STATE OF MICHIGAN

COURT OF APPEALS

HOLZMAN CORKERY PLLC, Plaintiff-Appellant,	UNPUBLISHED June 25, 2013
v	No. 309230 Oakland Circuit Court
MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT, Defendant-Appellee.	LC No. 2012-124328-CZ

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right the dismissal of its case with prejudice. This matter arose out of a request plaintiff made pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., to defendant for a report upon which defendant partially relied in a separate proceeding defendant commenced in federal court. That federal proceeding arose out of various fraudulent or otherwise illegal acts committed by numerous individual defendants, including, inter alia, former Detroit Mayor Kwame Kilpatrick and L. D'Agostini & Sons, Inc. (LDSI). LDSI is either directly represented by plaintiff in that proceeding or is represented in that proceeding by a law firm that itself has retained plaintiff. Defendant refused the FOIA request, and plaintiff promptly commenced the instant action. The trial court dismissed the matter. We affirm.

Questions of statutory interpretation are reviewed de novo, with the fundamental goal of effectuating the Legislature's intent. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). If the language is unambiguous, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159-160; 645 NW2d 643 (2002). Courts should strive to avoid an absurd result if it proves necessary to construe a statute. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999). However, the courts should not inquire into the wisdom or fairness of a statute or statutory scheme. *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420, 430; 617 NW2d 536 (2000). Thus, this Court may not infer that the Legislature meant something other than what it literally stated in a statute without finding the text ambiguous. See *People v McIntire*, 461 Mich 147, 155-156, n 2; 599 NW2d 102 (1999). Nevertheless, "a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result." *Detroit Internat'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 657; 760 NW2d 565 (2008).

"Whether a statutory exemption in the FOIA applies to preclude disclosure of a public record is a question of law that we also review de novo" *Detroit Free Press, Inc v Dep't of Consumer & Industry Services*, 246 Mich App 311, 314; 631 NW2d 769 (2001).

Defendant's first asserted basis for refusing the FOIA request is the "pending litigation exemption," MCL 15.243(1)(v), under which "[r]ecords or information relating to a civil action in which the requesting party and the public body are parties" is exempted from disclosure. *Taylor v Lansing Bd of Water and Light*, 272 Mich App 200, 203-204; 725 NW2d 84 (2006). The purpose to which information requested under FOIA and the identity of the person requesting that information are irrelevant to the determination of whether an exemption applies. *Id*. at 205. In *Taylor*, the defendant received a FOIA request for certain records relevant to litigation in which it was involved with the plaintiff's best friend, for whom the plaintiff was acting as an agent in making the FOIA request. *Id*. at 202-203. Despite explicitly acknowledging that the result was absurd, this Court concluded that the exemption only applied if the requesting party was a party to the pending action, and a party's friend is not definitionally a party. *Id*. at 205-207. Consequently, this Court held that the records were not exempt from disclosure under the circumstances. *Id*. at 207.

Defendant also cited privilege as a basis for refusing the FOIA request. Pursuant to MCL 15.243(1)(g) and (h), a public body may exempt from disclosure "information or records subject to the attorney-client privilege . . . or other privilege recognized by statute or court rule." The parties dispute whether the report was commissioned by defendant itself or by defendant's counsel, and thus whether defendant ever even possessed a complete copy of the report. Were the attorney-client privilege to be the only possible privilege at issue, we would remand this matter to the trial court to make factual findings. However, under the work-product privilege, materials "prepared in anticipation of litigation or for trial by or for another *party or another party's representative* (including an attorney, consultant, surety, indemnitor, insurer, or agent)" is privileged. MCR 2.302(B)(3)(a) (emphasis added); *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 637-646; 591 NW2d 393 (1998). Irrespective of whether defendant or defendant's counsel commissioned the report, it is uncontested that it was prepared in anticipation of litigation. The plain language of the Court Rule embodying the privilege indicates that it applies whether the material was prepared by a party itself *or* by the party's counsel. As it was prepared solely for purposes of litigation, the report is therefore within the work product privilege and so exempt from disclosure under FOIA, and it would be even if defendant had directly commissioned it.

Plaintiff contends that any privilege has been waived by prior disclosure. Plaintiff correctly observes that "[o]nce otherwise privileged information is disclosed to a third party by the person who holds the privilege . . . the privilege disappears." *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 658; 564 NW2d 922 (1997). However, plaintiff's claim that the information has been disclosed is based wholly on a reference to existence of the report in one paragraph of the federal complaint. The complaint does not quote from the report nor disclose its analysis. We do not find a mere reference to the document's existence to constitute a waiver of the work product privilege under FOIA. Moreover, the federal cases, some of which are unreported, on which plaintiff relies are inapplicable as they . . . pertain to situations in which the advice of counsel is directly placed at issue, so it would be unfair to use the privilege as both a sword and a shield.

Plaintiff provides no explanation of how that situation is present here. Rather, the gravamen of plaintiff's argument is the apparent assumption that the entire report must be deemed "disclosed" because its existence was disclosed. Disclosure of a document's existence does not waive privilege. Thus, absent an actual disclosure, the work-product exemption to FOIA applies to the report. Therefore the trial court reached the right result.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause