STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. RITZER,

Plaintiff/Counter-Defendant-Appellant,

v

LOCKPORT-FABIUS-PARK TOWNSHIP FIRE DEPARTMENT,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
February 8, 2005

No. 253262
St. Joseph Circuit Court
LC No. 02-001250-CZ

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order partially granting defendant's motion for summary disposition of plaintiff's suit for access to public records under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*. We affirm.

This appeal arose from a dispute between plaintiff, the owner of an auto towing service, and defendant, a volunteer fire department. Plaintiff asserts that in late 2001, the St. Joseph County prosecutor's office issued him a misdemeanor littering citation based on plaintiff's failure to clean up Hi-Dri, an absorbent material that defendant's personnel put on the roadway to absorb antifreeze after a car accident. According to plaintiff, the citation was unjustified because a competing auto towing service, which is partly owned by an employee of the county prosecutor's office, was not issued a similar citation despite the fact that there were three instances where the competing towing service also did not clean up the absorbent material at accident scenes.

Plaintiff filed six FOIA requests with defendant seeking to discover information about defendant's policies and procedures. Defendant responded to plaintiff's FOIA requests and made substantial disclosures; however, plaintiff was dissatisfied with defendant's disclosures and with defendant's refusal to permit plaintiff to inspect and copy the hard drives on defendant's computers. Plaintiff therefore filed a complaint against defendant alleging that defendant

violated the FOIA. In his complaint, plaintiff alleged that defendant failed to provide plaintiff the opportunity to inspect and copy from "Defendant's computer discs/tapes" and failed to provide defendant's fax drum[1] as plaintiff had requested.

Defendant moved for summary disposition of plaintiff's claim under MCR 2.116(C)(10). The trial court ruled that defendant had improperly failed to disclose the fax drum to plaintiff, stating that the fax drum "should have been provided" and that defendant's failure to provide it to plaintiff "constitute[d] a violation of the Freedom of Information Act." In all other respects, however, the trial court granted defendant's motion for summary disposition.

Plaintiff first argues that the trial court erred in partially granting defendant's motion for summary disposition. We review a decision to grant or deny summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id*. at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999).

According to plaintiff, the trial court's order partially granting summary disposition in defendant's favor was premature because discovery was not yet complete. Although summary disposition is usually inappropriate before the completion of discovery on a disputed issue, it may be appropriate if further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Kelly-Nevils v Detroit Receiving Hosp*, 207 Mich App 410, 421; 526 NW2d 15 (1994). Plaintiff contends that further discovery was necessary to resolve inconsistencies in witnesses' statements and to "pursue the truth." However, plaintiff has offered no evidence that additional discovery could have established that a dispute did indeed exist. "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). Plaintiff has not done so. We therefore conclude that summary disposition was not premature.

Plaintiff also argues that the trial court erred in partially granting defendant's motion for summary disposition because certain statements made by the trial court on the record at the summary disposition hearing indicate that the trial court improperly considered the reason

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[1] A fax drum is the long scroll of coated film that defendant's plain-paper fax machine used to print the image received onto paper. During the image transfer process, an exact negative of the image received is stored on the fax drum film. The fax drum therefore provided an archive of the information received by defendant's fax machine.

plaintiff sought disclosures from defendant under the FOIA. Plaintiff is correct that the reason for a party's request for information under the FOIA is generally irrelevant. *Cashel v Smith*, 117 Mich App 405, 411-412; 324 NW2d 336 (1982) ("A person seeking information under the [FOIA] is generally not required to divulge the reason for the request."). However, our review of the trial court's statements on the record reveals that the trial court did not improperly consider the reason for plaintiff's FOIA requests. While the trial court did state on the record that the FOIA can be subject to abuse and used as a form of harassment, the trial court's statements were made in the context of an explanation of the purposes and goals of the FOIA. Moreover, the trial court was speaking in general terms and never indicated that plaintiff's FOIA requests to defendant were made for improper purposes. We therefore reject plaintiff's suggestion that the trial court improperly considered the purpose plaintiff sought information from defendant in rendering its decision in this case.

