SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3016-20

C.E. and B.E., individually and on behalf of K.E.,

Plaintiffs-Appellants,

v.

ELIZABETH PUBLIC SCHOOL DISTRICT and HAROLD E. KENNEDY, JR., in his official capacity as School Business Administrator/Board Secretary of the Elizabeth Public School District,

Defendants-Respondents.

Argued October 24, 2022 – Decided July 18, 2023

Before Judges Whipple, Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-2290-20.

Walter M. Luers argued the cause for appellants (Cohn Lifland Pearlman Herrmann & Knopf LLP, and Jamie Epstein, attorneys; Walter M. Luers and Jamie Epstein, on the briefs).

Robert F. Varady argued the cause for respondents (La Corte, Bundy, Varady & Kinsella, attorneys; Robert F. Varady, of counsel and on the brief; Christina M. DiPalo, on the brief).

PER CURIAM

Plaintiffs appeal from the trial court's denial of a motion to reinstate their order to show cause and their motion for counsel fees pursuant to N.J.S.A. 47:1A-6. Among other things, plaintiffs contend on appeal that the trial court erred when it found that defendant did not deny their request for records and that plaintiff was not a prevailing party under the statute. We affirm.

I.

Plaintiffs C.E. and B.E. are the parents of K.E., a minor (plaintiffs, collectively), who have previously been involved in public records litigation with the Elizabeth Public School District (District). See C.E. v. Elizabeth Pub. Sch. Dist., 472 N.J. Super. 253, 258 (App. Div. 2022).

On May 15, 2020, Plaintiffs sought various records from the District pursuant to the Open Public Records Act (OPRA). N.J.S.A. 47:1A-1 to -13. The request, made via email, sought:

> 1. The financial records files for the C.E., et al. v. Elizabeth Public School District et al. Docket No UNN-L-002231-15 and the C.E. OPRA Request of 4/2/15 (a) financial records files: include, but are not limited to, contracts, bills, invoices, receipts, ledger accounts,

> purchase orders, payments, both sides of canceled checks which document payment of services provided and for payment for services provided to the Board for legal services.

Twelve days later, on May 27, 2020, the District replied:

> By order of the New Jersey Governor, all public and private schools in New Jersey . . . were closed on Wednesday, March 18, 2020 as part of a wide-ranging effort to contain the spread of the coronavirus. A related bill A3849/S2302[1] introduced March 16, 2020 modifies the deadline by which a public agency is required to respond to a request for governmental records during a period of emergency. We will respond to your request when circumstances allowing for the reopening of the District and access to records permit.
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> [(Emphasis added).]

Plaintiffs rejected the District's position that it would supply records "when circumstances . . . allowing for access . . . permit," and concluded their

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[1] N.J.S.A. 47:1A-5(i)(1), effective March 20, 2020, reads in pertinent part:

> During a period declared. . . as a state of emergency [or] public health emergency . . . the deadlines by which to respond to a request for . . . a government record . . . shall not apply, provided however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.
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> [N.J.S.A. 47:1A-5(i)(1) (emphasis added).]

written response by stating "the [District's] request to postpone the immediate access [to] records is DENIED." Next, the District formally rejected plaintiffs' OPRA request, citing a lack of specificity. This prompted plaintiffs to submit a reworded request on May 30, seeking:

> 1. The file(s) containing the legal services financial transaction records for the case of C.E., et al. v. Elizabeth Public School District, et al. Docket No. UNN-002231-15 and the C.E. OPRA request of 4/2/15;
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> (a) legal services agreement(s)/contract(s) received by the Board from providers of legal services to the Board in the case of C.E., et al. v. Elizabeth Public School District, et al. Docket No. UNN-002231-15 and the C.E. OPRA request of 4/2/15;
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> (b) legal services agreement(s)/contract(s) approved by the board from providers of legal services to the Board in the case of C.E., et al. v. Elizabeth Public School District, et al. Docket No. UNN-002231-15 and the C.E. OPRA request of 4/2/15;
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> (c) bills/invoices received from providers of legal services to the Board for legal services rendered in the case of C.E., et al. v. Elizabeth Public School District, et al. Docket No. UNN-002231-15 and the C.E. OPRA request of 4/2/15;
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> (d) vouchers/purchased orders approved by the Board for providers of legal services to the Board in the case of C.E., et al. v. Elizabeth Public School District, et al.

> Docket No. UNN-002231-15 and the C.E.
> OPRA request of 4/2/15.

The District responded to the amended request on June 3, citing a lack of responsive records for certain categories of information plaintiffs sought.[2] For the remaining categories, the District stated, "we will respond to your request for records when circumstances allowing for the reopening of the District and access to records permit."[3]

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[2] The District explained in part: "Contracts to perform legal services. . . are solicited thorough a Request for Qualifications process. These requests deal in specific area of law, not specific cases."

[3] The district explained:

> Both of the aforementioned requests require an on-premise search of manual billing records which can't be accomplished remotely while the District is closed. Additionally, vouchers/purchase orders may also be stored in closed off-site storage. Within its computerized . . . systems the [District] does not maintain searchable records remotely under the categories of C.E., et al. v. Elizabeth Public School District, et al. Docket No. UNN-002231-15 and the C.E. OPRA request of 4/2/15. We will respond to your request for records when circumstances allowing for the reopening of the District and access to records permit.

Plaintiffs filed a complaint and order to show cause to compel production of the sought-after records. Argument took place on August 14, 2020, and the trial court denied plaintiffs' requested relief without prejudice, reasoning:

> [H]ere I have a situation where there's a significant request. It has not been denied. It's saying we need some more time to gather this information. The Board of Education's position is, [j]udge, why don't you take judicial notice of the fact that what's happening in August of 2020 regarding putting schools together for the coming year[?]

The trial court then broached the idea of the parties negotiating to resolve the document request amicably: "what's so unreasonable about . . . working with counsel, working with the Board to say, you know, [plaintiffs] do want this material. I understand [the District has] a problem. You don't even know if [District schools will] open or not in three weeks." After further argument, the trial court denied plaintiffs' order to show cause application seeking to compel the District's production of records under OPRA:

> In this instance . . . I'm rejecting, obviously, without prejudice, to make the application within a reasonable degree of time, and I would hope that you'd work with the Board of Education to find out what reasonable period of time is because if you come back – you know, they know if they keep stalling you, attorney's fees are just going to keep mounting, mounting, mounting . . . .
>
> . . . .

> So[,] I'm denying this application without prejudice at this time.

After the trial court entered its August 14 order, the record shows plaintiffs took no further action until November 6, 2020, when they sent a letter to District counsel, again seeking records. The parties' ensuing negotiations proved fruitless, and plaintiffs filed a second order to show cause on January 20, 2021. They did not file a corresponding complaint, instead electing to rely upon the complaint filed in the original action.

At a February 22, 2021 hearing, the court once again found in favor of the District, noting procedural deficiencies in plaintiff's order. The court reasoned:

> This is a summary matter brought under the rules. And as such, [it] must be filed [with] a verified complaint with the order to show cause, as required by the rules. It did not happen here. . . . [The previous ruling] asked for you to talk. . . . And if discussions weren't successful, it was incumbent to file a new complaint.
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> At a minimum, what happened since August 14th, 2020, needed to be put into a pleading that would warrant an answer, as the statute and as an order to show cause . . . requires.

As to the District's ongoing COVID-19 explanation for the delay in producing records, the court noted:

> [COVID] cannot be the constant shield or a weapon to defend against these legitimate requests. . . . but I don't see anything in the papers that disputes the legitimacy

> and the appropriate response being production as to the scope of the request. It simply is being . . . stymied by [COVID] and it was regrettable circumstances that [defense counsel] found himself in, but he legitimately requested, so he didn't fall into the rabbit hole of I have now conceded to you that you are a prevailing party.

The court then dismissed the case, noting "[p]laintiff retains all rights, if any, under law for appropriate further applications if necessary or warranted under a new case and docket number."

Three days after the trial court dismissed the second order to show cause, the District produced the requested documents in two installments. It transmitted the first installment on February 25, specifying in the transmittal which requested documents were included, which did not exist, and which documents were physically located in the administration building, which had been closed due to District employees' positive COVID tests. The District further advised that it anticipated its records custodian, business administrator Harold Kennedy, would "gain entry to the building no earlier than March 3." The District forwarded the additional records on March 8.

On March 29, 2021, plaintiffs moved to reinstate the order to show cause and separately filed a motion for attorneys' fees, contending they were a prevailing party. In support of their argument, plaintiffs contended that the District had responded to other OPRA requests between May and November

2020. Some of those responses included hard copies of documents. Plaintiffs argued the trial court should conclude the released records were produced as a result of their lawsuit.

The District presented Kennedy's certification in opposition. He stated: all records requested by plaintiff were not electronically stored; some records were physically stored in the administrative building; the administrative building was closed for long periods in the prior year; and recovery of certain documents was difficult with reduced staff and limited building access. Kennedy also noted the files plaintiff sought were ultimately located by the District and turned over. The court rejected plaintiffs' arguments and found for the District.

First, the court cited procedural grounds for its decision:

> The case was done. So, reopening it, there's no basis . . . and I incorporate herein all my findings from the February 22nd, as well as findings made previously [in the] August 14, 2020 order . . . that this [c]ourt was bound by, the prior determination of a dismissal which bound this [c]ourt as a continuation of the findings and orders of [the trial court which issued the August 14, 2020 order].
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> . . . .
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> [T]here are certain procedural protocols necessary in an order to show cause[,] which include a verified complaint . . . with a brief . . . .

. . . .

> I simply set out [on February 22] exactly what the record is, which is a dismissed case, and what rights, if any, the plaintiff had remaining. And this court, even today, makes no comment on whether there are any rights, or whether there were no rights, but the docket is closed[,] and it was a dismissal.

The court then proceeded to the merits of the attorney's fees claim, finding plaintiffs were not prevailing parties, either directly or under the catalyst theory. The trial court found that the District's February 25 and March 8 document transmittal was simply a continuation of the negotiations ordered on August 14, 2020.

The court denied the application for attorney's fees and the reinstatement motion with prejudice, and this appeal followed.

On appeal, plaintiffs argue the trial court erred by: denying the motion to reinstate and the motion for counsel fees on May 14, 2021; dismissing plaintiffs' initial order to show cause without prejudice and directing the parties to negotiate the release of the requested documents; failing to find the District "denied" plaintiffs' OPRA requests; and to consider the District's cooperation with other OPRA requests during the pendency of this litigation.

II.

We apply a deferential standard in reviewing a trial court's factual findings. Balducci v. Cige, 240 N.J. 574, 594 (2020). However, review of an OPRA application is de novo. Simmons v. Mercado, 247 N.J. 24, 38 (2021). No deference is owed to the "interpretive conclusions" of the trial court. Ibid.

When we review the alleged errors of the trial court, the question on appeal is "whether in all the circumstances there [is] a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." State v. G.E.P., 243 N.J. 362, 389 (2020) (alteration in original) (quoting State v. Mohammed, 226 N.J. 71, 86-87 (2016)). Even if an alleged error was brought to the trial judge's attention, it will not be ground for reversal if it was harmless error. Willner v. Vertical Realty, Inc., 235 N.J. 65, 79 (2018); R. 2:10-2.

We "disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Packard–Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 444 (2001)).

III.

A.

Plaintiff first argues they were a prevailing party entitled to reasonable counsel fees and costs pursuant to N.J.S.A. 47:1A-6, and that the trial court committed reversible error by failing to award same. We first consider the OPRA statute, then examine what a prevailing party is in the OPRA context.

"The purpose of OPRA is 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005). The statute provides for fee shifting to level the playing field between an ordinary citizen and the State's "inexhaustible resources." New Jerseyans for a Death Penalty Moratorium v. Dep't of Corr., 185 N.J. 137, 153 (2005).

OPRA conditions fee awards on the finding that a requestor "prevail" in court after being "denied" access to government records. N.J.S.A. 47:1A-6. A plaintiff is considered to have prevailed "when the actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Underwood Prop. LLC v. City of Hackensack, 470 N.J. Super. 202, 215 (App.

Div. 2022) (alteration in original) (quoting Teeters v. Div. of Youth and Fam. Servs., 387 N.J. Super. 423, 432 (App. Div. 2006)).

An OPRA plaintiff is not required to obtain a final judgement in their favor to be awarded fees. Plaintiffs are also entitled to fees under a "catalyst theory," where they can demonstrate:"(1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiff[] had a basis in law.'" Mason v. City of Hoboken, 196 N.J. 51, 76 (2008) (quoting Singer v. State, 95 N.J. 487, 494 (1984)). Since plaintiffs never prevailed on either of their order to show cause actions, we examine the record through the lens of the catalyst theory.

The first prong – factual causal nexus – requires the plaintiff to establish their lawsuit was causally related to securing records that were first denied to them. Mason, 196 N.J. at 76. The plaintiff bears the burden of proving causation unless the responding agency has failed to respond at all to a request. Ibid. The precise quantum of proof is case-specific, but the court's ruling must always be supported by competent and credible evidence. Jones v. Hayman, 418 N.J. Super. 291, 306 (App. Div. 2011). A plaintiff can show a causal nexus when litigation causes a defendant to disclose additional documents.

Underwood, 470 N.J. Super. at 211. Settlement agreements can also satisfy the causal nexus standard. Teeters, 387 N.J. at 423.

Plaintiffs contend "there is a clear factual nexus between [their] lawsuit and the production of records" because "[the District] steadfastly refused to produce any records in this action," but then ultimately did disgorge the documents. We are not convinced.

The District did not "refuse" to produce records – it stated it would produce documents from the start, albeit on an open-ended timetable driven by the COVID-19 pandemic. The District's initial written response to plaintiff's requests was well reasoned and contained a cogent explanation for why it could not meet plaintiffs' records demands at that time. Citing the amended records statute, the District indicated it would produce the records when circumstances permitted. Given the state of the COVID-19 pandemic in spring and summer of 2020, that response was more than reasonable.

After plaintiff's second request in November 2020, the District offered to produce the records during failed settlement negotiations. The District ultimately did so after prevailing on plaintiff's second order to show cause. There was no agreement or settlement between the parties when the District produced the records. The trial court ultimately found the production bore no

causal relationship to the litigation, and in the court's words, "attached no significance" to the fact that production took place three days after the second dismissal.

Plaintiffs argue that the District's November offer to deliver the requested documents three weeks from plaintiffs' renouncement of their claim to statutory fees demonstrates they had the capability to deliver the documents at that time. Hence, plaintiffs argue, the trial court erred because COVID-19 cannot be said to be the cause of any delay after November 2020. We are not persuaded, and agree with the trial court, which rejected this argument. During that phase of the pandemic, the District could offer to produce records at one point, with the belief the buildings would be accessible, only to delay their retrieval due to a new wave of infected employees causing building closure. This very scenario took place between November 2020 and February 2021.

Kennedy certified that the records sought by plaintiffs were not all electronically stored, and some "may also be stored in closed off-site storage." He certified that the District administration building was closed due to personnel testing positive for COVID-19. The trial court could reasonably find the settlement offer did not represent an "alteration of position and behavior" on the part of defendants.

Regardless of the post-November delay in the District's release of records, plaintiffs still had the burden of demonstrating their actions precipitated the eventual disclosure. Mason, 196 N.J. at 76; Gannet Satellite Info. Network, LLC v. Twp of Neptune, 467 N.J. Super. 385, 413 (App. Div. 2021). They can show no causal link. Plaintiffs were unsuccessful on the merits at both hearings, the District released the documents unilaterally after the trial court denied plaintiffs' second order to show cause, and there was no settlement.

Plaintiffs failed to demonstrate their litigation bore a causal relationship to the District's eventual disclosure, so we comment only briefly upon the second prong, whether the relief ultimately secured by the plaintiff had a basis in law. Such an analysis requires a court to consider a plaintiff's success in obtaining partial or interim relief. Jones, 418 N.J. Super. at 308. The degree of plaintiffs' success is weighed against what obtaining a complete or final judgment on the merits would have achieved. Ibid. Therefore, a party need not obtain all relief sought, but there must be a resolution that "affect[s] the defendant's behavior towards the prevailing plaintiff." Smith v. Hudson Cnty. Reg., 422 N.J. Super. 387, 394 (App. Div. 2011) (alteration in original) (citing Teeters, 387 N.J. Super. at 431). Such action includes a "change (voluntary or otherwise) in the custodian's conduct." Spectraserv, Inc. v. Middlesex Cnty. Utils. Auth., 416

N.J. Super. 565, 583 (App. Div. 2010) (citing Teeters, 387 N.J. Super. 432). It is plaintiffs' burden to show their lawsuit affected the District's behavior. Mason, 196 N.J. at 76.

The record shows the timing of the District's disclosure was: not mandated by court decision or order; reasonably explained by COVID-19 closings; and undertaken at the defendant's discretion. Plaintiff was simply not a prevailing party, and we discern no error.

B.

Plaintiffs next argue the trial court erred by failing to issue a decision on the merits when evaluating the first order to show cause, on August 14, 2020. They further contend the trial court failed to make findings of fact during the August 14 hearing, and committed additional error when it instructed the parties to meet and discuss a schedule for disclosure of documents.

OPRA proceedings are summary and governed by Rule 4:67. N.J.S.A. 47:1A-6. The parties must file a complaint and an answer together with briefs. R. 4:67-4, -5. The trial court makes findings of fact by either adopting uncontested facts in the pleadings or by conducting an evidentiary hearing. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 551 (App. Div. 2005).

"Summary actions are, by definition, short, concise, and immediate, and further, are designed to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment." Ibid. (internal quotations and citations omitted).

When considering whether a trial court has committed reversible error, the question is "whether in all the circumstances there [is] a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." G.E.P., 243 N.J. at 389. "The proper and rational standard is not perfection . . . no trial can ever be entirely free of even the smallest defect. Our goal, nonetheless, must always be fairness." State v. R.B., 183 N.J. 308, 333-34 (2005).

The trial court did not deny plaintiffs a fair hearing on August 14, 2020. The court considered the parties' arguments and submissions, and it denied the order to show cause without prejudice. The record shows the hearing was short, not uncommon in a summary proceeding. The trial court also expressly found COVID-19 was the basis for the District's original delay in responding. We discern no reversible error in the trial court's dismissal of the complaint without prejudice and subsequent direction to the parties to attempt an effort at accommodation. See Mason, 196 N.J. at 91.

C.

Plaintiffs also contend the trial court committed error when it denied their second order to show cause application. The trial court found Plaintiffs' second application cause lacked a corresponding complaint and was therefore procedurally deficient. See Rule 4:67-1. The court properly noted plaintiffs could have filed an amended complaint alleging new procedural and factual developments to accompany the second order to show cause. Finally, the court observed that plaintiffs failed to explain their inaction between August and November 2020, and the record shows they did not attempt to amicably resolve the records request, as the court had instructed them to do.

D.

Plaintiffs maintain the trial court erred by not finding their request was "deemed denied." We are not persuaded.

An OPRA request is "deemed denied" when the time for the records custodian to provide responsive records has expired. Prior to the March 2020 amendment, this meant responding within either seven business days or, in the case of archived material, "within the time that a records custodian states that it can be made available." N.J.S.A. 47:1A-5(i)(1). However, N.J.S.A. 47:1A-5(i)(2) suspends the operation of (i)(1) so long as there is an ongoing state of

emergency. Instead, custodians must "make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter." Ibid. (emphasis added). This clear language removed any specific timeframe for document production during the pandemic, and it replaced the hard document production deadline with guidelines bounded by reasonable effort. The Legislature further instructed that documents produced by "reasonable effort" were to be produced "as circumstances permit." The trial court had sufficient evidence in the record from which to conclude the District operated within the wide latitude the amended statute provided. We find no basis to disturb this finding.

E.

Next, plaintiffs argue the District falls short of even the relaxed statutory production deadline imposed by the Legislature because it "made no efforts to retrieve responsive records." The question is one of degree. Was the District's document production effort reasonable under the circumstances?

The record shows the District certified that some records were stored as physical documents inside closed offices. Some records were digitally stored, but dispersed between administration computers and computers belonging to private law firms retained by the District. The surrounding circumstances at the

time the plaintiffs filed their first order to show cause shaped the District's responses to the document requests. On August 14, 2021, the COVID-19 pandemic was in its earliest stages. Many businesses, as well as public institutions like school offices, were closed. Public and private employees alike were working remotely while their offices remained inaccessible. It was in this setting that the trial court directed the parties to discuss settlement of the matter. The record shows that plaintiffs inexplicably waited for nearly three months to contact the District.

In November 2020, in communication for the first time since the August order, the parties failed to reach a resolution. Following that, plaintiffs' second order to show cause action failed. Only at that time did the District release the requested records, including digital ones.

The record contains ample evidence from which the finder of fact could have concluded that retrieval of the records sought by plaintiffs were delayed by District's difficulties in getting and keeping access to record storage facilities.

We find the trial court was within its discretion in concluding the District acted reasonably.

Plaintiffs' final argument, asserting the trial court erred by failing to consider reports of District responses to unrelated document requests, lacks

sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION