STATE OF MICHIGAN

SUPREME COURT

SUSAN BISIO,

Plaintiff-Appellant,

v

THE CITY OF THE VILLAGE OF CLARKSTON,

Defendant-Appellee.

Supreme Court No. 158240

Court of Appeals No. 335422

Oakland County Circuit Court
Case No. 2015-150462-CZ

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PLAINTIFF-APPELLANT'S ANSWER TO DEFENDANT'S MOTION TO FILE REPLY BRIEF ON ITS MOTION TO REVIEW TAXATION OF COSTS

Plaintiff-appellant files this answer the defendant-city's Motion for Leave to File Reply Regarding Plaintiff's Answer to Defendant-Appellee's Motion to Review Costs.

More Briefing Is Not Needed. The Court Should Deny the Motion to File Another Brief

Taxation of costs is supposed to be a simple matter. Not here. Plaintiff filed a simple bill of costs. The city objected. The clerk taxed costs (less than the total plain-

tiff requested). The city filed a motion to review the clerk's taxation. Plaintiff answered the motion. Now the city wants another round of briefing. The city says this will not prejudice plaintiff but doesn't acknowledge the cost and delay attendant to responding to the city's motion and brief.

The Court should put an end to this and decide the simple question of whether plaintiff is entitled to costs because she is the prevailing party because she improved her position on appeal. MCL 600.2445(2).

But the city cannot abide by a simple procedure. Although the city bemoans the characterization of its conduct as a "litigation crusade," it is doing exactly what plaintiff's response to the city's motion to review taxation of costs said it would do—"fighting every inch of the way" and "continuing to hide the documents this Court held are public records." In addition to battling costs, the city has now announced (1) it will not disclose the records the Court held are public records even if the Court's opinion stands[1] and (2) it will relitigate the case anew in the circuit court, advancing unpled affirmative defenses.[2]

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[1] "[T]he majority opinion does not provide a legal basis for enforcing an order against either the City … or the City Attorney …." City's proposed reply brief, p 4.

[2] City's proposed reply brief, pp 4-5, n 3, stating an intention to litigate exemptions in the circuit court. The only exemption the city pled was the "civil action exemption" under MCL 15.243(1)(v). Affirmative Defenses, ¶ 4. The Court of Appeals rejected that theory. *Bisio v City of the Village of Clarkston,* unpublished opinion of the Court of Appeals, entered 7/3/18 (docket 335422), p 9 (exemption does not apply when the person requesting records is not a party to a lawsuit, as held by *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200; 725 NW2d 84 (2006)). The city's rejected theory was that plaintiff here couldn't make a FOIA request because her

The Court should not countenance full-blown prolonged litigation on costs. Nothing the city says justifies this. Plaintiff is not trying to "punish" the city for defending the case or for its multiple post-opinion motions in this Court. City's proposed brief, pp 2-3. Plaintiff simply wanted to tax a minimal amount of costs against the city, the natural consequence of the city's losing this case.[3] We have simply pointed out that the city is inflexible and unreasonable, unwilling to discuss any resolution of this matter, and invoking every procedural obstacle to a final resolution. The city's conduct here is consistent with these observations. This Court need not indulge that approach to litigation. It should simply deny the city's motion and decide this straightforward cost issue.

The City Waived Arguments

The city raises new arguments for the first time in its proposed reply brief. MCR 7.219(E), applicable in the Supreme Court under MCR 7.319(A), says the Court cannot consider objections that were not filed with the clerk. Thus the city waived the argument that the Court cannot tax costs now because there is no final judgment and

husband was in litigation with the city on a completely separate matter at the time, in which he prevailed, showing the city violated the Open Meetings Act.

[3] The city itself quotes a case that says: "taxation of costs is … [not] a punishment imposed on the losing party." *North Pointe Ins Co v Steward*, 265 Mich App 603, 611; 697 NW2d 173 (2005). City's proposed brief, p 3.

waived the other arguments that attack this Court's opinion on procedural and substantive grounds.

Other Arguments Have Been Briefed

We briefed these arguments in plaintiff's response to the motion to review taxation of costs:

- Plaintiff is the "prevailing party" because she improved her position on appeal. MCL 600.2445(2). The Court reversed the circuit court's summary disposition in defendant's favor. See, e.g., *Klug v Berkley Homes, Inc*, 334 Mich 618, 622; 55 NW2d 121 (1952) (awarding costs on reversal of summary judgment); *Bonney v Citizens' Mut Auto Ins Co*, 333 Mich 435, 440; 53 NW2d 321 (1952) (same).

- FOIA makes a cost award to a prevailing plaintiff mandatory. MCL 15.240(6).[4] FOIA's requirement to award costs is an exception to the public question/no costs principle. *Penokie v Michigan Technological Univ*, 93 Mich App 650, 665; 287 NW2d 304 (1979).

- The city advocates a new standard for determining the prevailing party, one not reflected in any statute, rule, or caselaw. Asking court clerks to parse opinions, briefs, and oral arguments to determine what argument won and what argument didn't win to determine a prevailing party is contrary to the statutory definition of "prevailing party" and would needlessly complicate taxation of costs.

- The city's arguments were not made in "good faith" when it argued it can keep records of the conduct of city business secret by the device of having separate off-premises files held by city officers—a theory directly contrary to the public policy of FOIA.

These questions have been briefed. There is no need for more briefing.

[4] The city tries to confuse the RJA and FOIA provisions. There is no conflict. Both apply and can be read in harmony. The RJA defines the prevailing party and FOIA mandates the award. The city would have the Court ignore the FOIA statute in this FOIA case.

The Court Can Consider Other Questions the City Raises When It Decides the City's Motion for Rehearing

The Court has not yet entered a judgment on its opinion, since the city filed a motion for rehearing. MCR 7.315(C)(2)(b). Several of the arguments the city makes reprise arguments in its motion for rehearing. The city says costs should be denied because "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 ruling of two lower courts in favor of the City." City's proposed brief, p 2. This just repeats arguments from the city's motion for rehearing. Plaintiff will respond to that motion in full by the deadline for doing so. Suffice it to say now:

- The statutory interpretation approach the Court adopted was consistent with what plaintiff always argued for—that the city attorney possesses public records subject to FOIA.

- Plaintiff saw no need to file an additional brief supporting the argument the press amici raised for the statutory interpretation approach the Court adopted, particularly in light of the fact that the city deliberately decided not to brief that issue or raise it at oral argument.

- Plaintiff did not concede the issue on appeal. She acknowledged that the city attorney is not a public body under MCL 15.232(h)(*iii*). The Court held the office of the city attorney is a public body under another subsection of the definition, MCL 15.232(h)(*iv*). Plaintiff's discussion of (h)(*iii*) did not concede anything under (h)(*iv*).

- The city's announcement that it will not comply with the Court's opinion is based on an erroneous theory that the city can't require its city attorney to turn over the records this Court held are public records—that the city attorney is somehow independent from the city and not subject to the city's control.

- The Court's 6-1 decision in plaintiff's favor was not a "splintered decision." Five justices agreed on the proper statutory interpretation approach and the Chief Justice concurred, adopting plaintiff's statutory interpretation.

The Court will be fully informed on these issues in the briefing on the motion for rehearing. Its decision on that motion will definitively decide whether plaintiff is the prevailing party. The Court can decide costs when it decides that motion.

Conclusion—The Court Should Deny the Motion to File a Reply Brief and Decide Taxation of Costs When It Decides the Motion for Rehearing

Enough briefing on costs. The Court should deny the motion to file a reply brief and decide costs when it decides the motion for rehearing.

If the Court allows the city to file its reply brief, plaintiff requests leave to file a response to that brief addressing the new issues the city raises.

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