Plaintiff further argues that the trial court erred in granting summary disposition of plaintiff's request for defendant's "computer disc/tapes" because defendant did not provide plaintiff with the information in the same format that plaintiff requested. We disagree.

According to plaintiff, defendant erred in providing plaintiff with the information he requested in paper form, rather than in disc or tape form, as he requested. While the trial court did not explicitly address this issue below, plaintiff raised it, and the trial court, in granting defendant's motion for summary disposition of plaintiff's claim relating to his FOIA requests for defendant's "computer disc/tapes," implicitly rejected it. Plaintiff's FOIA requests sought defendant's "computer disc/tapes," and not merely hard copies of the information contained in the "computer disc/tapes." Plaintiff is correct that, in general, a party responding to an FOIA request must provide the information in the form requested by the requesting party. *Farrell v Detroit*, 209 Mich App 7, 14-15; 530 NW2d 105 (1995) ("We agree that defendant is required to provide the 'public record' plaintiffs request, not just the information contained therein. We conclude that the trial court erred to the extent it held that defendant was not required to provide plaintiffs with the computer tape because the information contained on the computer tape was made available in printed form." (internal citation omitted)). The FOIA "'gives a person the right to inspect, copy, or receive copies of a *public record*, not merely to obtain the information contained in a public record in any form in which the public body sees fit to release it. A paper printout is simply not a copy of a magnetic tape.'" *Payne v Grand Rapids Police Chief*, 178 Mich App 193, 203; 443 NW2d 481 (1989), quoting *Kestenbaum v Michigan State University*, 414 Mich 510, 558; 327 NW2d 783 (1982) (opinion by Ryan, J.) (internal quotations omitted).

In this case, plaintiff seeks access to and disclosure of the hard drives[2] of defendant's computers. In addition to information subject to disclosure under the FOIA, the hard drives of

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[2] For purposes of this appeal, we assume, as did the parties and the trial court below, that plaintiff's request for defendant's "computer disc/tapes" is a request for access to the hard drives of defendant's computers. While we need not decide this issue because it was not decided by the trial court below and was not raised by the parties on appeal, we question whether plaintiff's request for defendant's "computer disc/tapes" was sufficiently specific under MCL 15.233(1) to constitute a request for the hard drives of defendant's computers.

defendant's computers would most certainly contain information that is exempt from disclosure under the FOIA, such as computer software and other information that would be exempt under § 13 of the FOIA. MCL 15.232(e); MCL 15.243. The combination of exempt and nonexempt material on a computer hard drive would require defendant to "separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." MCL 15.244(1). We are aware of no way for defendant to separate the exempt material from the nonexempt material and make only the nonexempt material available for plaintiff to examine and copy in the form requested by plaintiff unless defendant creates a new disc or tape containing only the nonexempt material. However, the FOIA "does not require a public body to create a new public record." MCL 15.233(5). Accordingly, we conclude that under the facts of this case, when separation of exempt and nonexempt materials would require defendant to create a new document, it was not improper for defendant to provide plaintiff with paper copies of the nonexempt material contained on defendant's "computer tape/discs." We therefore conclude that the trial court did not err in granting defendant's motion for summary disposition of plaintiff's claim relating to his request for defendant's "computer disc/tapes."

Plaintiff next argues that the trial court erred in partially granting summary disposition in favor of defendant when defendant failed to disclose a videotape of the incident that was allegedly made by an assistant fire chief. We disagree. Defendant disputed that such a videotape of the incident was created and asserted that even if it had been created, it would not have been retained because such videotapes are routinely destroyed after an accident scene is cleared. Defendant was not required to create a public record that did not exist in order to satisfy plaintiff's FOIA request. MCL 15.233(5). Moreover, plaintiff has failed to offer evidence establishing that a genuine issue of material fact exists regarding the existence of such a videotape. We therefore reject plaintiff's contention that the trial court erred in granting summary disposition on this basis.

