STATE OF MICHIGAN

COURT OF APPEALS

FRANK J. LAWRENCE, JR.,

Plaintiff-Appellant,

v

CITY OF TROY,

Defendant-Appellee.

UNPUBLISHED
January 30, 2014

No. 316395
Oakland Circuit Court
LC No. 2008-095176-CZ

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

PER CURIAM.

Plaintiff appeals as of right from a final judgment in this action under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The judgment, in plaintiff's favor, ordered defendant to pay plaintiff $500 in punitive damages, but denied plaintiff's motion for costs and sanctions against defendant, which included a request for approximately $13,000, in attorney fees. We affirm.

First, plaintiff asserts that he was entitled to $3,000 in punitive damages – $500 for each of the six items he asked for in his FOIA request. We disagree.

This Court reviews questions of law, including questions of statutory interpretation, de novo. *Meredith Corp v City of Flint*, 256 Mich App 703, 711; 671 NW2d 101 (2003). The trial court's findings of fact are reviewed for clear error. *Id.* at 712.

The FOIA was enacted "to carry out this state's strong public policy favoring access to government information, recognizing the need for citizens to be informed so that they may fully participate in the democratic process and thereby hold public officials accountable for the manner in which they discharge their duties." *Thomas v City of New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002), citing MCL 15.231(2). If the public body "arbitrarily and capriciously" violates the FOIA by refusing or delaying disclosure, the individual requesting the public record is entitled to punitive damages under MCL 15.240(7), which provides:

> If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public

> record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

The issue in this case is not whether plaintiff is entitled to punitive damages. The trial court already determined that such damages are proper, and defendant does not contest that decision on appeal. Rather, plaintiff disputes the amount he was awarded. He claims that under the plain language of the statute, he is entitled to $500 in punitive damages for *each* record he requested that was wrongfully withheld. Because his initial letter to the Troy Police Department contained six requests, plaintiff argues that he was entitled to $3,000 in punitive damages.

When interpreting a statute, a court's goal is "to ascertain and give effect to the intent of the Legislature." *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 145; 683 NW2d 745 (2004). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case." *Id.* (emphasis in original; internal citations omitted). The most reliable evidence of the Legislature's intent in enacting a statute is the language of the statute itself. *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). "An undefined statutory term must be accorded its plain and ordinary meaning," and a "lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008).

In the instant case, the part of MCL 15.240(7) at issue provides, "the court shall award . . . punitive damages in the amount of $500 to the person seeking the right to inspect or receive a copy of a public record." For a number of reasons, we conclude that the maximum amount of punitive damages an individual can receive under the FOIA is $500, regardless of the number of records that were wrongfully withheld by the public entity. First, the plain language of MCL 15.240(7) gives a precise amount – $500 – and immediately follows that amount with the language "to the person." This language indicates that the $500 is tied to "the person seeking the right to inspect or receive a copy of a public record," not to the number of records requested. See MCL 15.240(7).

Second, the FOIA's use of the phrase "a public record," does not support plaintiff's argument. Plaintiff contends that the use of the nonplural word, "record," indicates that $500 should be awarded for each record requested. At first blush, use of the word "a" preceding the word record would appear to support plaintiff's contention. And, the FOIA defines "public record," as "*a* writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e)(emphasis added). Use of the word "a" would typically denote a singular. However, further exploration of the FOIA reveals that use of the word "a" in this instance does not necessarily denote a singular object. MCL 15.243(1), which lists the types of public records exempt from disclosure, provides more guidance in determining what constitutes "a public record." In MCL 15.243(1), "a public record" is described as "information" (MCL 15.243(1)(a) and (o)), "investigating records" (MCL 15.243(1)(b)), "records or information" (MCL 15.243(1)(d), (g), (h), (t), (v), (w), and (y)), "trade secrets" (MCL 15.243(1)(f)), "appraisals of real property" (MCL 15.243(1)(j)), "test questions and answers" (MCL 15.243(1)(k)), "medical, counseling, or psychological facts or evaluations"

(MCL 15.243(1)(l)), and "communications and notes . . . of an advisory nature" (MCL 15.243(1)(m)). Finally, MCL 15.244(1) provides instructions for when a requested public record "contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13." This language contemplates that a public record may contain a variety of materials. See MCL 15.244(1).

Given the broad definition of "a public record," and the FOIA's use of the term to describe a multitude of documents (and collections of documents), it would be impossible for trial courts to determine how many "records" an individual is actually asking for in his FOIA request. See MCL 15.243(1); MCL 15.244(1). For example, plaintiff argues that he requested six "distinct and separate records that were independent of each other," but he does not explain why his requests call for "distinct and separate" records. In paragraphs four, five, and six of his FOIA request, plaintiff requests "any records . . . ." Thus, his request acknowledges that more than one record may be responsive to any one of these requests.

Finally, we have found no cases in which an individual was awarded more than $500 in punitive damages in an action under the FOIA, and plaintiff concedes that such cases do not exist.

In his motion for reconsideration, plaintiff argued that the cases cited by the court in its April 29, 2013, opinion were inapplicable. Plaintiff said that he contacted the plaintiffs' attorneys in each of those cases and found that none of them requested more than $500 in punitive damages. As defendant argues, this information was hearsay and not properly admitted into the record. Regardless, the decisions relied upon by the trial court are still helpful in demonstrating that this Court has never discussed awarding an individual more than $500 in punitive damages in a FOIA action.

Finally, both plaintiff and defendant contend that this Court's decision, in a prior appeal in the instant case, *Lawrence v City of Troy*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2012 (Docket No. 300478) (*Lawrence II*), supports their respective arguments. In *Lawrence II*, this Court concluded:

> As a result, we conclude that defendant denied plaintiff's request in an arbitrary and capricious fashion, and we remand for the calculation and award of damages pursuant to MCL 15.240(7).

Plaintiff focuses on this Court's use of the word "calculation," arguing, this Court did not simply remand this matter for entry of a specific amount of punitive damages. Rather, the Court employed the word "calculation" in its remand order. On the other hand, defendant argues that res judicata[1] precludes plaintiff's argument because, "[h]ad the Michigan Court of Appeals panel agreed that punitive damages could be multiplied, then it would have expressly noted this in [*Lawrence II*]."

[1] Although defendant uses the term res judicata, it appears it is actually arguing that the law of the case doctrine applies.

"The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *New Props, Inc v George D Newpower, Jr. Inc*, 282 Mich App 120, 132; 762 NW2d 178 (2009). This doctrine "applies only to issues implicitly or explicitly decided in the previous appeal." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007). The law of the case doctrine does not apply in the instant case because the amount of punitive damages was not implicitly or explicitly decided in *Lawrence II*. This Court remanded for the trial court to award plaintiff damages pursuant to MCL 15.240(7) but did not indicate a specific amount to be awarded or instruct the trial court to award plaintiff $500 for each of his requests.

Plaintiff next contends that the trial court should have granted his motion for sanctions against defendant. We disagree.

"This Court reviews a trial court's decision to deny sanctions for clear error." *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 485-486; 760 NW2d 526 (2008). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 486 (internal citation omitted).

Plaintiff argues that defendant should have been sanctioned pursuant to MCR 2.114(D) and MCL 600.2591. MCR 2.114(D) provides:

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> > (1) he or she has read the document;
> >
> > (2) 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
> >
> > (3) 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.

If a document is signed in violation of MCR 2.114(D), then MCR 2.114(E) states that the trial court shall impose "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."

MCL 600.2591(1) provides:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

MCL 600.2591(3)(a) explains that "frivolous" means one of the following conditions has been met:

> (*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.

Plaintiff's arguments for sanctions under MCR 2.114(E) and MCL 600.2591 stem from the same alleged wrongdoing by defendant – its failure to disclose in its affirmative defenses that it did not possess any records responsive to at least one of plaintiff's FOIA requests. However, defendant's affirmative defenses make no positive representations regarding the existence of the records requested, which would be required for defendant to be sanctioned under MCR 2.114 (D). In addition, defendant reserved the right to "rely upon additional affirmative defenses identified during the course of pretrial discovery and otherwise." There is no evidence that defendant knew the Troy Police Department did not have any records responsive to paragraph five of plaintiff's FOIA request. This paragraph asks for "[a]ny and all records that indicate whether one or both of the officers described in #1 above are subject to any guidelines, goals or expectations as to how many traffic citations they must issue in a given period." By using the word "whether," plaintiff's request contemplates the possibility that such records may not exist. Thus, Captain Gerard Scherlinck's affidavit indicating that no records exist regarding a quota system is still responsive to plaintiff's FOIA request in paragraph five.

Plaintiff asserts that he wasted time and money "litigating over something that the City knew did not exist." However, while Captain Scherlinck's affidavit was provided after this case had already once gone through this Court, it relates to only some of the items requested by plaintiff-items five and six. With respect to the information requested in paragraph six of plaintiff's FOIA request, Captain Scherlinck's affidavit is responsive to plaintiff's request. Paragraph six asks for "[a]ny and all records relating to whether one or both of the officers . . . have ever been subject to any discipline or disciplinary proceedings for misconduct, . . . including whether the officer(s) has ever been sued for official misconduct." In his affidavit, Captain Scherlinck states that neither officer plaintiff inquired about has been subject to any disciplinary proceedings or sued for alleged official misconduct. The trial court did not clearly err in denying plaintiff's request for sanctions because defendant did not make any positive representations in its affirmative defenses that the requested records existed, and because Captain Scherlinck's affidavit was actually responsive to the information plaintiff asked for in paragraphs five and six of his request.

Affirmed.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra