

STATE OF MICHIGAN  
COURT OF APPEALS

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TONI SWIGER and TOM ROTTA,

Plaintiffs/Counterdefendants-  
Appellants,

v

CITY OF LUDINGTON,

Defendant/Counterplaintiff-  
Appellee.

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UNPUBLISHED

January 15, 2015

No. 321675

Mason Circuit Court

LC No. 11-000415-CZ

Before: TALBOT, C.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs Toni Swiger and Tom Rotta appeal the trial court's March 21, 2014 order granting them only \$210 in costs from defendant City of Ludington pursuant to MCL 15.240(6) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* We affirm.

This appeal is the second time this case has come before us. We first addressed this case in *Swiger v Ludington*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2013 (Docket No. 313081). In our opinion, we provided a brief factual background for this case.

Plaintiffs were news reporters for the blog, The Ludington Torch. They submitted numerous FOIA requests to defendant, including one on September 7, 2011. Defendant denied this request on the basis that it was duplicative of previous FOIA requests that plaintiffs had submitted. Eventually plaintiffs filed a complaint for injunctive relief, requesting that defendant produce the records requested in their September 7th request.

Defendant filed an answer and counterclaim, requesting, *interia alia*, that the court order plaintiffs to pay for the FOIA requests that they had submitted but declined to pay. Both parties filed motions for summary disposition. Defendant attached to its motion an exhibit that purported to satisfy plaintiffs' September 7th request, thereby arguing that plaintiffs' complaint was moot. Plaintiffs filed a prehearing brief, asserting that the records defendant provided did not satisfy the September 7th request fully. Thereafter, defendant provided the outstanding records that plaintiffs sought and reasserted that plaintiffs' complaint was moot.

While the case initially was assigned to Judge Richard Cooper, he informed the litigants at the beginning of the summary disposition hearing that his son worked two days a week at defendant's law firm, so plaintiffs could request a different judge if they so desired. Plaintiffs did so, and the case was assigned to Judge Mark Wickens. At the subsequent summary disposition hearing, plaintiffs acknowledged that they had received all of the records requested on September 7th. Thus, the trial court granted summary disposition to defendant regarding plaintiffs' complaint, and conducted a bench trial on defendant's counterclaim.

The trial court ultimately ruled in favor of defendant's counterclaim. The court ordered plaintiff Swiger to pay defendant \$380 and plaintiff Rotta to pay defendant \$316.85 for unpaid FOIA fees. Plaintiffs now appeal on several grounds. [*Id.* at 1-2.]

During their first appeal, plaintiffs argued that the trial court erred in declining to award them reasonable attorney fees and costs. We held that plaintiffs were not entitled to attorney fees because they acted *in propria persona* at all times before the trial court. However, we held that because plaintiffs were the prevailing parties in a FOIA action, they were entitled to costs under MCL 15.240(6). We remanded to the trial court for "a determination of plaintiffs' actual costs."<sup>1</sup>

On January 9, 2014, Rotta sent the 51st Circuit Court a letter informing the court that plaintiffs were waiting for the trial court to contact them regarding their costs and disbursements.

On January 15, 2014, the trial court informed plaintiffs that the court's "standard practice is for the prevailing party to submit a taxed bill of court costs to the court and the opposing party. If no objections are received, the Court would order those costs without a hearing." The trial court also directed plaintiffs to "submit a written list of their court costs."

On January 21, 2014, Rotta sent the 51st Circuit Court a letter informing the court that plaintiffs had not been notified that the trial court had received the lower court record after remand. Rotta stated that plaintiffs would not send their "costs and disbursements" to the trial court until they had been notified that the trial court had the lower court record and that, therefore, the trial court had jurisdiction over this case. On February 10, 2014, plaintiffs were informed that the trial court had received the lower court record after remand.

On February 14, 2014, plaintiffs sent defendant a letter detailing their "costs and disbursements." Plaintiffs indicated in the letter that their costs and disbursements included "such for prosecuting this case in the appeals court" for the purpose of bettering their situation before this Court.

On March 21, 2014, the trial court entered an order granting plaintiffs \$210 in total costs, which included \$150 to cover the cost of their original filing fee in the trial court and \$60 to cover the cost of plaintiffs' fees for filing three motions before the trial court.

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<sup>1</sup> We denied plaintiffs relief regarding the remainder of their claims.

On appeal, plaintiffs argue that the trial court erred in denying them the reasonable costs of their first appeal. We review the grant of relief under MCL 15.240(6) for an abuse of discretion. *Prins v Mich State Police*, 299 Mich App 634, 641; 831 NW2d 867 (2013) (*Prins II*); *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 647; 591 NW2d 393 (1998). “An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

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.

Thus, “The FOIA contemplates that ‘[i]f a person asserting the right to’ access a public record ‘prevails in an action commenced under this section,’ the court ‘shall award reasonable attorneys’ fees, costs, and disbursements.’ ” *Prins v Mich State Police*, 291 Mich App 586, 588 n 1; 805 NW2d 619 (2011) (*Prins I*), quoting MCL 15.240(6). “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). When a plaintiff prevails on appeal under the FOIA, the plaintiff is entitled to costs and attorney fees the plaintiff incurred on appeal pursuant to MCL 15.240(6). *Rataj v Romulus*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 315669, issued September 23, 2014); slip op at 10; *Hartzell v Mayville Community Sch Dist*, 183 Mich App 782, 790; 455 NW2d 411 (1990).

In this case, however, defendant complied with the FOIA by providing the requested records during the time this case was before the trial court prior to plaintiffs’ first appeal. Within their first appeal, plaintiffs did not raise an issue regarding the propriety of compelling defendant to comply with the FOIA in regard to the delivery of information to them. Thus, plaintiffs did not “prevail” under the FOIA during their first appeal because plaintiffs’ first appeal was not “reasonably necessary to compel the disclosure” and because the appeal did not have a “substantial causative effect on the delivery of the information to the plaintiff.” *Detroit Free Press, Inc*, 269 Mich App at 289. Accordingly, the trial court did not abuse its discretion when it did not grant plaintiffs relief regarding the costs of their first appeal under MCL 15.240(6). See *Prins II*, 299 Mich App at 641 (the grant of relief under MCL 15.240(6) is reviewed for an abuse

of discretion).<sup>2</sup> Because remand is unnecessary, we need not address plaintiffs' request that a different judge be assigned this matter. And we decline defendant's request for sanctions under MCR 7.216(C).

Affirmed.

/s/ Michael J. Talbot  
/s/ Mark J. Cavanagh  
/s/ Michael J. Kelly

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<sup>2</sup> Because we hold that the trial court did not abuse its discretion, we do not address defendant's alternate ground for affirmation.