Plaintiff next argues that the trial court abused its discretion in determining the amount of attorney fees, costs, and disbursements it awarded plaintiff based on its denial of defendant's motion for summary disposition of plaintiff's claim relating to the fax drum. We disagree.

The trial court concluded that defendant violated the FOIA by failing to disclose and subsequently destroying the fax drum and therefore awarded plaintiff $1,000 in costs and attorney fees. The amount of attorney fees awarded to a prevailing party under the FOIA is within the discretion of the trial court. *Yarbrough v Dep't of Corrections*, 199 Mich App 180, 186; 501 NW2d 207 (1993), citing *Booth Newspapers, Inc v Kalamazoo School Dist*, 181 Mich App 752, 759; 450 NW2d 286 (1989). MCL 15.240(6) provides, in relevant 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 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. . . .

While there is no precise formula for computing the reasonableness of an attorney's fee, there are several factors to be taken into consideration in determining the reasonableness of the fee. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 430; 552 NW2d 466 (1996). In this case the trial court did not specifically articulate the factors it was relying on in

determining the amount of the attorney fees. However, "the court need not detail its findings relative to each specific factor considered." *Id*. Based on our review of the record, we conclude that the trial court did not abuse its discretion in awarding plaintiff $1,000 in attorney fees.

Plaintiff finally argues that defendant's refusal to disclose the fax drum[3] and subsequent destruction of the fax drum was "arbitrary and capricious" as a matter of law according to *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726; 415 NW2d 292 (1987), and that the trial court therefore abused its discretion in denying plaintiff's request for punitive damages under MCL 15.240(7). We disagree.

The circuit court must award the requesting party $500 in punitive damages if it determines that the public body "arbitrarily and capriciously violated [the FOIA] by refusal or delay in disclosing or providing copies of a public record." MCL 15.240(7). We review for clear error the circuit court's finding that a defendant did not act arbitrarily and capriciously. *Meredith Corp v Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003), citing *Yarbrough*, *supra* at 185. Even if a defendant's refusal to disclose or provide the requested materials was a violation of the FOIA, it was not necessarily arbitrary or capricious if the defendant's decision was based on consideration of principles or circumstances and was reasonable rather than whimsical. *Id*.

We reject plaintiff's contention that *Walloon* supports his claim for punitive damages in this case.[4] In *Walloon*, we found that the defendant's denial of the plaintiff's request for disclosure of a letter was arbitrary and capricious as a matter of law because the defendant informed the plaintiff that it possessed the requested document, but refused, without explanation, to disclose it, and then subsequently relinquished the only copy of the document to a third party before trial. *Walloon*, *supra* at 734. This case is distinguishable from *Walloon*, however, because in the instant case, unlike in *Walloon*, defendant did offer a written response to plaintiff's request, in which defendant asserted that "[a] facsimile drum is not a public record as defined by the FOIA, therefore it has not been produced, reproduced or made available for inspection as requested . . . ." This case is also distinguishable from *Walloon* because in this case, the destruction of the drum was inadvertent and resulted in the ordinary course of business rather than from a deliberate attempt to circumvent the FOIA. In contrast, in *Walloon*, the defendant's relinquishment of the document was an intentional attempt to defeat the purposes of the FOIA. *Walloon*, *supra* at 733. Because defendant did offer a written response to plaintiff's request and because defendant's destruction of the fax drum was inadvertent and not an intentional attempt to circumvent the FOIA, we conclude that *Walloon* is distinguishable from

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[3] We observe that the record supports the trial court's finding that defendant "inadvertently" destroyed the fax drum when its employees replaced the used fax drum with a new fax drum during the ordinary course of business.

[4] We observe that plaintiff made a similar argument in *Ritzer v St. Joseph Co Sheriff's Dep't*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2003 (Docket No. 243837). We rejected plaintiff's argument in that case and, for the same reasons, we reject plaintiff's reliance on *Walloon* in this case.

the instant case. *Walloon* therefore provides no support for plaintiff's claim for punitive damages.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello