

STATE OF MICHIGAN
COURT OF APPEALS

RITA R. JOHNSON,

Plaintiff-Appellant,

v

CITY OF SAGINAW,

Defendant-Appellee.

UNPUBLISHED

December 17, 2019

No. 348024

Saginaw Circuit Court

LC No. 17-034574-CZ

Before: LETICA, P.J., and GADOLA and CAMERON, JJ.

PER CURIAM.

Plaintiff, Rita R. Johnson, appeals as of right the order of the trial court granting her partial attorney fees in her lawsuit against defendant, the city of Saginaw. We remand for further proceedings.

I. FACTS

The facts of this case are essentially undisputed. In June 2017, plaintiff sought documents from defendant under Michigan's Freedom of Information Act (FOIA), MCL 15.231, *et seq.* Among other documents, plaintiff sought copies of emails that plaintiff believed related to discussions about her business and the suspension of her business license by defendant. Defendant responded to plaintiff's request, advising plaintiff that it was availing itself of an extension of time to either grant or deny the request. Defendant thereafter advised plaintiff of the costs associated with providing the copies, stating that defendant would respond to the request within 10 days of receiving the fee deposit. Defendant thereafter provided some of the requested copies while advising plaintiff of the need for more time to produce other of the requested copies. Ultimately, defendant denied plaintiff's request for the emails.

Plaintiff initiated this action in the trial court, contending in Count II of her complaint that defendant had violated the FOIA by refusing to provide her with the emails. Plaintiff also alleged in Count I of her complaint that defendant failed to comply with the FOIA by improperly twice extending its deadline to respond to plaintiff's FOIA request.

Defendant moved for summary disposition of plaintiff's complaint, and the trial court considered plaintiff's response to the motion as a cross-motion for summary disposition. The trial court stated that it was granting in part and denying in part each party's motion for summary disposition, granting defendant summary disposition of plaintiff's claim that defendant violated the FOIA by exercising an improper extension of the time in which to respond to the request and denying in large part defendant's motion regarding the production of the documents. The trial court ordered defendant to produce 23 of the 25 pages of requested email, determining that defendant failed to meet its burden to establish that those documents fell within an exception to the FOIA.

Plaintiff thereafter sought attorney fees, asserting entitlement to the fees under the FOIA because she had prevailed on her claim. Plaintiff requested attorney fees for 45.5 hours at \$300 per hour for a total amount of attorney fees of \$13,650. The trial court found that plaintiff had prevailed in part on her claim, and also specifically found that the filing of the complaint was necessary to and had a substantial causative effect on plaintiff securing the documents. The trial court consequently granted in part plaintiff's motion for costs and fees, awarding her attorney fees for 55% of the attorney time expended, being 25.02 hours at \$250 per hour, for a total amount for attorney fees of \$6,255. The trial court explained that it found the reasonable hourly rate for counsel in this case to be \$250, and further explained that the breakdown of plaintiff's attorney's billing did not permit the trial court to distinguish between the time spent on the successful claim and the time spent on the unsuccessful claim. Plaintiff now appeals to this Court, challenging the amount of the attorney fees awarded by the trial court.

II. DISCUSSION

The Michigan FOIA "provides for the disclosure of public records in the possession of a public body." *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 360; 616 NW2d 677 (2000) (quotation marks and citation omitted). The FOIA is a pro-disclosure statute and as such, a public body must disclose all public records not exempted from disclosure by the act. *Thomas v City of New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2003). This Court reviews de novo the trial court's interpretation and application of the FOIA, *Rataj v City of Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014), and reviews for clear error a trial court's factual determinations in a FOIA action. *King v Mich State Police Dep't*, 303 Mich App 162, 174; 841 NW2d 914 (2013). We review for an abuse of discretion a trial court's award of attorney fees to a prevailing plaintiff in an action under the FOIA. *Nash Estate v City of Grand Haven*, 321 Mich App 587, 605; 909 NW2d 862 (2017).

When a person entitled to a public record under the FOIA prevails in an action to compel the public body to produce the record, the FOIA provides for the award of attorney fees as follows, in pertinent part:

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 a 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. . . . [MCL 15.240(6).]

Thus, if a plaintiff prevails in his or her action under the FOIA, the trial court is required to award the plaintiff reasonable attorney fees. MCL 15.240(6); *Amberg v City of Dearborn*, 497 Mich 28, 33-34; 859 NW2d 674 (2014). This Court has also stated more specifically that if a plaintiff prevails “completely” in an action under the FOIA, the trial court is required to award plaintiff attorney fees. See *Nash Estate*, 321 Mich App at 606. If, however, a party prevails only partially under FOIA, the decision to award attorney fees is within the discretion of the trial court. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 150-151; 683 NW2d 745 (2004).

A party “prevails” under the FOIA within the meaning of MCL 15.240(6) if the action was reasonably necessary to compel the disclosure of public records and “had a substantial causative effect on the delivery of the information to the plaintiff.” *Amberg*, 497 Mich at 34; see also *Nash*, 321 Mich App at 606, quoting *Wilson v Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1993) (the plaintiff has prevailed under the FOIA “if the prosecution of the action was necessary to and had a substantial causative effect on the delivery of or access to the documents.”) This Court has stated that “we believe that a plaintiff ‘prevails’ in the action so as to be entitled to a mandatory award of costs and fees where he is forced into litigation and is successful with respect to the central issue that the requested materials were subject to disclosure under the FOIA” *Thomas v City of New Baltimore*, 254 Mich App 196, 205; 657 NW2d 530 (2003) (citation omitted). In this case, the trial court specifically found that “the filing of this case was necessary to, and did have a substantial causative effect on [plaintiff’s] ultimate access to 23 of the 25 documents at issue.” The trial court further found, however, that plaintiff prevailed only in part because defendant prevailed on Count I of the complaint, while both parties prevailed in part on Count II of the complaint given that 23 of the 25 pages of email were not exempt but two pages were exempt.

On appeal, plaintiff does not challenge the trial court’s finding that she prevailed only in part, but argues that the trial court abused its discretion by awarding only 55% of attorney fees sought and in determining a reasonable hourly rate for attorney fees to be \$250. When determining the amount of attorney fees to be awarded to a prevailing plaintiff in a FOIA case, the “touchstone” is reasonableness. *Prins v Michigan State Police*, 299 Mich App 634, 642; 831 NW2d 867 (2013). If the trial court decides to award attorney fees when a plaintiff partially prevails, then the fees “should be ‘fairly allocable’ to that portion” on which the plaintiff prevailed. *Booth Newspapers, Inc, v Kalamazoo Sch Dist*, 181 Mich App 752, 759; 450 NW2d 286 (1990).

A court determining a reasonable attorney fee in the context of a FOIA action should consider the factors articulated by our Supreme Court in *Smith v Khouri*, 481 Mich 519, 530-531; 751 NW2d 472 (2008). *Prins*, 299 Mich App at 645. Under *Smith*, when determining reasonable attorney fees the trial court should begin by determining the rate customarily charged in the locality for similar legal services and multiply that rate by the reasonable number of hours expended, the product of which is the starting point for determining the reasonable fee. *Smith*, 481 Mich at 530-531. The court should then consider and briefly discuss the factors articulated in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 587-588; 321 NW2d 653 (1982), as well as the reasonable attorney fee factors of Rule 1.5(a) of the Michigan Rules of Professional Conduct, to determine whether it is necessary to adjust that amount. See *Prins*, 299 Mich App at 642-643. These factors were refined by our Supreme Court in *Pirgu v United Services Auto*

Ass'n, 499 Mich 269, 274; 884 NW2d 257 (2016), wherein the Court recognized that the *Smith* test required a trial court to consider factors from two sources and therefore distilled the factors into one list, *id.* at 281-282, articulating the list of combined factors that the trial court must consider when determining reasonable attorney fees as follows:

- (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
- (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
- (3) the amount in question and the results obtained,
- (4) the expenses incurred,
- (5) the nature and length of the professional relationship with the client,
- (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer
- (7) the time limitations imposed by the client or by the circumstances, and
- (8) whether the fee is fixed or contingent. [*Pirgu*, 499 Mich at 282,]

The trial court is not limited to these specific factors, but is required to briefly address on the record its view of each of the factors. *Prins*, 299 Mich App at 645. If the trial court considers an additional factor, it should expressly state the factor and justify the relevance and use of the additional factor. *Smith*, 481 Mich at 531 n 15.

In this case, the trial court found that the reasonable hourly rate for counsel in this case was \$250 per hour. The hourly rate of \$250 determined by the trial court as a reasonable hourly rate for attorney fees is supported by the record as a fee customarily charged in the locality for similar legal services. See *Smith*, 481 Mich at 530. The trial court therefore did not abuse its discretion in using this hourly rate to calculate reasonable attorney fees in this case.

The trial court then awarded plaintiff her attorney fees for 55% of the attorney time expended, being 25.02 hours at \$250 per hour, for a total amount for attorney fees of \$6,255. The trial court explained that plaintiff's breakdown of her attorney's billing did not permit the trial court to distinguish between the time spent on the successful claim and the time spent on the unsuccessful claim. The trial court, however, did not discuss the factors articulated in *Smith* and *Pirgu*, and thus this Court has no analysis to review. We therefore vacate the trial court's opinion and order with respect to attorney fees and remand this case to the trial court to reevaluate the determination of the amount of reasonable attorney fees addressing the factors articulated in *Smith* and *Pirgu*.

Remanded for proceeding consistent with this opinion. We do not retain jurisdiction.

/s/ Anica Letica

/s/ Michael F. Gadola
/s/ Thomas C. Cameron