

**STATE OF MICHIGAN
IN THE SUPREME COURT**

SUSAN BISIO,

Plaintiff-Appellant,

v.

THE CITY OF THE
VILLAGE OF CLARKSTON,

Defendant-Appellee.

Supreme Court Case No. 158240

Court of Appeals Case No. 335422

Oakland County Circuit Court

Case No. 15-150462-CZ

**DEFENDANT-APPELLEE THE CITY OF THE VILLAGE OF CLARKSTON'S
MOTION FOR LEAVE TO FILE REPLY REGARDING PLAINTIFF'S ANSWER TO
DEFENDANT-APPELLEE'S MOTION TO REVIEW COSTS**

NOW COMES Defendant-Appellee The City of the Village of Clarkston, by its counsel Kerr, Russell and Weber, PLC, and for its Motion for Leave to File Reply Regarding Plaintiff's Answer To Defendant-Appellee's Motion To Review Costs, hereby states as follows:

1. On August 17, 2020, Plaintiff-Appellant Susan Bisio filed an Answer to Defendant-Appellee the City of the Village of Clarkston's ("the City") Motion for Review of Costs.
2. In her Answer, Ms. Bisio makes a number of assertions that must be addressed by the City to avoid prejudice.
3. Under MCR 7.316(A)(7), this Court has discretion to grant leave to file a reply to assist this Court in deciding the Motion for Review.
4. The City's proposed reply is attached to this Motion. **(Exhibit A)**.
5. Allowing the City to file a reply will not cause any delay, will not cause any prejudice to Ms. Bisio, and is in the best interests of substantial justice so that the City is afforded an adequate opportunity to be heard on the taxed costs issue.

6. This Motion, and the attached Reply, were served on Plaintiff via the Court's electronic filing system.

WHEREFORE Defendant-Appellee The City of the Village of Clarkston respectfully asks that this Honorable Court grant this Motion and accept the attached reply for filing.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

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Dated: August 24, 2020

CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being first duly sworn deposes and says that on August 24, 2020 she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/ Cynthia J. Villeneuve
Cynthia J. Villeneuve

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Exhibit A

STATE OF MICHIGAN
IN THE SUPREME COURT

SUSAN BISIO,

Plaintiff-Appellant,

v.

THE CITY OF THE
VILLAGE OF CLARKSTON,

Defendant-Appellee

Supreme Court Case No. 158240

Court of Appeals Case No. 335422

Oakland County Circuit Court
Case No. 15-150462-CZ

**DEFENDANT-APPELLEE THE CITY OF THE VILLAGE OF CLARKSTON'S
REPLY REGARDING MOTION FOR REVIEW OF TAXED COSTS**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

ARGUMENT 1

 I. Taxed Costs Should Not Be Awarded.1

 A. FOIA Does Not Deprive This Court of Discretion to Deny Taxed
 Costs.....1

 B. Exercising Discretion Not to Award Costs is Particularly Appropriate
 Where a Public Question is Involved.....2

 C. This Court Did Not Accept Ms. Bisio’s Public Records Argument.3

 D. Ms. Bisio Has Avoided Summary Disposition but Judgment Has
 Not Been Entered.4

CONCLUSION.....5

RECEIVED by MSC 8/24/2020 3:36:05 PM

INDEX OF AUTHORITIES

Cases

North Pointe Ins Co v Steward (On Remand),
265 Mich App 603; 697 NW2d 173 (2005)..... 3

Penokie v Michigan Technological Univ,
93 Mich App 650; 287 NW2d 304 (1979)..... 1

Statutes

MCL 15.232(h)(iii) 3

MCL 15.232(i) 3

MCL 15.240 1, 2

MCL 15.240(6) 1, 4

MCL 600.2445 2

MCL 600.2445(1) 1, 2

MCL 600.2455 1

Rules

MCR 7.319 1, 2, 4

MCR 7.319(B) 2

ARGUMENT

I. Taxed Costs Should Not Be Awarded.

Defendant-Appellee The City of the Village of Clarkston moves for review of (and an order to vacate) the Clerk's taxation of costs on multiple grounds. One basis is this Court's discretionary authority to deny costs, particularly when a public question is presented. Another basis is the majority's rejection of Ms. Bisio's "agency" argument and the unusual posture of the majority's decision. A third basis is the absence of a final judgment or order.

A. FOIA Does Not Deprive This Court of Discretion to Deny Taxed Costs.

Ms. Bisio contradicts herself in seeking to convince this Court that it has no discretion to order that costs not be taxed. Ms. Bisio argues that there is no "public question" exception for taxed costs under MCR 7.319 and MCL 600.2455 because MCL 15.240(6) provides that "a court must *always* award costs to a FOIA plaintiff whose lawsuit results in disclosure of public records." Bisio Resp. at 3 (emphasis in original). Ms. Bisio cites *Penokie v Michigan Technological Univ*, 93 Mich App 650, 665; 287 NW2d 304 (1979), for the proposition that "[t]he Legislature has enacted a statutory exception to the public question/no costs rule." Bisio Resp. at 4.

Penokie has no precedential value, is not binding on this Court, and is irrelevant to the question raised by the City's motion because *Penokie* addresses *costs under MCL 15.240*, not MCR 7.319 or MCL 600.2455.¹ And in fact, Ms. Bisio later expediently disavows her initial reliance upon MCL 15.240(6) and *Penokie* by arguing that "[t]he standards for taxation of costs and a FOIA fee award are different," and "these are different standards" and again referring to "these different standards." Bisio's Resp. at 9-10. Ms. Bisio admits that she seeks costs under MCL 600.2445(1) and MCR 7.319, not FOIA's costs provision (MCL 15.240). There is no

¹ Further, *Penokie* arose from a judgment in favor of plaintiff, with plaintiff cross-appealing the trial court's denial of costs under the FOIA costs provision.

question that costs are discretionary under MCR 7.319 and MCL 600.2445(1). See MCR 7.319(B) (“Unless the Court otherwise orders ...”); MCL 600.2445(1) (“Costs on appeal to the circuit court, the court of appeals, or to the supreme court shall be awarded in the discretion of the court.”).

If Ms. Bisio is attempting to argue that MCL 15.240 supplants the discretion *not to tax costs* under MCR 7.319 and MCL 600.2445, she provides no supporting authority for that assertion and fails to explain how the admittedly different standard for costs under MCL 15.240(6) is relevant to the issue of costs under MCL 600.2445(1) and MCR 7.319. This Court’s statutorily created discretion to not tax costs is unaffected by FOIA’s cost provision. Such a ruling is particularly warranted here given that the dispositive issue was not argued by Ms. Bisio, was not identified in this Court’s leave order, was an issue of first impression, resulted in a splintered decision, and overturned the rulings of two lower courts in favor of the City.

B. Exercising Discretion Not to Award Costs is Particularly Appropriate Where a Public Question is Involved.

Ms. Bisio acknowledges that this Court has repeatedly declined to award costs in cases addressing public questions. She argues the cases offered by the City are inadequate because the decisions offer little or no explanation as to why costs were not awarded. But these cases amplify the fact that this Court’s discretion is extensive: this Court can decline costs under the public question rule without providing any detailed reasoning beyond noting a public question. This case involves a significant public question and the City’s arguments were made in good faith. Costs should not be taxed.

Rather than challenge the significance of the public question, Ms. Bisio seeks to vilify the City by accusing the City of trying “to make a cautionary example of plaintiff to deter anyone else who may have the temerity to challenge the city’s practice of concealing public documents.” See *Bisio* Resp. at 9, n 5. Ms. Bisio’s unfounded, inflammatory accusations are apparently designed to suggest that the City should be punished for contesting Ms. Bisio’s FOIA request, for defending

itself in the litigation and on appeal, for seeking rehearing, and for opposing taxation of costs. Ms. Bisio disregards the fact that the City *prevailed* in the Trial Court and the Court of Appeals. That this Court may have disagreed with the lower court rulings does not mean that those proceedings were spurious, frivolous, or designed to unlawfully conceal public records. FOIA does not say that *all* government documents are public records except for certain specified exceptions. FOIA employs the reverse approach. Only “writings” that are “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” are public records potentially subject to disclosure. MCL 15.232(i).

Further, “[t]he taxation of costs is neither a reward granted to the prevailing party nor a punishment imposed on the losing party, but rather a component of the burden of litigation presumed to be known by the affected party.” *North Pointe Ins Co v Steward (On Remand)*, 265 Mich App 603, 611; 697 NW2d 173 (2005) (citing *Harvey v Lewis*, 10 Mich App 23 (1968)). Ms. Bisio’s attempt to influence this Court’s discretion by characterizing the City as a wrongdoer is inappropriate and unavailing.

C. This Court Did Not Accept Ms. Bisio’s Public Records Argument.

Ms. Bisio fashions herself as the technical “prevailing party” despite the failure of her public records agency argument. Not only that, through her unqualified concession that the City Attorney is not a public body, Ms. Bisio essentially removed from this Court’s consideration the very basis upon which she purports to have “prevailed.” Although she now characterizes her position as supportive of the amici’s subsection (iv) argument, Ms. Bisio’s lawyer did not seek to file a supplemental brief in support of that argument and, upon information and belief, did not so much as mention this public records theory at oral argument, let alone express support for it. Nor did Ms. Bisio confine the breadth of her contrary concession that the City Attorney is “obviously” not a public body to MCL 15.232(h)(iii). As Justice Viviano points out,

Defendant has argued throughout this case that the city attorney is not himself a “public body” under FOIA, and *plaintiff has repeatedly and emphatically conceded the point and indeed even argued it herself for strategic advantage*. See *Bisio v The City of The Village of Clarkston*, unpublished per curiam opinion of the Court of Appeals, issued July 3, 2018 (Docket No. 335422), p 6 (“Plaintiff argues that the *Breighner* Court’s holding is irrelevant to the case at bar because she has never claimed that the city attorney was a public body.”). Plaintiff also asserted at oral argument: “[W]e are not claiming that the city attorney is a public body. Obviously, he’s not. Because as you point out, the definition doesn’t include officers and employees of municipalities.” *Bisio Op.*, (Viviano, J, dissenting) at 5-6, n 5 (emphasis added).

See also, *Bisio Op* at 8, n 7 (“We recognize that this argument was offered only by amici ...”).²

Ms. Bisio seeks to avoid the exercise of this Court’s discretion by arguing that court clerks should not be enmeshed in complicated prevailing party determinations when taxed costs are sought. But nothing will change if this Court exercises its discretion not to tax costs in this unusual but significant case. No new procedure need be invoked. MCR 7.319 provides all that is necessary to allow objections – irrespective of the basis - to be decided.

D. Ms. Bisio Has Avoided Summary Disposition but Judgment Has Not Been Entered.

Here, there is no final judgment entered in Ms. Bisio’s favor and no court has yet ordered the City to produce the documents. Ms. Bisio acknowledges further proceedings will be required. *Bisio’s Resp.* at 4, n 2. In fact, as argued in the Motion for Rehearing, the majority opinion does not provide a legal basis for enforcing an order against either the City (because the majority did not accept the agency argument) or the City Attorney (who is not a party to this action). Moreover, the majority opinion notes that the issue of FOIA exemptions has not yet been resolved. See *Bisio Op.* at 3, n 2.³

² Given the parties’ concession that the City Attorney was not a public body, as well as the fact that this Court did not identify, even through amendment, the amici’s novel argument as an issue the Court would consider, there would have been no reason for the City to seek to reply to amici’s last minute, minor argument.

³ This appeal was taken from the Court of Appeals’ affirmance of the trial court’s entry of summary disposition in favor of the City. Even FOIA costs could not be assessed at this time

Ms. Bisio demands an order for immediate payment of costs based on “the city’s penchant for resisting every inch of the way and its insistence on continuing to hide the documents this Court held are public records[.]” Arguing that the City is on a “litigation crusade,” Ms. Bisio says “the city must pay the costs now.” Yet there are no facts, rule or legal authority supporting Ms. Bisio’s demand, and Ms. Bisio makes no suggestion to the contrary. Rather, it seems Ms. Bisio is upset that the City exercised the same basic principles of due process that all litigants enjoy. At the same time, Ms. Bisio forgets that there is no final judgment in her favor. This Court reversed summary disposition in favor of the City, nothing more. Because (1) there is still much to be addressed in the trial court, (2) the City’s Motion for Rehearing is pending, and (3) there is no evidence the City failed to comply with court orders, there is no reason to hasten payment of costs.

CONCLUSION

Ms. Bisio’s angry response should not dissuade this Court from ordering that costs not be taxed in this case. The City respectfully requests that the clerk’s taxation of costs be vacated.

Respectfully submitted,

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Dated: August 24, 2020

because under MCL 15.240(6), costs can only be ordered when “a court . . . determines a public record is not exempt from disclosure.” Further, if the party only partially prevails, the Court has discretion. Here, it would have been premature for the City to raise (or the Court to decide) the exemption question until it was first determined whether the documents were public records.