STATE OF MICHIGAN

COURT OF APPEALS

NICHOLS LAW FIRM, PLLC, Plaintiff-Appellee,	UNPUBLISHED November 20, 2012
v	No. 310395 Ingham Circuit Court
CITY OF LANSING, Defendant-Appellant.	LC No. 11-001411-AW

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this Freedom of Information Act (FOIA)[1] case, defendant, City of Lansing, appeals as of right from the trial court's order granting summary disposition and attorney fees, costs, and punitive damages in favor of plaintiff, Nichols Law Firm, PLLC. We affirm in part and reverse in part.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff submitted a FOIA request to defendant on August 24, 2011, seeking documents and evidence related to the drunk-driving arrest of one of its clients. The letter specifically referenced the client's name, the date of the incident, and the ticket number. On September 20, 2011, defendant sent a response letter stating that plaintiff's "request has been granted in part and denied in part for the reasons listed below."

The table below summarizes plaintiff's requests and defendant's responses using the corresponding paragraph numbers contained in both letters:

[1] MCL 15.231 *et seq.*

Plaintiff's Requests:	Defendant's Responses:
1) A copy of any case notes or logs produced by Officer Dave Ellis (badge number provided)	1) Logs or notes produced by Sgt Ellis were not located.
2) A copy of any case notes or logs produced by Officer Angela Perez (badge number provided)	2) Logs produced by Officer Perez are attached.
3) A copy of any case notes or logs produced by any other officers or Lansing City officials involved in any way with this case	3) Logs or notes produced by others officers not located.
4) Any and all transmissions in the officers' mobile data terminal (laptop) for the time period that included the traffic stop and one hour immediately before and after the traffic stop	4) The request for any and all transmissions in the officers' MDT is denied as overly broad.
5) A copy of any text messages made from the time the call was dispatched until the officers' shifts ended	5) The request for any text messages made is denied as overly broad.
6) A copy of any videotapes related to this incident, including but not limited to: a) Video depicting the probable cause vehicle stop; b) Video depicting the scene of the arrest; c) Video depicting field sobriety testing; d) Any other pre-booking or booking activity; and e) Any video of the holding cell	6) Video of the booking and data master testing is attached. Video depicting the stop, arrest, and sobriety testing was not located.
The entry for line "7" is skipped	The entry for line "7" is skipped
8) A copy of any audiotape related to this incident, including radio and dispatch recordings	8) 911 audio is attached.
9) Any booking information	9) The request for "any booking information" is denied as being non-specific and overly broad.
10) Booking photo or "mug" shot	10) Booking photo is released in full and attached.
11) Fingerprint card	11) A finger print card does not exist.

12) Inventory of the client's property	12) Property inventory attached.
13) The names of any officers, including dispatch officers, who appear or can be heard on any video or audiotape related to this incident	13) The CAD Case is attached.
14) Any and all records which relate to, or reference, the training and/or certification of Officer Dave Ellis in the following areas; a) Administration and interpretation of field sobriety testing; b) Administration of PST; and c) Administration and calibration of DataMaster instruments	14) Training certification is located within the officer's personnel file, therefore denied under MCL 15.2431(s)(ix).
15) Any and all records which relate to, or reference, the training and/or certification of Officer Angela Perez' in the following areas: a) Administration and Interpretation of field sobriety testing; b) Administration of PST; and c) Administration and calibration of DataMaster instruments	15) Training certification is located within the officer's personnel file, therefore denied under MCL 15.2431(s)(ix).
16) Any and all records related to the training and qualification of any officer who conducted the calibration of the DataMaster instrument referenced above, to the extent that the information is not already included in your response to requests 1-14 above	16) Training certification is located within the officer's personnel file, therefore denied under MCL 15.2431(s)(ix).
17) Calibration records for the specific breath test instrument used in this case for a 6-month period prior to and including the aforementioned date of incident	17) Calibration records are attached.
18) Any logs of any kind, including dispatch logs, whether maintained by hand, on computer, or otherwise, which detail the activity related to this incident	18) Dispatch logs (CAD) is attached.
19) A complete written explanation as to the loss of any information requested above which was previously held by the Lansing	19) A written explanation of loss is denied under MCL 15.242(2)(e).

Police Department, but is no longer available to the Department	

In November and December of 2011, plaintiff submitted several subpoenas regarding its client's drunk-driving case.

On November 8, 2011, plaintiff submitted two subpoenas. The first required that an Officer Dahlke produce his or her[2] "breath test operator's certification card" and "breath test operator's manual." The second required Officer Dave Ellis to provide "any and all Lansing Police Department policies and/or training manuals" for (1) "[u]se of the mobile vision recorder device" and (2) "[a]dministration and interpretation of . . . [s]tandardized field sobriety tests" and "[p]reliminary breath tests (PBTs)."

On December 6, 2011, plaintiff submitted a subpoena requiring Abby Vanderlaan to produce (1) the "Lansing Police Department policy for use of mobile vision recorders in police vehicles, including but not limited to the policy for making sure that the video for the MVR is working properly at the beginning of an officer's shift" and (2) the "Lansing Police Department policy for the authentication and holding of mobile vision recordings from police vehicles."

On December 8, 2011, plaintiff submitted two subpoenas. The first required Officer D. Porter to produce the "breath test operator's manual." The second required Sergeant Brian Ellis to produce the "Lansing Police Department policy and curriculum for the training, education and certification of police officers in the areas of DUI/OWI investigation."

On December 27, 2011, plaintiff filed its complaint, alleging that defendant failed to comply with FOIA by improperly denying some of its requests. Plaintiff requested that the court order defendant to comply with the FOIA request and also requested attorney fees, costs, disbursements, and punitive damages. On February 2, 2011, defendant filed its answer. Defendant generally restated the reasons for denying plaintiff's requests and denied that it acted untruthfully or in an arbitrary or capricious manner. Defendant stated that it "provided the documents that were sufficiently identified and existed to the Plaintiff prior to the trial." However, defendant admitted that a thorough search for the officer's training certifications revealed that the certifications were not actually in the officer's personnel files as initially stated in the FOIA response letter. Last, defendant alleged that it already gave plaintiff some of the information that plaintiff requested, including a video of the traffic stop that plaintiff used at its client's trial where its client was found not guilty.

On February 27, 2012, plaintiff moved the trial court for summary disposition under MCR 2.116(C)(10) and for an award of attorney fees. On April 4, 2012, the trial court held a hearing on plaintiff's motions. At the hearing, plaintiff's counsel accused defendant of lying in its FOIA response, including defendant's assertion that the video footage that plaintiff requested

[2] The subpoena does not identify the first name or gender of Officer Dahlke.

did not exist. Counsel argued that, even though defendant eventually produced "documents," defendant violated FOIA at the time of its denial of plaintiff's request. Defense counsel countered with several lengthy explanations as to why defendant denied some of plaintiff's FOIA requests. Defense counsel said that defendant provided plaintiff with everything except the text messages before the trial of plaintiff's client. According to defense counsel, the information plaintiff requested in the subpoenas was produced at a December 7, 2011, evidentiary hearing regarding plaintiff's client and also at the client's trial. With respect to the video footage requested in ¶ 6 of plaintiff's FOIA letter, defense counsel explained that defendant could not originally find the video tape because it was logged incorrectly but that it later provided plaintiff with the video, which plaintiff used at a December 7, 2011, evidentiary hearing, although the video did not have audio. Defense counsel also explained that Sgt. Ellis's log sheets did not exist because commanding officers do not create daily logs. Last, defense counsel said that defendant originally believed that the training certifications were located in the officers' personnel folders but that a more extensive search revealed that they were kept by the officers personally.

After hearing arguments from both parties, the trial court found for plaintiff:

> It does seem to me that the Lansing Police Department tried to comply with FOIA. However, when I look at is this a reasonable reading and a reasonable compliance with FOIA and I listen to [defense counsel's] rendition of the case law, although I agree with the case law and her rationale, I also have to look at the language that she quotes to the Court, and I look at the words intolerable, administrative burden, and I ask, was there an intolerable administrative burden placed on the Lansing Police Department . . . .
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> [S]o I look at this through eighth grade eyes, and when I look at it through eighth grade eyes what I see is one name, [the name of plaintiff's client]; one ticket number, G401676; and one date of incident, 7/2/2011 . . . . When I look at the response, there is no notice given of hours when the requester can come in and look for the documents or at the information. There is no information provided as to what the cost is going to be to have this information put together.
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> Overly broad, I do not think so when I look at one individual, one incident, one date. Certainly some names could have been provided with a note saying, based on your request we believe this is correct and this is all the information we can provide because the rest seems to be overly broad, and I think that would have satisfied. . . . I think it's very clear when you look at the totality of the letter and what counsel was requesting of what should have been provided.
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> [I] think overall people who deal with FOIA are very used to looking at these requests and saying any time we see any and all that's a signal that it's probably overbroad so we're going to do a blanket denial, and that way of thinking should be struck from their language. They should -- under the spirit and the letter of the law of FOIA, they should try to comply first before they go through such lengths as to deny.

> This Court is never entertained by denials of FOIA. I don't believe in America we are served by hiding things. I think that, try as they may have, Lansing Police Department fell short here.
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> [I] actually don't think that overall the department did anything wrong except to be too busy to pay attention.
>
> However, for not paying proper attention to FOIA, this court is not entertained by having to be bothered by their lack of paying attention. Therefore, I am granting the (C)(10). I am fining them $500 and attorney fees.

Defendant timely appealed as of right.

II. ANALYSIS

A. MOTION FOR SUMMARY DISPOSITION

Defendant contends that the trial court erroneously granted summary disposition for two reasons: (1) questions of fact existed and (2) the trial court failed to make findings of fact distinguishing between the documents plaintiff sought by subpoena and its FOIA request.

We review de novo a trial court's decision on a motion for summary disposition. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009). When a party moves for summary disposition under MCR 2.116(C)(10), "[t]he moving party must specifically identify the matters that have no disputed factual issues, and it has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 440; 814 NW2d 670 (2012). "The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed material fact exists." *Id.* at 440-441. "[A]n adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in [MCR 2.116], set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4); see also *Coblentz*, 475 Mich at 568-569. "The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form." *Bronson Methodist Hosp*, 295 Mich App at 441. Summary disposition of a claim may be granted when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). In determining whether a genuine issue of material fact exists, the court must consider all documentary evidence in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the court finds any material issue upon which reasonable minds could differ, then a genuine issue of material fact exists. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Defendant argues that summary disposition under MCR 2.116(C)(10) was "totally improper" in this case because questions of fact clearly exist. In support of its argument, defendant claims that plaintiff's pleadings are erroneous and that "[t]he information sought by Plaintiff relying on the Freedom of Information Act were blurred with the materials sought under subpoena." Defendant's cursory allegation of erroneous pleadings and "blurring" do not demonstrate a genuine issue of material fact—particularly where defendant does not cite any

documentary evidence demonstrating the existence of a material factual dispute. An appellant may not give issues cursory treatment and leave it to this Court to unravel its arguments and search for a factual basis for its claims. *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 106; 776 NW2d 114 (2009); *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009); *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). Defendant does give citation to a page of transcript from an unidentifiable hearing for the proposition that "[o]ne of the items, the DVD, claimed not to have been provided to the Plaintiff was actually used in an evidentiary hearing and during the jury trial." However, our review is limited to the evidence that was presented to the trial court at the time it decided plaintiff's motion, see *Ragin*, 285 Mich App 476, and the transcript was not presented to the trial court. "[A] party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 51; 649 NW2d 783 (2002).

Defendant also argues that the trial court failed to make findings of fact regarding the documents requested by subpoena and FOIA. According to defendant, the trial court failed to distinguish the information plaintiff sought by subpoena from the information sought through FOIA. This argument lacks merit. It is well established that "it is not for the trial court to make factual findings . . . when deciding a summary disposition motion." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009); see also *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) ("The court is not permitted to . . . determine facts on a motion for summary judgment."). Furthermore, there is no indication in the record that the trial court, when concluding that defendant did not comply with FOIA, concluded that defendant violated FOIA by failing to produce records that were sought through a subpoena but not FOIA. Indeed, the record illustrates that the court did not confuse the FOIA request with the subpoenas; the court specifically stated: "I would agree with you that FOIA stands alone. I don't really care what subpoenas are out there . . . ." Moreover, the court's reasoning for its conclusion that defendant did not comply with FOIA was, in large part, on the basis that plaintiff's requests were not overly broad as defendant claimed.

Accordingly, defendant has not established that the trial court erroneously granted summary disposition in favor of plaintiff.

B. ATTORNEY FEES, COSTS, AND DISBURSEMENTS

Attorney fees are not ordinarily awarded unless expressly provided for in a statute, court rule, or common-law exception. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). Section 10 of FOIA specifically calls for the award of attorney fees, but only in a limited context. See MCL 15.240(6). If a requesting person prevails in an action challenging the denial of a FOIA request, then the court must award reasonable attorney fees, costs, and disbursements. *Id.*; see also *Meredith Corp v City of Flint*, 256 Mich App 703, 712-713; 671 NW2d 101 (2003). If the requesting person prevails only in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorney fees, costs, and disbursements. *Meredith Corp*, 256 Mich App at 713.

A requesting person does not prevail unless (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.* A plaintiff can prevail in an action even if the defendant

voluntarily discloses the requested information so long as the voluntary disclosure is after commencement of the circuit court action. *Thomas*, 254 Mich at 202-204. But, a plaintiff must show that filing the circuit court action was the substantial cause of the defendant's voluntary disclosure. See *Wilson v Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1992).

Here, the trial court should not have granted plaintiff attorney fees, costs, or disbursements. In bringing its motion for summary disposition under MCR 2.116(C)(10), plaintiff presented only two pieces of documentary or testimonial evidence: its FOIA request and defendant's FOIA response. Nothing in those letters—or in the record as a whole—establishes that plaintiff is the prevailing party in this action. The trial court never ordered defendant to provide plaintiff with previously requested information. In addition, plaintiff presented no evidence indicating that defendant voluntarily provided plaintiff with requested information after plaintiff filed its complaint. Nor did plaintiff present evidence indicating that defendant turned over requested information *because* plaintiff filed its complaint. Lastly, plaintiff did not request at the motion hearing that the court order defendant to disclose the requested information. Rather, plaintiff simply asked for "an order granting attorney fees and costs and finding that there was a violation of FOIA." Plaintiff told the trial court that "[FOIA] says produce it, and they didn't do it. They lost. We win." In response, the court granted plaintiff's motion without finding that plaintiff was the prevailing party. Although the trial court concluded that defendant did not comply with FOIA, more is required to gain attorney fees, costs, and disbursements under Section 10 of the Act. Because plaintiff did not establish that it was the prevailing party in this action, the trial court should not have granted attorney fees, costs, or disbursements.

C. PUNITIVE DAMAGES

As with an award of attorney fees, costs, and disbursements, FOIA only provides for the award of punitive damages in a very limited context. See MCL 15.235(3); MCL 15.240(7). Courts in Michigan will not award punitive damages unless (1) there has been a court-ordered disclosure and (2) the defendant acted arbitrarily and capriciously in refusing to provide the requested information. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 151-153; 683 NW2d 745 (2004). Here, the trial court never ordered defendant to disclose any information to plaintiff. More importantly, the trial court never made a finding that defendant acted arbitrarily or capriciously. Indeed, the court stated that "[i]t does seem to me that the Lansing Police Department tried to comply with FOIA" and that defendant didn't do anything wrong "except to be too busy to pay attention." These statements do not demonstrate that the trial court found that defendant acted arbitrarily or capriciously. Therefore, the trial court necessarily erred when it awarded plaintiff punitive damages in the amount of $500.

Affirmed in part and reversed in part.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly