STATE OF MICHIGAN

COURT OF APPEALS

MARK K. WASVARY and MARK K. WASVARY, P.C.,

Plaintiffs-Appellants,

v

CITY OF EASTPOINTE,

Defendant-Appellee.

UNPUBLISHED
October 22, 2020

No. 351499
Macomb Circuit Court
LC No. 2018-009699-CZ

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

PER CURIAM.

In this Freedom of Information Act (FOIA) case, plaintiffs appeal as of right from the trial court's order granting partial summary disposition in favor of defendant.[1] We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Mark K. Wasvary is a licensed attorney in Michigan and the president and sole shareholder of Mark K. Wasvary, P.C. Wasvary's practice includes prosecuting class action lawsuits brought by property owners and property management companies against municipalities, including defendant.

On November 9, 2018, Wasvary sent a request under FOIA, written on his law firm's letterhead, to defendant requesting certain records related to vendor invoices received by defendant for services such as grass cutting, weed and debris removal, or other maintenance services for privately-held properties located in defendant's city, including two specific properties located at

[1] Summary disposition was entered in favor of plaintiff under MCR 2.116(C)(9) and MCR 2.116(C)(10) on one of defendant's claimed statutory exemptions, MCL 15.243(1)(v), and summary disposition was entered in favor of defendant under MCR 2.116(I)(2) on the other claimed statutory exemption, MCL 15.243(1)(a). Thus, the trial court's order was a final order.

22071 Saxony, Eastpointe, MI and 23098 Cushing, Eastpointe, Michigan. Defendant denied the FOIA request, stating for each numbered request:

> This Freedom of Information Act Request is denied. . . . [Y]our Request seeks information which is exempt from disclosure under MCL 15.243(1)(v) as "records or information relating to a civil action in which the requesting party and the public body are parties." Specifically, the property owner of the properties upon whose behalf this request has been made is a party to pending litigation with the City of Eastpointe.

Plaintiffs thereafter filed a complaint in the Macomb Circuit Court seeking disclosure of the records, attorney fees, costs, and punitive damages. After discovery, plaintiffs filed a motion for summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10). The trial court entered an order granting summary disposition in part in favor of plaintiffs, finding that defendant's claimed exemption under MCL 15.243(1)(v) did not apply to plaintiffs' request. The trial court also granted summary disposition in part under MCR 2.116(I)(2) in favor of defendant, concluding its claimed exemption under MCL 15.243(1)(a) applied to any names and addresses contained on the requested records. The trial court did not order defendant to produce any records and denied plaintiffs' request for attorney fees, costs, and punitive damages. This appeal followed.

II. STANDARDS OF REVIEW

This Court:

> review[s] a trial court's decision regarding a motion for summary disposition de novo. *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich 1, 5-6, 890 NW2d 344 (2016). A motion for summary disposition brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint," *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 768, 887 NW2d 635 (2016), and should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law," *West v Gen Motors Corp*, 469 Mich 177, 183, 665 NW2d 468 (2003).
>
> "The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693, 818 NW2d 410 (2012). The court must consider all of the admissible evidence in a light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29, 772 NW2d 801 (2009). However, the party opposing summary disposition under MCR 2.116(C)(10) "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Oliver v Smith*, 269 Mich App 560, 564, 715 NW2d 314 (2006) (quotation marks and citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Bahri v IDS Prop Cas Ins Co*., 308 Mich App 420, 423, 864

NW2d 609 (2014) (quotation marks and citation omitted). [*Lockwood v Twp of Ellington*, 323 Mich App 392, 400-401; 917 NW2d 413 (2018).]

"When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim." *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). "Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Id*. at 425-426.

Additionally, "[t]his Court reviews questions of statutory interpretation de novo." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006). "The role of this Court in interpreting statutory language is to ascertain the legislative intent that may reasonably be inferred from the words in a statute." *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019) (quotation marks and citations omitted). "[W]here the statutory language is clear and unambiguous, the statute must be applied as written." *Id*. (quotation marks and citations omitted) (alteration in original).

"[C]ertain FOIA provisions require the trial court to balance competing interests." *Herald Co*, 475 Mich at 470. "[W]hen an appellate court reviews a decision committed to the trial court's discretion, such as the balancing test at issue in [FOIA] case[s] . . . the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes." *Id*. at 472.

This Court 'review[s] for an abuse of discretion an award of attorney fees to a prevailing plaintiff in an action under the FOIA' and reviews 'a trial court's factual findings for clear error.' " *Estate of Nash v Grand Haven*, 321 Mich App 587, 605; 909 NW2d 862 (2017), quoting *Prins v Mich State Police*, 299 Mich App 634, 641; 831 NW2d 867 (2013). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Estate of Nash*, 321 Mich App at 605 (quotation marks and citation omitted). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Id*. (quotation marks and citation omitted).

III. DISCUSSION

Plaintiffs first argue on appeal that the trial court erred when it concluded the names and addresses contained in the requested records were exempt from disclosure under MCL 15.243(1)(a). According to plaintiffs, such information is not exempt under that statutory provision because it is not embarrassing or confidential and, even if it is, its disclosure would not constitute an unwarranted invasion of privacy. We disagree.

"[T]he Michigan FOIA requires disclosure of the 'public record[s]' of a 'public body' to persons who request to inspect, copy, or receive copies of those requested public records." *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 664-665; 753 NW2d 28 (2008), quoting MCL 15.232(e) and MCL 15.232(d) (alteration in

original). "However, § 13 of FOIA sets forth a series of exemptions granting the public body the discretion to withhold a public record from disclosure if it falls within one of the exemptions." *Id.* at 665.

"In the event a FOIA request is denied and the requesting party commences a circuit court action to compel disclosure of a public record, the public body bears the burden of sustaining its decision to withhold the requested record from disclosure." *Id.* FOIA contains a privacy exemption, which states:

> "(1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." [*Id.*, quoting MCL 15.243(1)(a).]

"[T]he privacy exemption . . . has two prongs that the information sought to be withheld from disclosure must satisfy." *Mich Federation of Teachers*, 481 Mich at 675. "First, the information must be of a personal nature." *Id.* (quotation marks omitted). "Second, it must be the case that the public disclosure of that information would constitute a clearly unwarranted invasion of an individual's privacy." *Id.*

Our Supreme Court has held that "intimate, embarrassing, private, or confidential information is of a personal nature . . . ." *Id.* at 676 (quotation marks omitted). In other words, "private or confidential information relating to a person, in addition to embarrassing or intimate details, is information of a personal nature." *Id.* (quotation marks omitted). Under this prong of the exemption, "[w]here a person lives and how that person may be contacted fits squarely within the plain meaning of this definition because that information offers private and even confidential details about that person's life." *Id.* This is true even if the information is publicly available from other sources, such as the Internet or phone book. *Id.* at 680.

With respect to the second prong—whether disclosure would constitute an unwarranted invasion of privacy—our Supreme Court has stated that "a court must balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect." *Mager v Dep't of State Police*, 460 Mich 134, 144-145; 595 NW2d 142 (1999) (quotation marks and citation omitted). "[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Id.* at 145 (quotation marks and citation omitted).

Plaintiffs assert that under *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285; 565 NW2d 650 (1997), names and addresses of property owners in defendant's city does not constitute information of a private nature. In *Bradley*, our Supreme Court held that information was of a private nature if it "reveal[ed] intimate or embarrassing details of an individual's private life." *Bradley*, 455 Mich at 294. Thus, plaintiffs argue that because names and addresses of property owners is not intimate or embarrassing information, the exemption under MCL 15.243(1)(a) does not apply.

However, plaintiffs fail to acknowledge that the holding in *Bradley* was modified by *Mich Federation of Teachers*, where our Supreme Court announced:

> We hold that the *Bradley* formulation, as far as it goes, is a correct description of what information is "of a personal nature." Thus, we continue to hold that "intimate" or "embarrassing" details of an individual are "of a personal nature." However, a case such as this leads us to conclude that "intimate" and "embarrassing" do not exhaust the intended scope of that statutory phrase. Indeed, the *Bradley* Court itself noted, whether inadvertently or not, that "information of a personal nature" includes more than "intimate" or "embarrassing" details of a person's life. After articulating its "succinct test," the *Bradley* Court expanded it by concluding that "none of the documents [sought in that case] contain information of an embarrassing, intimate, private, or confidential nature." After careful consideration, we conclude that the observation from *Bradley* that intimate, embarrassing, private, or confidential information is "of a personal nature" more accurately and fully describes the intended scope of the statutory text as assessed in the first prong of the privacy exemption. Indeed, the words "personal" and "private" are largely synonymous. Thus, private or confidential information relating to a person, in addition to embarrassing or intimate details, is "information of a personal nature." *Mich Federation of Teachers*, 481 Mich at 675-676 (alteration in original) (footnotes omitted).

Thus, we conclude the trial court did not err when it determined the names and addresses of defendant's property owners was information of a private nature. See *id*. at 676 ("Where a person lives and how that person may be contacted fits squarely within the plain meaning of this definition because that information offers private and even confidential details about that person's life.").

Plaintiffs further assert that even if the requested records contain information of a private nature, the disclosure of such information would not constitute an unwarranted invasion of privacy. Plaintiffs contend that the records would reveal how much defendant was charged for certain services and how much defendant charged property owners for those services. Thus, according to plaintiffs, the records would demonstrate how defendant's government operated.

While we agree with plaintiffs that the records themselves would demonstrate how defendant's government operates, the specific disclosure of names and addresses of property owners would not further that understanding. In other words, plaintiffs did not demonstrate they needed to know the specific identities of property owners to determine whether defendant was charging a reasonable fee for the services it claims are necessary to remedy municipal violations. See *id*. at 682 ("[D]isclosure of employees' home addresses and telephone numbers to plaintiff would reveal little or nothing about a governmental agency's conduct, nor would it further the stated public policy undergirding the Michigan FOIA. Disclosure of employees' home addresses and telephone numbers would not shed light on whether the University of Michigan and its officials are satisfactorily fulfilling their statutory and constitutional obligations and their duties to the public.") (quotation marks and footnotes omitted); *Rataj v Romulus*, 306 Mich App 735, 754; 858 NW2d 116 (2014) ("[O]ur Supreme Court has held that the disclosure of [names and addresses] would reveal little or nothing about a governmental agency's conduct, nor would it

further the stated public policy undergirding the Michigan FOIA.") (quotation marks and citation omitted).

Although we conclude the trial court did not err when it determined the requested records contained information subject to the privacy exemption, defendant does have a duty to produce all nonexempt records which, in this case, would amount to redacting the names and addresses from the documents. See MCL 15.244(1) ("If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying."). To that end, defendant argues that in addition to being exempt under MCL 15.243(1)(a), the records were subject to complete exemption under MCL 15.243(1)(v). Defendant points to the fact that plaintiffs filed class action lawsuits against defendant regarding municipal ordinance violations, which were the subject of the FOIA requests.

"Pursuant to MCL 15.243(1), a public body may exempt the following from disclosure . . . '(v) Records or information relating to a civil action in which the requesting party and the public body are parties.' " *Taylor v Lansing Bd of Water and Light*, 272 Mich App 200, 204; 725 NW2d 84 (2006), quoting MCL 15.243(1)(v). "The plain language of the exemption cited by defendant applies only to information relating to a civil action in which *both* the *requesting party* and the *public body* are parties." *Id*. at 205-206.

Defendant lost this argument in the trial court, which granted summary disposition in plaintiffs' favor regarding this exemption. Defendant did not cross-appeal this decision of the trial court. "An appellee, like defendant, without filing a cross-appeal, may urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court or tribunal." *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 713 n 3; 909 NW2d 890 (2017) (quotation marks and citation omitted). "But while alternative grounds to affirm may be considered, affirming the circuit court on the alternative grounds asserted would grant defendant more relief than defendant obtained in the circuit court." *Id*. On this basis, we "decline to address defendant's alternative arguments" because affirming on the basis of an exemption under MCL 15.243(1)(v) "would grant defendant more relief than defendant obtained in the circuit court." *Id*.

Next, plaintiffs argue the trial court erred when it failed to order defendant to produce all nonexempt records. According to plaintiffs, the trial court's order granting summary disposition in defendant's favor only applied to its claimed exemption regarding names and addresses; thus, defendant was obligated under MCL 15.244(1) to produce all nonexempt records. Defendant, on the other hand, claims it is under no obligation to produce any records. We agree with plaintiffs, and remand this case to the trial court for entry of an order directing defendant to produce all nonexempt records to plaintiffs.

Under MCL 15.244(1), "[i]f a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." See also *Bitterman v Oakley*, 309 Mich App 53, 68; 868 NW2d 642 (2015) ("[E]ven if the responsive documents contain exempt information, the FOIA statute provides that the public body shall separate the exempt and nonexempt material and make the

nonexempt material available for examination and copying.") (quotation marks and citation omitted).

In the portion of the trial court's order granting summary disposition in defendant's favor, the trial court stated: "Requested documents that have properly redacted names and addresses will be sufficient for Plaintiffs to evaluate Defendant's operations and activities while also honoring the privacy exemption." While this portion of the order reads as if the trial court intended to order defendant to produce the records in redacted form, the trial court never actually ordered their production. The trial court erred by failing to do so.

In *Detroit Free Press, Inc v Dep't of State Police*, 243 Mich App 218, 221; 622 NW2d 313 (2000), the plaintiff sought from various public bodies the names of any state legislators who held concealed weapons permits. After concluding that disclosure of the information would constitute an unwarranted invasion of privacy, this Court stated that the apparent objectives of the FOIA requests could be fulfilled by disclosure of the records without identifying information: "[I]t is sufficient for the county clerks to delete information that would identify applicants while, to the extent possible in that process, leaving intact information that might indicate their status as public officials. This tailored approach would fulfill the goals of the FOIA without any clearly unwarranted invasion of the privacy of elected officials." *Detroit Free Press*, 243 Mich App at 230. The same result is appropriate here.

Defendant has not asserted any justification for withholding the requested records in their entirety other than its belief that it prevailed completely in the trial court. Defendant's interpretation of the trial court's order is strained at best. Indeed, the trial court specifically stated that "[r]equested documents that have properly redacted names and addresses will be sufficient for Plaintiffs to evaluate Defendant's operations and activities while also honoring the privacy exemption." While it is unclear from the trial court's order whether it intended to order defendant to produce the records, the plain language of the order demonstrates that it did not. Moreover, defendant now asserts that it is not required to produce any nonexempt records. Thus, we remand the case to the trial court for entry of an order requiring defendant to produce the nonexempt portions of the records consistent with MCL 15.244(1).

Plaintiffs final argument on appeal is that the trial court erred when it denied their request for attorney fees, costs, and punitive damages. While we agree with plaintiffs that the trial court erred when it denied their request for attorney fees and costs, we conclude that plaintiffs have abandoned any argument they were entitled to punitive damages because plaintiffs failed to make any argument to this Court that punitive damages were proper. See *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008) ("A party abandons a claim when it fails to make a meaningful argument in support of its position.").

"The FOIA requires that a trial court must award reasonable attorney fees, costs, and disbursements to a prevailing party." *Scharret v Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002); see also *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006) ("The use of the word 'must' indicates that the imposition of . . . sanctions is mandatory."). Under MCL 15.240(6):

> 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 award shall be assessed against the public body liable for damages under subsection (7).

"A party prevails in the context of an FOIA action when the action was reasonably necessary to compel the disclosure, *and the action had a substantial causative effect on the delivery of the information to the plaintiff*." *Scharret*, 249 Mich App at 414.

The trial court denied plaintiffs' request for attorney fees and costs because "[p]laintiffs only prevailed on part of their claim." It is unclear from the trial court's order whether the trial court was referring to plaintiffs prevailing on one of two exemptions or prevailing by being awarded production of partially-redacted records. In either case, the trial court should have awarded plaintiffs' its attorney fees and costs.

When plaintiffs filed their FOIA request, defendant denied the request in whole and refused to produce a single record. Plaintiffs thereafter filed their lawsuit to compel defendant to produce the records. Although defendant has still refused to produce any responsive records, as explained above, we remand the case and direct the trial court to enter an order requiring defendant to produce all nonexempt records. Thus, plaintiffs have satisfied their burden as to whether they are entitled to attorney fees and costs because the lawsuit was reasonably necessary to compel disclosure, and the lawsuit had a substantial effect on obtaining the records. See *Scharret*, 249 Mich App at 414. Thus, we remand the case to the trial court for determination of reasonable attorney fees and costs. See *Rataj*, 306 Mich App at 756 ("On remand, the circuit court shall determine the reasonable attorney fees, costs, and disbursements incurred by plaintiff in this case, including those attorney fees and costs necessitated by this appeal, and shall award plaintiff an appropriate portion thereof in accordance with MCL 15.240(6).").

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Kathleen Jansen
/s/ Stephen L. Borrello