321 Mich App at 606 (quotation marks and citation omitted). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Estate of Nash by Nash v Grand Haven*, 321 Mich App 587, 605; 909 NW2d 862 (2017).

In this case, the trial court recognized that "sometimes citizen investigations are a good thing and warranted under certain circumstances, necessary." Notably, although not sworn testimony, plaintiff informed the trial court that he personally witnessed Joly receive a text message from Mayor Dobies concerning the nondiscrimination ordinance, giving him a legitimate basis to question defendant's denial of responsive records. Likewise, defendant's initial response that the documents did not exist was, at best, equivocal because defendant's response changed over time. Although defendant's briefing is vague regarding this point, it does not appear that Mayor Dobies ever denied that he conducted public-related business subject to the FOIA on his private cell phone, but simply maintained that the records no longer existed because of the theft of the phone. Accordingly, we see no error in the trial court's determination that plaintiff did not act in bad faith. We reject defendant's attempt to cast aspersions against

[2] MCR 2.114 was repealed by our Legislature, effective September 1, 2018. The existing language transferred to MCR 1.109.

plaintiff as a "frequent litigant" who is never sanctioned when his claims are dismissed and that "there is no deterrent" against him continuing to do so. Plaintiff's identity or the intended use for any information obtained is an irrelevant consideration. See *Taylor v Lansing Bd of Water and Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006). More importantly, defendant's "deterrence" argument is utterly incompatible with the purpose of FOIA "to provide to the people of Michigan 'full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees,' thereby allowing them to 'fully participate in the democratic process.' " *Amberg v Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014), quoting MCL 15.231(2). The trial court's decision to deny defendant's request for attorney fees and costs was a reasonable and principled one.

B. MCL 600.2591

Defendant also sought attorney fees under MCL 600.2591, which, "require[s] a court to sanction an attorney or party that files a frivolous action or defense." *Meisner Law Group PC*, 321 Mich App at 731; see also MCR 2.625(A)(2) (requiring an award of costs as provided by MCL 500.2591 where the trial court "finds on motion of a party that an action or defense was frivolous"). As set forth in MCL 600.2591(3)(a), civil action is frivolous where at least one of the following conditions exists:

> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

"To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made, and the factual determination by the trial court depends on the particular facts and circumstances of the claim involved." *DC Mex Holdings LLC v Affordable Land LLC*, 320 Mich App 528, 548; 907 NW2d 611 (2017) (quotation marks, citation, and alteration omitted). "The purpose of imposing sanctions for asserting a frivolous action or defense is to deter parties and their attorneys from filing documents or asserting claims or defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *Meisner*, 321 Mich App at 731-732.

Defendant contends that it fully complied with FOIA by filing a Certification of Nonexistence and that plaintiff filed this suit based on "nothing more than supposition, innuendo, and defamatory statements . . . not warranted by existing law or grounded in good faith." As stated earlier in this opinion, the trial court determined that (1) plaintiff was not acting in bad faith; (2) there was at least some basis to believe that responsive public records may have at one point existed; and (3) that it was not unreasonable for plaintiff to believe that those documents were potentially recoverable, even though the evidence did not ultimately bear out on that belief. This Court explained in *Louya v William Beaumont Hosp*, 190 Mich App 151, 162; 475 NW2d 434 (1991), "[t]here is a significant difference between bringing a lawsuit with no basis in law or

fact at the outset and failing to present sufficient evidence to justify relief at trial." Nothing about defendant's argument on appeal undermines the trial court's factual determination under a clear error standard of review. The trial court's finding has sufficient evidentiary support, and we are not left with a definite and firm conviction that a mistake was made. See *Meisner Law Group PC*, 321 Mich App at 733.

C. MCR 1.109

Finally, defendant sought attorney fees under MCR 2.114, which is now MCR 1.109. MCR 1.109 provides, in relevant part:

> (5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
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> (a) he or she has read the document;
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> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
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> (6) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
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> (7) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

Defendant's arguments for obtaining attorney fees under this court rule closely track those under MCL 600.2591 and, therefore, fail for the same reasons. Specifically, plaintiff did not file this action in bad faith; plaintiff had some reason to believe that the text messages sought may have existed at one point in time; and plaintiff's belief that the text messages were potentially recoverable was not unreasonable.

Based on the foregoing, we conclude that the trial court did not abuse its discretion in declining to award defendant an award of attorney fees and costs under FOIA and did not clearly err when it found that plaintiff's FOIA action was not frivolous at the time of its filing.

Affirmed.

/s/ James Robert Redford
/s/ Kathleen Jansen
/s/ Anica Letica