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 OPPOSING DEFENDANT CITY'S MOTION TO FILE REPLY BRIEF ON ITS MOTION FOR REHEARING

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The city proposes to file another brief in its efforts to persuade the Court that there is an "endemic deficiency" in the Court's July 24, 2020 decision and it needs an opportunity "to definitively address the many flaws in the majority's opinion." City's proposed brief, pp 17, 19.[1] Those flaws include "contorting the rules of statutory construction" and reaching an "unwarranted and unprecedented conclusion" and an "unprecedented expansion of FOIA [that] will have far-reaching consequences." *Id.,* p 22.

The city's proposed brief repeats arguments from its motion for rehearing and its amicus MML/MTA's brief supporting rehearing. There is no good reason to prolong this matter. There are already four briefs (two on each side) addressing the city's arguments for reversing the Court's July decision.[2] The city now wishes to file another brief that repeats arguments in the previous briefing.

There must come a time when argument is over and a case is decided. We thought that time came when the Court issued its opinion on July 24, 2020. Since then, the city and its amici have made six filings in an effort to delay taxation of costs

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[1] Defendant-Appellee the City of the Village of Clarkston's [Proposed] Reply in Support of Motion for Rehearing, 9/15/20.

[2] Defendant-Appellee the City of the Village of Clarkston's Motion for Rehearing, 8/14/20; Plaintiff-Appellant's Answer to Defendant's Motion for Rehearing, 8/27/20; Amici Curiae the Michigan Municipal League, the Michigan Townships Association, and the Michigan Association of Municipal Attorneys Answer in Support of the City of the Village of Clarkston's Motion for Rehearing, 8/28/20; and Appellant's Brief Responding to MML/MTA Amicus Brief on Motion for Rehearing, 8/31/20 (accepted for filing in the Chief Justice's 9/9/20 order).

and the effectiveness of the Court's opinion. The Court should reject this new proposed brief because it is repetitious and adds nothing to the briefing now on file.

The following discussion addresses each part of the proposed brief, showing it unnecessarily repeats arguments already before the Court

I. The Court Properly Considered the Statutory Interpretation Approach Briefed by an Amicus

The city says the Court should not have considered the statutory interpretation approach that the press amici advocated. City's proposed brief, pp 1-3. E.g., the Court based its "dispositive ruling on the new amicus issue." *Id.,* p 1. This was already briefed in—

- The city's motion for rehearing, pp 1, 3-6.[3] E.g., the issue "'was inserted as an alternative theory at the very end of" an amicus brief." *Id.,* p 1.
- The MML/MTA brief supporting rehearing, pp 3, 5-7.[4] E.g., "this unconventional argument had been raised only as a two-page alternative argument in an amicus brief." *Id.,* p 3.

Plaintiff addressed this argument in her answer to the motion for rehearing, pp 14-15.[5]

The city argues various court rules regarding "new issues" on appeal. City's proposed brief, pp 1-3. But the press amici did not introduce a "new issue." The issue

[3] Defendant-Appellee the City of the Village of Clarkston's Motion for Rehearing, 8/14/20.

[4] Amici Curiae the Michigan Municipal League, the Michigan Townships Association, and the Michigan Association of Municipal Attorneys Answer in Support of the City of the Village of Clarkston's Motion for Rehearing, 8/28/20.

[5]Plaintiff-Appellant's Answer to Defendant's Motion for Rehearing, 8/27/20.

on appeal was not limited to an interpretation of the definition of "public body," as the city would like to narrowly define it. Rather, the first issue on appeal, as the Court defined it in its grant order, was "whether the Court of Appeals erred in holding that the documents sought by the plaintiff were not within the definition of "public record" in § 2(i) [MCL 15.232(i)] of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*." Order 9/25/19. This was likewise the issue raised in plaintiff's application for leave to appeal. Appellant Susan Bisio's Application for Leave to Appeal, 8/14/18, p x ("Are the charter-appointed city attorney's nonprivileged correspondence and emails, involving his conduct of city business, public records subject to the freedom of information act …?"). The Court's opinion reiterated that it directed the parties to brief this issue. *Bisio v City of the Village of Clarkston,* __ Mich __; __ NW2d __ (2020) (docket no. 158240) ("Opinion"); slip op at 4. Accord, concurring opinion of McCormack, CJ, p 2 ("The question is not *who* is a public body, but *what* is a public record?") (emphasis in original). The Court's grant order did not limit the issue of whether the documents were "public records" to a particular subsection of the definition of "public body" and did not limit what arguments could be made regarding whether the documents are "public records."

Thus the issue on appeal was whether the contested records were "public records" under FOIA. It was not a "new amicus issue" when the press amici offered a statutory interpretation that the documents were "public records." The city's discussion of various court rules and methods of placing issues before the Court is beside the point. The parties addressed, and the Court decided, the "public records" issue.

The city's proposed brief discusses rules that don't apply because this was not a new issue that the press amici introduced. And there was no reason for plaintiff to file something agreeing with the press amici (city's proposed brief, p 10), as though such an unnecessary pro forma filing would somehow transform the issues in the case.

In an attempt to bolster its position that an amicus argument should not be considered if it supposedly introduces a new issue, the city highlights plaintiff's objection to the city's amicus interjecting a new issue in the court of appeals. City's proposed brief, pp 3-5.[6] Plaintiff argued in the court of appeals that an amicus cannot interject a new issue, relying on the court of appeals rule that expressly prohibits that. MCR 7.212(H)(2). That is unlike the Supreme Court rule on amicus briefs, which does not have such a prohibition. MCR 7.312(H); plaintiff's answer to motion for rehearing, pp 14-15. Nonetheless, the court of appeals allowed the city's amicus to file the brief plaintiff objected to (order 7/26/17, COA docket no. 335422); denied plaintiff's motion to strike the brief (order 9/13/17, COA docket no. 335422); and allowed plaintiff to respond to the amicus brief. Order 9/6/17, COA docket no. 335422.

[6] The city doesn't inform the Court this was briefing in the court of appeals over three years ago, not in this Court. The filings in COA docket no. 335422 the city quotes from are Appellant Susan Bisio's Answer to MML and MTA Untimely Motion to File an Amicus Curiae Brief, 7/13/17; Appellant's Motion to Strike MML/MTA Amicus Brief, 8/23/17; and Brief Supporting Appellant's Motion to Strike MML/MTA Amicus Brief, 8/23/17

This result in the court of appeals shows two things. First, the court allowed an amicus to introduce a new issue. Second, if a party objects to an amicus introducing what the party thinks is a new issue, it can timely file a motion to try to prevent that and, if unsuccessful, can respond to the amicus brief. Here, that means two things: First, even if the press amici's brief is improperly characterized as introducing a new issue, that is permissible. Second, the city had ample opportunity to address this when the press amici filed their brief.[7]

Plaintiff's proposed new brief does not add anything to the arguments already before the Court.

II. Plaintiff Did Not Abandon or Concede the Statutory Interpretation Approach the Court Adopted

The city claims it was taken by surprise and the Court acted "in secret without an order or notice to the parties." City's proposed brief, p 2. This is so, the city says, because plaintiff conceded the city attorney is not a public body (under MCL 15.232(h)(*iii*)) and that concession supposedly prohibited the Court from considering whether the office of the city attorney (a body distinct from the city attorney as an

[7] The city is wrong in saying that "the issue [under MCL 15.232(h)(*iv*)] was only raised in an untimely amicus brief filed just before oral argument, well after the parties' briefs were filed." City's proposed brief, p 2. The press amici filed their brief on January 31, 2020, as did the city's amici. This was the deadline set by the Chief Justice's 1/7/20 order, which extended the usual time for amicus briefs. This was not "just before oral argument," which was held on March 5, 2020. The city had ample time to respond to the press amici. That is shown by the fact that the city has filed dozens of pages of objections, motions, and briefs since the Court's July 24 decision, almost the same period of time from January 31 to March 5 when it could have filed something responding to the press amici's brief.

individual) is a public body under MCL 15.232(h)(*iv*). City's proposed brief, pp 5-10. E.g., "Throughout these proceedings, Plaintiff correctly conceded that *the city attorney is not a public body*." *Id.,* p 5 (emphasis in original). This was already briefed in—

- The city's motion for rehearing, pp 2, 4, 8. E.g., "the majority's dispositive ruling is contrary to the parties' mutual admission throughout these proceedings that the City Attorney *is not* a public body …." *Id.,* p 2 (emphasis in original).
- The MML/MTA brief supporting rehearing, pp 4, 5-7, 12. E.g., "Plaintiff repeatedly acknowledged that the Clarkston city attorney was *not* a 'public body' under FOIA …." *Id.,* p 7 (emphasis in original).

Plaintiff addressed this argument in her answer to the motion for rehearing, pp 12-14, and her answer to the MML/MTA brief supporting rehearing, pp 5-7.[8]

The city's argument on this point rests on a fundamental mischaracterization of both the Court's opinion and plaintiff's arguments. The city says the Court made a "dispositive finding that the city attorney is a public body subject to FOIA …." City's proposed brief, p 1. Accord, *id.,* p 22 ("the majority has gone out on a limb in contorting the rules of statutory construction to reach the unwarranted and unprecedented conclusion that the Clarkston city attorney is a public body"). The city does not distinguish—as the Court does—between the city attorney as an individual and the office of the city attorney, an office created by the city charter. "[W]e do not conclude that the city attorney, individually, is himself a 'public body' under MCL 15.232(h)(*iv*).

[8] Appellant's Brief Responding to MML/MTA Amicus Brief on Motion for Rehearing, 8/31/20 (accepted for filing in the Chief Justice's 9/9/20 order).

Rather we conclude that the entity, the 'office of the city attorney,' constitutes the pertinent 'public body' under MCL 15.232(h)(*iv*)." Opinion, p 13 n 10.

In the same vein, the city does not distinguish between plaintiff's concession that the city attorney as an individual is not a public body under MCL 15.232(h)(*iii*) and the separate concept that the office of the city attorney is a public body under MCL 15.232(h)(*vi*), something plaintiff did not concede. See plaintiff's answer to motion for rehearing, pp 12-14; plaintiff's answer to the MML/MTA brief supporting rehearing, pp 5-7.

The city's proposed brief repeats its previous erroneous argument that plaintiff conceded the issue and the Court should not have decided it. It adds nothing.

III. The City Had Every Opportunity to Brief the Alternative Statutory Interpretation and Was Not Deprived of Due Process

The city claims it had no opportunity to brief the statutory interpretation approach the Court adopted. City's proposed brief, pp 1, 14-16. E.g., the Court ruled "without giving notice to the parties or an opportunity to be heard"; "the City was precluded from presenting a defense to the majority's dispositive analysis …. The City had no such opportunity" *Id.,* pp 1, 14. This was already briefed in—

- The city's motion for rehearing, pp 6-8. E.g., "the majority subjects Clarkston to an adverse ruling … without affording Clarkston an opportunity to be heard on the dispositive issue." *Id.,* p 6.
- The MML/MTA brief supporting rehearing, p 3. E.g., "No one … had the opportunity to respond to" the press amici's statutory interpretation argument." *Id.*

Plaintiff addressed this argument in her answer to the motion for rehearing, pp 15-17, 21-22, and her answer to the MML/MTA brief supporting rehearing, pp 1-5.

The city offers only one reason why it did not seek to brief the issue when it had a chance: It improperly assumed that the press amici's statutory interpretation approach was not an issue because plaintiff supposedly conceded it. But, as noted above in section II, plaintiff made no such concession. The city had ample time to address the press amici's statutory interpretation approach after receiving it on January 31, 2020, well before the March 5, 2020 oral argument. The city's motion for rehearing is an attempt to now fix its lack of diligence in addressing an argument that was before the Court long before the Court's decision. As the city itself says: "If the issue was important to the disposition of the case, [it] could have raised it." City's proposed brief, p 11 n 4. The city's proposed brief offers nothing new on that.

The city also continues to claim it has a property interest protected by due process. City's proposed brief, pp 13-14. Plaintiff noted in her answer to the motion for rehearing, pp 19-20, that the city's costs are covered by insurance and its lawyers have said any fee award would likewise be covered. The city, which has the burden of proof on its due process claim, doesn't say anything to refute that. It is not, as the city suggests (p 13), plaintiff's burden to show there is not a property interest. It is the city's burden to show there is.[9]

[9] The city attaches an email from plaintiff's counsel, who approached the city regarding settlement—an approach that did not even elicit the courtesy of a reply. The city summarily rebuffed plaintiff with its multiple post-decision filings in this

IV. The City Doubles Down on Its Announced Intention to Defy the Court's Decision if the Court Does Not Reverse It

The city once again says it will not comply with the Court's decision and will not produce the records the Court held are public records. City's proposed brief, pp 16-18. E.g., "the majority provides no legal path to enforcement"; there is "no legal basis for ordering the City to produce the documents …." *Id.,* pp 16-17. Although the city disclaims an intent not to comply (*id.,* p 18 n 11), the logical import of the city's argument that the Court's opinion is not enforceable is that the city will not produce the records.

This was already briefed in the city's motion for rehearing, pp 8-9. E.g., "The majority's analysis does not allow for enforcement of its decision." *Id.,* p 8. Plaintiff responded to this argument in her answer to the motion for rehearing, pp 22-29.

The city does not explain why it can't produce the public records its city attorney has. Its technical argument—that the Court did not hold the city itself possesses these public records—runs counter to the common sense fact that the city attorney works for the city, is a city officer, and is subject to the city's control and the Michigan Rules of Professional Conduct. The city suggests this Court rejected the proposition that the city attorney is under the city's control because the Court supposedly rejected plaintiff's agency argument—that the city attorney's possession of records is the city's possession because the city attorney is the city's agent. City's proposed brief, pp 17,

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Court. The attachment is an improper attempt to expand the record on appeal. MCR 7.310(A) (the "original papers" constitute the record on appeal).

18. But the Court did not reject that argument. It ruled on other grounds and did not discuss that argument (except in the Chief Justice's concurring opinion, which did accept the argument). There is nothing in the Court's opinion that suggests the city is powerless to produce public records in its attorney's hands. And the city doesn't expressly say that. The Court's supposed "failure to chart a legal basis for enforceability" (city's proposed brief, p 17) flies in the face of reality. Certainly the Court did not intend to issue a meaningless unenforceable opinion. Rather it likely reasonably concluded that, once the Court held the records were "public records" subject to FOIA, the city would turn them over because it controls the actions of its city attorney.

The city's reiteration of its intention not to produce the records adds nothing to the previous briefing.

V. The City Repeats Its Criticism of the Court's Statutory Analysis but Offers Nothing New

The city again argues the Court was wrong in its statutory interpretation. City's proposed brief, pp 19-22. The city's statutory interpretation arguments and "the many flaws in the majority's opinion" (*id.,* p 19) were already briefed in—

- The city's motion for rehearing, pp 1, 10-19. E.g., "The majority's analysis violates principles of statutory construction and reaches an erroneous result." *Id.,* p 10.
- The MML/MTA brief supporting rehearing, pp 8-14. E.g., "There are a number of errors—or, at minimum, weak links—in the Court's reasoning." *Id.,* p 9.

Plaintiff responded to these criticisms in her answer to the motion for rehearing, pp 29-35, and her answer to the MML/MTA brief supporting rehearing, pp 12-16. The

city has had a full opportunity to brief the statutory interpretation approach the Court adopted. Its new proposed brief adds nothing.

The Court based its decision on MCL 15.232(h)(*iv*), which defines a body created by local authority as a "public body" subject to FOIA. Opinion, pp 12-14. The city says this was not intended to be a catchall provision in the multi-part definition of "public body." City's propose brief, p 19. But that is exactly what it is. *Coalition Protecting Auto No-Fault v Michigan Catastrophic Claims Ass'n,* 317 Mich App 1, 12; 894 NW2d 758 (2016); *Jackson v Eastern Michigan Univ Foundation*, 215 Mich App 240, 244; 544 NW2d 737 (1996) (both referring to MCL 15.232(h)(*iv*) as a "catchall" provision). As such, it is intended to include additional "public bodies" that may not be included in the preceding subsections. The Court analyzed this subsection in coordination with the others to come to the conclusion that the office of the city attorney is a "public body." Opinion, pp 7-11; *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012) (connected subsections must be read together).

The parties' briefs already thoroughly discuss the statutory interpretation of MCL 15.232(h)(*iv*). The city's proposed brief simply repeats previous arguments.

VI. The Court Should Reject This Duplicative Brief

The discussion above shows the city's proposed brief adds nothing new. Saying the same thing over again with more words adds nothing to the city's efforts to continue to conceal public records. And nothing the city says, now or in its previous briefs, suggests an interpretation consistent with the transparency policy of FOIA. The city's position has always been and continues to be that its city attorney can conduct official

city business and keep records of that business in a separate file that is not subject to FOIA.

The Court should reject the city's proposed brief and deny the motion for re-hearing.

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