STATE OF MICHIGAN

COURT OF APPEALS

JAMES AMBERG,

Plaintiff-Appellant,

v

CITY OF DEARBORN and CITY OF DEARBORN POLICE DEPARTMENT,

Defendants-Appellees.

UNPUBLISHED
March 25, 2014

No. 311722
Wayne Circuit Court
LC No. 12-002188-CZ

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendants in this Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, action. We affirm.

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition. We disagree.

Generally, an issue must have been raised before, and addressed and decided by, the trial court to be preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Defendants argued in the trial court that the videos were not public records. Although the trial court failed to specifically conclude that the videos were not public records, the trial court implicitly came to this conclusion. Therefore, the issue regarding public records is preserved for review.

However, plaintiff's claim that the trial court granted summary disposition in favor of defendants because he could have obtained the videos through subpoena is unpreserved. See *Hines*, 265 Mich App at 443. No party argued this claim in their respective briefs in the trial court. In addition, the trial court did not base its ruling on the premise that plaintiff's claim was moot or that his claim was proper under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), rather than FOIA. Therefore, plaintiff's claims regarding mootness and *Brady* are also unpreserved. *Id.*

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court granted defendants' motion for summary disposition, but did not specify under which subpart. After reviewing the record, we conclude that the trial court granted summary disposition pursuant to MCR 2.116(C)(10) because it considered evidence outside of the

pleadings. Thus, we confine our analysis to that which is normally applied to a MCR 2.116(C)(10) motion. See *Spiek v Michigan Dept of Transp*, 456 Mich 331, 338; 572 NW2d 201 (1998).

"This Court . . . reviews de novo a trial court's legal determination in a FOIA case." *Hopkins v Duncan Twp*, 294 Mich App 401, 408; 812 NW2d 27 (2011). This Court also reviews de novo a trial court's determination on a motion for summary disposition. *Hill v Sears, Roebuck and Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews the motion by considering "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012). "This Court considers only the evidence that was properly presented to the trial court in deciding the motion." *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 506; 802 NW2d 712 (2010). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to a judgment as a matter of law." *Douglas*, 492 Mich at 256. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Lakeview Commons*, 290 Mich App at 506 (internal quotations and citation omitted).

This Court reviews plaintiff's unpreserved claims for plain error affecting his substantial rights. See *Lenawee Co v Wagley*, 301 Mich App 134, 164-165; 836 NW2d 193 (2013).

Plaintiff argues that the trial court erred in concluding that the videos were not public records under FOIA. We disagree.

MCL 15.231(2) provides:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

"The FOIA provides that 'a person' has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body." *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). "Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins*, 294 Mich App at 409, citing MCL 15.233(1) and *Coblentz v City of Novi*, 475 Mich 558, 571, 573; 719 NW2d 73 (2006).

MCL 15.232(e) defines "public record" as follows:

> "Public record" means 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. Public record does not include computer software. This act separates public records into the following 2 classes:

(*i*) Those that are exempt from disclosure under section 13.

(*ii*) All public records that are not exempt from disclosure under section 13 and which are subject to disclosure under this act.

A "writing" includes a "means of recording or retaining meaningful content." MCL 15.232(h); *Hopkins*, 294 Mich App at 409. "A writing can become a public record after its creation if possessed by a public body in the performance of an official function, or if used by a public body, regardless of who prepared it." *Hopkins*, 294 Mich App at 409.

Plaintiff contends that the videos became public records once defendants came into possession of them. However, mere possession of a record by a public body does not render it a public record. See *id*. at 409-410. Rather, the record must be used or possessed in the performance of an official function to be a public record. *Id*. Plaintiff has presented no record evidence to support the conclusion that the videos were used in the performance of an official function. However, it is clear that the records were subpoenaed in the course of the official function of the prosecutor's office. It is equally clear that the videos were equally available to the defense through the same mechanism and that the documents were potentially a part of the discovery in the underlying criminal case.

However, contrary to plaintiff's claim, it is at best unclear as to the basis of the court's ruling. After a lengthy colloquy, the court indicated that based upon the arguments and briefs it was granting summary disposition. A remand would be appropriate to ascertain the basis of the ruling but for the fact that the plaintiff has all of the requested records and that attorney fees and costs would not have be awarded for reasons stated below.

Plaintiff argues that the trial court abused its discretion in denying additional discovery. We disagree. "This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion." *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003).

The purpose of discovery in this case would have been to uncover an additional video. The record does not support plaintiff's claim that an additional video existed. On appeal, plaintiff merely argues that an additional video exists based on an alleged assertion by defendants in a "supplemental brief." To the contrary, the record supports the conclusion that plaintiff made this assertion in the trial court based solely on his own review of the videos that were disclosed by defendants. Thus, the trial court did not abuse its discretion in denying plaintiff's request for additional discovery based on conjecture. See *Augustine v Allstate Ins Co*, 292 Mich App 408, 419-420; 807 NW2d 77 (2011) ("Michigan's commitment to open and far-reaching discovery does not encompass fishing expeditions. Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition.") (internal quotation marks, citations, and brackets omitted).

Plaintiff argues that the trial court erred in not awarding him costs, attorney fees, and punitive damages. We disagree.

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

MCL 15.240(6) 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 first requirement for an award of attorney fees in a FOIA action is that the party "'prevails' in its assertion of the right to inspect, copy, or receive a copy of all or a portion of a public record." *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 149; 683 NW2d 745 (2004). "The test is whether: (1) the action was reasonably necessary to compel the disclosure; and (2) the action had the substantial causative effect on the delivery of the information to the plaintiff." *Id*. at 149-150 (citations and quotation marks omitted).

MCL 15.240(7) provides:1

> 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.

Here, plaintiff failed to meet the first requirement of proving that a FOIA claim was reasonably necessary to obtain the records. As noted earlier, the defendant could have also subpoenaed the records form the third party and had the ability to obtain them through discovery in the criminal case. Likewise, plaintiff has not made any claim in his brief that defendants arbitrarily and capriciously violated the act. Rather, plaintiff merely asserts that he was entitled to attorney fees, costs, and punitive damages. "It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims, or unravel and elaborate the appellant's arguments, and then search for authority either to sustain or reject the appellant's position." *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

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JAMES AMBERG, Plaintiff-Appellant,	UNPUBLISHED March 25, 2014
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CITY OF DEARBORN and CITY OF DEARBORN POLICE DEPARTMENT, Defendants-Appellees.	LC No. 12-002188-CZ

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

BECKERING, P.J. (*concurring*).

I concur in result only with the majority's conclusion that the trial court did not err when it granted summary disposition to defendants. I write separately because I respectfully disagree with the majority's conclusion that the videos requested in this case were not public records, and because I respectfully disagree with the majority's conclusion that plaintiff's FOIA action could not have been "reasonably necessary" as the phrase is used in *Local Area Watch v Grand Rapids*, 262 Mich App 136, 149; 683 NW2d 745 (2004), simply because the records were potentially available through another source.

MCL 15.232(e) provides, in pertinent part, that a public record is "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." As used in the statute, the term "writing" means:

> handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content. [MCL 15.232(h).]

I agree with the majority that mere possession of a record by a public body does not render it a public record. *Hopkins v Duncan Twp*, 294 Mich App 401, 409-410; 812 NW2d 27 (2011). Rather, "the use or retention of the document must be in the performance of an official function." *Howell Ed Ass'n MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 236; 789 NW2d 495 (2010) (citation and internal quotation marks omitted). I also agree with the majority that the videos at issue in this case were subpoenaed in the course of the official function of the

prosecutor's office. Where I disagree with the majority is in the conclusion that the videos were not public records simply because they were potentially available to plaintiff through other means, such as the discovery process in the underlying criminal case. The fact that the videos were available through other means, including through the discovery process, is not relevant to determining whether the videos were public records. That writings are available through the discovery process can, under certain circumstances, be relevant to a public body's claimed exemption to a FOIA request. See *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006).[1] However, the potential availability of writings through another source is not relevant to determining whether something is "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." See MCL 15.232(e). Therefore, the videos sought in this case were public records that were subject to disclosure.

I also disagree with the majority's assertion that, because the videos were potentially available to plaintiff through other means, plaintiff could not be a prevailing party who was entitled to attorney fees. MCL 15.240(6) provides that if a person asserting the right to inspect, copy, or receive a public record in a FOIA action prevails, "the court shall award reasonable attorneys' fees, costs, and disbursements." "A plaintiff has prevailed if: (1) the action was reasonably necessary to compel the disclosure; and (2) the action had the substantial causative effect on the delivery of the information to the plaintiff." *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 289; 713 NW2d 28 (2005) (quotations omitted). The majority concludes that plaintiff failed to meet the first requirement of showing that his FOIA action was reasonably necessary to obtain the records because the records could have been obtained through other means. MCL 15.240(6) awards fees on the basis of whether the plaintiff prevails in a FOIA action. Thus, the requirement that the action be reasonably necessary to compel disclosure focuses on whether the FOIA action was reasonably necessary to compel disclosure *from the public body*. That the documents were available from another source is irrelevant to such a consideration. Nevertheless, because I agree with the majority's decision that plaintiff abandoned a request for attorney fees by failing to develop any argument on this issue, and because plaintiff received the only videos to which he was entitled, I concur with the result reached by the majority.

/s/ Jane M. Beckering

[1] Defendants have not claimed any exemptions in this case. Moreover, on this record, none of the statutory exemptions are applicable.