# STATE OF MICHIGAN

# COURT OF APPEALS

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ANN COBLENTZ, LEE COBLENTZ, JOHN LEWANDOWSKI, and DEBORAH LEWANDOWSKI,

Plaintiffs-Appellants,

v

CITY OF NOVI,

Defendant-Appellee.

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UNPUBLISHED
April 21, 2009

No. 285431
Oakland Circuit Court
LC No. 2003-046760-CZ

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Plaintiffs appeal by right an order entered by the trial court on April 24, 2008, granting their motion for attorney fees, costs, and disbursements pursuant to the FOIA, MCL 15.240(6), and awarding attorney fees in the amount of $24,090 for 146 hours of work at an hourly rate of $165, as well as costs. We affirm.

This case has a protracted and contentious procedural history and returns to this Court for the second time. The salient facts need not be repeated here because they are set forth in this Court's prior opinion, *Coblentz v City of Novi*, 264 Mich App 450, 452; 691 NW2d 22 (2004) (*Coblentz I*), as well as in our Supreme Court's opinion, *Coblentz v City of Novi*, 475 Mich 558, 562; 719 NW2d 73 (2006) (*Coblentz II*). Following the Supreme Court's remand for entry of a judgment compelling disclosure, plaintiffs filed a motion in the trial court for attorney fees, costs, and disbursements pursuant to the FOIA, MCL 15.240(6). They requested $408,310 for attorney fees and $11,326.74 for costs. Defendant objected to the motion and requested a period of discovery, as well as an evidentiary hearing to determine whether plaintiffs were entitled to an award of attorney fees and costs and, if so, the appropriate amount of fees and costs. The trial court granted a period of discovery and ordered an evidentiary hearing over plaintiffs' objections.

Before the evidentiary hearing commenced, plaintiffs filed a motion to strike the testimony of defendant's expert witness, Lawrence Ternan, pursuant to MRE 702. On the day the evidentiary hearing began, May 14, 2007, the trial court denied the motion to strike, holding that Ternan was qualified to testify as an expert in this matter regarding attorney fees. A ten-day evidentiary hearing followed. However, on the third day of the hearing, the trial court narrowed its scope, holding that: (a) time spent preparing the complaint or other pretrial litigation was

compensable; (b) it would allocate the attorney fees so as to award them only for work on the two issues on which plaintiffs prevailed—the intentionally deleted exhibits and side letters, but not the global readings or site plans; (c) it would award attorney fees for the work involved in challenging the $150 labor fee charged by defendant because plaintiffs prevailed on this issue; (d) it would award attorney fees for post-remand work, but not for all of the work; and (e) it would award no more than three percent of whatever the main fees were in the primary action for post-remand work. After extensive, as well as irrelevant and redundant, testimony was received, the evidentiary hearing was completed on February 15, 2008.

On April 24, 2008, the trial court rendered its opinion and order on plaintiffs' motion for attorney fees, costs, and disbursements pursuant to the FOIA, MCL 15.240(6). The trial court held that plaintiffs were entitled to attorney fees and costs as the prevailing party, but not for activities prior to the commencement of the action. The court noted that, although not limited to those factors, it considered the factors set forth in *Michigan Tax Mgt Services Co v City of Warren*, 437 Mich 506; 473 NW2d 263 (1991), in determining a reasonable attorney fee. The court also set forth several findings of fact. First, plaintiffs only prevailed in part on their FOIA requests. Second, this was not a particularly difficult case—plaintiffs knew what they were after and they knew their rights under the FOIA. "Further, Plaintiffs just repeated their requests over and over again and as a result, there was a great deal of redundancy in the case itself." Third, with regard to the hourly rate, plaintiffs' counsel Gary Rossi testified that his regular hourly rate in 2002-2005 was $140 an hour and he never charged over $200 an hour. Fourth, Lawrence Ternan, an attorney with 42 years of experience, testified as an expert and opined that plaintiffs prevailed on about 60 percent of their requests. Fifth, Gerald Fisher opined that plaintiffs prevailed on only 50 percent of their requests and, because plaintiffs' counsels' normal hourly rate was $140, it should be no higher here.

The trial court concluded that, based on the evidence presented, an hourly rate of $165 was reasonable. Citing *Booth Newspapers, Inc v Kalamazoo School Dist*, 181 Mich App 752, 760; 450 NW2d 286 (1989), the court noted that, when a plaintiff prevails only on a portion of a request, the award should be "fairly allocable" to that portion. Then, after noting that this was not a difficult case, the court set forth the number of hours to which plaintiffs' counsels should be credited:

> Plaintiff is entitled to 20 hours of work to prepare the Complaint or other pretrial litigation.
>
> Next, with regard to attorney fees for issues on which Plaintiffs prevailed as to the intentionally deleted exhibits and side letters to the agreements, the court finds that Plaintiff [sic] is entitled to fees for 50 hours of work. The court will further award Plaintiff [sic] compensation for fees incurred for 16 hours in challenging the $150 labor fee. Finally, for the post remand work, the court is satisfied that Plaintiff [sic] is entitled to attorney fees for 60 hours of work, for a total of 146 hours at $165.00 per hour, or $24,090.00 in attorney fees to be awarded in addition to the costs requested.

This appeal followed.

First, plaintiffs argue that the trial court failed to apply any of the procedures required by *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), for determining a reasonable attorney fee under the FOIA. We disagree. A trial court's decision to award attorney fees pursuant to statute is reviewed de novo as a question of law. *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006). However, the award of attorney fees and costs is reviewed for an abuse of discretion. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), modified by *Smith*, *supra* at 522. And, a trial court's findings of fact underlying an award of attorney fees are reviewed for clear error. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

In this case, the trial court relied on the factors set forth in the *Michigan Tax Mgt Services Co*, *supra*—a case repeatedly cited and relied upon by plaintiffs—to support its analysis regarding the amount of reasonable attorney fees plaintiffs were entitled to recover. Now, on appeal, plaintiffs argue that the trial court should have followed the procedures outlined in *Smith*, *supra*, a case not yet decided at the time the trial court rendered its opinion. Nevertheless, plaintiffs claim that the trial court failed to consider "any reliable surveys or other credible evidence of the legal market" in determining the appropriate fee. But, as has long been the rule, it was plaintiffs' burden to prove the reasonableness of their requested attorney fees. *Id*. at 529, 531. In support of their claim for a rate of $380 an hour, plaintiffs' counsels merely offered their own testimony, which included counsel Richard Wilson's testimony that he researched case law and found in a lower court record that Herschel Fink requested $380 an hour and Cameron Evans requested $275 an hour for work on an FOIA matter in *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275; 713 NW2d 28 (2005). On cross-examination, however, Wilson admitted that he did not know if either Fink or Evans were actually awarded their requested fees. As the *Smith* Court noted, "reasonable fees are different from the fees paid to the top lawyers by the most well-to-do clients." *Smith*, *supra* at 533. Rather,

> the reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. 'The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question.' [*Id*. at 531.]

Although it was their burden, plaintiffs failed to present any other evidence as to the fee customarily charged in the locality for similar legal services on FOIA matters. Defendant, however, presented the testimony of Gerald Fisher, a practicing attorney for many years, who had previously been qualified as an expert in the Wayne and Oakland Circuit Courts for the purpose of testifying on the reasonableness of attorney fees in two condemnation cases. Fisher had been a senior partner at Secrest, Wardle, and was the manager of the municipal practice group for about ten years where he reviewed the billings from 12 to 15 attorneys within that practice group. Fisher testified that, in his opinion, a reasonable hourly rate would be $140, at the most, because that was plaintiffs' counsels' normal rate and FOIA law was not their specialty. Further, because a contingency agreement was in place, counsels' hourly rate should actually be less than a full hourly rate. Defendant also presented the testimony of Lawrence Ternan, who was qualified as an expert by the trial court. He had been a practicing attorney for 42 years, and specialized in municipal law. He had reviewed billings from associates and others for over 30 years on a regular basis. Ternan testified that, in his opinion, a reasonable rate for plaintiffs' counsels would be $175 an hour.

Plaintiffs argue that their request for $380 an hour was reasonable when the six factors set forth in *Wood*, *supra*, are considered. The *Wood* Court adopted the guidelines set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), for determining a reasonable attorney fee, which included the following factors: (1) professional standing and experience, (2) skill, time, and labor involved, (3) amount in question and the results achieved, (4) difficulty of the case, (5) expenses incurred, and (6) the nature and length of the professional relationship with the client. *Wood*, *supra* at 588. The trial court, however, is not limited to those factors in determining a reasonable attorney fee. *Id*.

Here, with regard to the first factor, plaintiffs argue that Gary Rossi had practiced law for over 30 years, had handled municipal work since 1992, and had worked with FOIA issues for about 15 years. Rossi testified that, in his career, he had five or six FOIA cases go to litigation, but none went through trial. However, on cross-examination, he testified that he had possibly only worked on one other FOIA case for which he filed a complaint in court. Rossi had never handled a case involving a potentially exempt document under the FOIA. Rossi testified that his regular rate was $140 an hour, until January 1, 2007, when it became $155 an hour. Rossi had never charged over $200 an hour. Rossi's co-counsel, Wilson, testified that he had practiced law for over 20 years, had been involved "peripherally" in some FOIA cases in the past, but this was his first FOIA case as a plaintiff's attorney. He also never litigated an FOIA case as defense counsel. Wilson's regular rate was $140 an hour from 2002 through 2006. In rendering its decision, the trial court noted plaintiffs' counsels' typical hourly rate as well as counsels' reasoning for requesting $380 an hour.

With regard to the second factor, plaintiffs argue that the skill, time, and labor involved in this case was extensive in that it was litigated successfully through to our Supreme Court. They note that 16 boxes of documents pertaining to this matter resulted from their efforts. However, there was witness testimony indicating that thousands of documents were turned over to plaintiffs well before this litigation commenced. The docketing sheets from the circuit court, this Court, and the Supreme Court were admitted into evidence to demonstrate the amount of activity involved in this matter. But, as the trial court noted, volume does not necessarily equate with skill, time, and labor, particularly redundant, unnecessary, or irrelevant labor.

Rossi further testified that it took a lot of skill to proceed with this case because defendant contested all of their requests and it was complicated by the participation of Sandstone Associates Limited Partnership-A (Sandstone). However, the documents requested were (1) intentionally deleted exhibits from the settlement agreement entered into between defendant and Sandstone, which were plainly referenced in the final settlement agreement that was given to plaintiffs prior to their two FOIA requests, (2) side agreements or letters which were also referenced in the documents—five of which were disclosed after the second FOIA request, and two that were refused on a claim of an exemption after Sandstone objected to their release, (3) site plans that did not exist, and (4) global readings that did not exist. In other words, plaintiffs knew about the intentionally deleted exhibits before the complaint in this matter was filed, and had five of the seven side agreements. As to these requested documents, the trial court noted, plaintiffs knew what they were seeking and "just repeated their requests over and over again and as a result, there was a great deal of redundancy in the case itself."

With regard to the third factor, the amount in question and results achieved, plaintiffs argue that the result achieved was a victory in our Supreme Court. While it is true that our

Supreme Court ordered defendant to disclose the intentionally deleted exhibits from the final settlement agreement between defendant and Sandstone, *Coblentz II*, *supra* at 572-573, the only exhibits that existed to be disclosed were draft exhibits G, U, and AA. Fisher testified that the other exhibits that were referenced as "intentionally deleted" either never existed or, if they did, were no longer in existence.

And, our Supreme Court did order defendant to disclose the two side agreements or side letters. Those letters indicated the amount Sandstone would have paid for plaintiffs' properties during a small window of time, but that time had long since passed. Fisher testified that there was essentially nothing of any consequence accomplished by this case on behalf of plaintiffs. Ternan testified that obtaining the two side letters may have had some value to plaintiffs initially because they may have been able to get a higher offer for the release of their deed restriction, but because Sandstone was no longer interested in purchasing their deed restriction, there was no value to the side letters. He questioned whether anything had been accomplished by the pursuit and disclosure of the side letters that benefited these plaintiffs.

Plaintiffs also note that they prevailed on their claim that they were improperly charged a $150 fee for the retrieval of the side letters. Perhaps apropos of how plaintiffs' counsels have litigated this matter, Rossi testified that, for a hearing pertaining to the $150 fee defendant was seeking for retrieving the documents, plaintiffs' counsels billed 29 hours, at a rate of $380 an hour, totaling $11,020. We seriously question whether a paying client would spend $11,020 to save $150. See *Smith*, *supra* at 531.

Plaintiffs also contend that the fourth factor—the difficulty of the case—weighs in their favor and supported their request for almost $500,000 in attorney fees. They primarily argue that the fact that our Supreme Court considered the matter proves its difficulty. However, whether the intentionally deleted exhibits and side agreements had to be disclosed presented issues of law. Defendant either had to honor the FOIA requests by producing the specific documents, if they existed and were not exempt, or not. MCL 15.233(1), 15.243(1)(f). Whether the $150 fee was properly chargeable also was an issue of law. MCL 15.234(3). The case was summarily dismissed by motion in the trial court. Although Rossi testified that there was an exchange of interrogatories and requests for admissions—including plaintiffs' request for 89 admissions apparently at least in part related to these two categories of documents—this was not a fact intensive case that necessitated a protracted discovery schedule. The girth of this matter appears to have grown because of acrimony and overkill, not necessarily complexity. The trial court, which presided over this entire matter from its inception, repeatedly indicated that this was a fairly routine case. Fisher and Ternan both testified that this was a fairly routine case, with the exception of the issue pertaining to the confidential nature of the two side letters.

With regard to the fifth factor, pertaining to the expenses incurred, the trial court awarded plaintiffs' counsels their costs. Fisher had testified that the award of costs should be apportioned at a rate of 50 percent because, in his opinion, plaintiffs only prevailed on two of the four issues. Ternan also testified that the award of costs should be apportioned, but at a rate of 60 percent because there were six issues and three were decided in plaintiffs' favor. The trial court did not apportion the costs awarded.

The sixth factor pertains to the professional relationship with the client and, here, there was testimony that Rossi had known the plaintiffs for a significant period of time, particularly

the Coblentz plaintiffs. According to the record evidence, there was no fee agreement between plaintiffs and their counsels pertaining to this FOIA matter. Leland Coblentz testified that he, in fact, did not expect to pay any legal fees related to this matter. There was, however, a contingency agreement in place in the event that a money damage suit was filed against defendant related to the Sandstone settlement.

We conclude, from the record evidence, that the trial court—which presided over this very lengthy and acrimonious matter—was aware of, and properly considered the required factors in determining a reasonable attorney fee. See *Wood*, *supra* at 588. Therefore, we deny plaintiffs' request to remand this matter for additional proceedings premised on this theory.

Next, plaintiffs argue that the trial court abused its discretion in applying a "procedural due process" rationale to reduce their attorney fees. We disagree.

After addressing the factors that are to be considered in determining the reasonableness of attorney fees, the trial court noted that it was not limited to considering merely those factors. See *Wood*, *supra* at 588. The trial court also noted the purpose of the FOIA attorney fee provision, which "was to facilitate the disclosure of full and complete information regarding governmental affairs," and not to assess attorney fees as a penalty for nondisclosure, as provided under MCL 15.240(5).

In discussing the concept of "reasonableness" with respect to an award of attorney fees in a FOIA matter, the court referenced considerations of due process in the sense that principles of fair play and fundamental fairness should be considered in such an analysis. That discussion was particularly applicable and appropriate in this case where plaintiffs' counsels were requesting, after the ten-day evidentiary hearing, over $620,000 in attorney fees, for years of effort to recover two stale side letters and three draft, as well as unincorporated, exhibits (G, U, and AA) to the settlement agreement between defendant and Sandstone. And, the testimony was clear, plaintiffs' counsels had no fee agreement with their clients concerning this matter and their clients, in fact, did not expect to pay for these legal services—win or lose. The trial court's sentiments actually echoed those later espoused by our Supreme Court with regard to case evaluation sanctions, "[t]he rule, however, is not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls." *Smith*, *supra* at 528. In any case, the trial court was merely indicating that plaintiffs' counsels' request was grossly disproportionate to conduct and circumstances involved here and inappropriately sought to impose punishment for noncompliance with the FOIA, not reasonable compensation for their legitimate efforts. Appellate relief is not warranted.

Next, plaintiffs argue that the trial court abused its discretion in denying their request for attorney fees for pre-complaint activities undertaken to discover the existence of the documents that were subject to the FOIA requests. We disagree.

MCL 15.233 provides:

> (1) Except as expressly provided in section 13, upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body.

MCL 15.235 provides:

> (1) Except as provided in section 3, a person desiring to inspect or receive a copy of a public record shall make a written request for the public record to the FOIA coordinator of a public body.
>
> * * *
>
> (7) If a public body makes a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion of that public record, the requesting person may do either of the following:
>
> (a) Appeal the denial to the head of the public body pursuant to section 10.
>
> (b) Commence an action in circuit court, pursuant to section 10.

MCL 15.240 provides:

> (1) If a public body makes a final determination to deny all or a portion of a request, the requesting party may do 1 of the following at his or her option:
>
> * * *
>
> (b) Commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.
>
> * * *
>
> (6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or any appropriate portion of reasonable attorneys' fees, costs, and disbursements.

Our primary goal with regard to statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). We first consider the language of the statute. *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004). The fair and natural import of the terms employed, in view of the subject matter of the law, governs. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). If the plain and ordinary meaning of the language is clear, judicial construction is not permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

As this Court held in *Local Area Watch v City of Grand Rapids*, 262 Mich App 136; 683 NW2d 745 (2004), after quoting MCL 15.240(6):

> The first criterion for an award of attorney fees in litigation under the FOIA is that a party "prevails" in its assertion of the right to inspect, copy, or receive a copy of all or a portion of a public record. The test is whether: '(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*. at 149 (citations omitted).]

Thus, to be entitled to attorney fees, first, as denoted by the statutory phrase "in an action commenced under this section," there must be a litigation under the FOIA. Second, that legal action must pertain to a particular or specific request for information that was denied; thus, the legal action was reasonably necessary to compel the disclosure of that information. See MCL 15.233(1), 15.235(1). Without a specific request for information, there can be no purported wrongful denial that gives rise to a cause of action. MCL 15.235(4)(d)(ii) and (7)(b); MCL 15.240(1)(b); *Detroit Free Press, Inc*, *supra* at 290. Third, the substantive causative effect of that legal action must be the disclosure of the requested information; hence, the use of the word "prevails." MCL 15.240(b). And, if a plaintiff only prevails on a portion of the request, the award of attorney fees should be fairly allocable to that portion. *Booth Newspapers, Inc*, *supra* at 759-760.

According to plaintiffs, however, failure to award attorney fees for efforts to discover *what* information to request is contrary to public policy. We are dumbfounded by this legally unsupported claim. The statutory language is clear—until a specific request for a public information has been denied, a legal cause of action does not accrue. And, until a party prevails in a cause of action, at least in part, there is no right to attorney fees. Accordingly, pre-complaint efforts to determine what information to request are not compensated in the form of attorney fees. We have been provided with no legal support for plaintiffs' claim that governmental entities must bear the burden and expense of educating, and reimbursing, them for their investigatory efforts on behalf of a client. Accordingly, the trial court properly denied plaintiffs' requests for attorney fees for their pre-complaint efforts.

Next, plaintiffs argue that the trial court abused its discretion by limiting their attorney fees for participation in postjudgment hearings and other legal proceedings related to the pursuit of their attorney fees. We disagree.

The trial court awarded attorney fees to plaintiffs for 60 hours of work for post-remand proceedings. These proceedings primarily occurred after plaintiffs filed a motion for attorney fees, costs, and disbursements pursuant to MCL 15.240(6), requesting $408,310 in attorney fees and $11,326.74 in costs. Defendant filed an answer and objection to this motion and requested an evidentiary hearing to determine the reasonableness of the requested attorney fees and costs. It is well established that, when the reasonableness of a fee request is challenged, the trial court should conduct an evidentiary hearing. *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). Thus, plaintiffs' annoyed claim that they were "forced to participate in the numerous evidentiary hearings" to justify their request for over $400,000 in attorney fees is particularly unfounded.

The evidentiary hearing in this case proceeded through the course of ten days. Presumably because it was their burden to prove the reasonableness of their requests, *Smith*, *supra* at 528-529, plaintiffs' counsels both testified for almost five days. Their cross-examination of defendant's two witnesses constituted about 500 pages of transcript and proceeded over the course of several days. Accordingly, there were "numerous evidentiary hearings" in which plaintiffs' counsels were "forced to participate." Despite the trial court's best

efforts to limit the introduction of redundant and irrelevant testimony, the trial court was unsuccessful and perhaps too lenient. Nevertheless, in light of the record evidence, we conclude that the trial court's award of 60 hours for post-remand work, which primarily consisted of this evidentiary hearing and the filing of several motions, did not constitute an abuse of discretion. See *Wood*, *supra* at 588.

Next, plaintiffs argue that the trial court erred in allowing expert testimony of an attorney who (1) was not an FOIA expert, (2) had never handled a plaintiff FOIA case, a FOIA appeal, or reviewed a plaintiff FOIA bill, and (3) failed to meet the requirements of MRE 702. We disagree. The qualification of a witness as an expert and the admissibility of his testimony are within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In this case, the testimony of defendant's expert witness, Lawrence Ternan, was admitted for the purpose of assisting the trial court in determining the reasonableness of plaintiffs' counsels' requested attorney fees in this FOIA matter.

The evidence included that Ternan had been practicing law for 42 years and specialized in municipal law. He had been a city attorney for the City of Rochester Hills for 28 years and the city attorney for Lake Angelus for five years. In his professional capacity he had extensive experience with FOIA matters, and testified that FOIA litigation was within his practice area. He had been a plaintiff's attorney on a continuing basis for over 42 years and, thus, had significant knowledge as to how much plaintiff's attorneys charge for their services, particularly in Oakland County. Ternan testified that, as a senior partner at his law firm, it was his responsibility to evaluate the billing practices, as well as the billings themselves, of individual attorneys who practiced in various specialties, including municipal law. Although Ternan admitted that he had never litigated a FOIA matter against a municipality, neither had plaintiffs' counsels yet Rossi was offered as an expert on the reasonableness of their requested fees. In any case, it is apparent that Ternan was qualified "by knowledge, skill, experience, training, or education" to render an expert opinion in this matter.

Plaintiffs argue that Ternan's opinions were not based on sufficient facts or data because he did not read every pleading, every brief, every case cited in every brief, every document disclosed by defendant in response to their two FOIA requests, and every other document in some way related to this case. We do not believe that is required by MRE 702. Ternan clearly testified that he reviewed the major briefs, including exhibits, pleadings, plaintiffs' counsels' deposition testimony, billings, and other documents. We are confident that he was sufficiently familiar with the subject matter involved in this case. Further, we reject plaintiffs' claim that

Ternan's testimony was not the product of reliable principles or methods. Ternan clearly considered, and based his testimony on, the six factors set forth in *Wood*, *supra*. And he applied those principles and methods reliably to the facts of this case. In summary, the trial court did not abuse its discretion when it admitted this expert testimony.

Next, plaintiffs argue that the trial court abused its discretion in precluding them from placing into evidence the hours defendant's attorneys spent on this matter. We disagree. At issue in the evidentiary hearing was the reasonableness of plaintiffs' counsels' requested attorney fees. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. The hours that defendant's attorneys spent defending this matter is neither relevant to the issue of how many hours plaintiffs' counsels spent pursuing this matter nor to the issue of their hourly rate. Thus, the trial court did not abuse its discretion in denying the request for admission of this evidence. See *Woodard*, *supra*.

Next, plaintiffs argue that the trial court failed to award them the damages and costs resulting from defendant's vexatious proceeding in the Supreme Court. However, on October 16, 2008, the trial court did enter an order in that regard which is the subject of plaintiffs' appeal pending with this Court, docket number 288764. Plaintiffs' motion to consolidate that matter with this action was denied by order dated January 15, 2009, thus we will not consider this issue here.

Next, plaintiffs argue that the trial court abused its discretion by allocating their attorney fees despite the Supreme Court determination that they had prevailed. We disagree.

First, the Supreme Court's order dated November 8, 2006, did indicate that "taxation of the plaintiffs' costs in this case was appropriate. See MCL 600.2445(2)." *Coblentz v City of Novi*, 477 Mich 1218; 723 NW2d 206 (2006). MCL 600.2445 pertains to appeals and provides:

> (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.
>
> (2) The appellant may be awarded the costs on appeal if he improves his position on appeal.
>
> (3) The appellee may be awarded damages for the delay and vexation caused by the appeal, to be assessed in the discretion of the court, in addition to costs on appeal, if the appellant does not improve his position on appeal.
>
> (4) Costs in the court below may be awarded to the party who ultimately prevails in the case.

The Supreme Court awarded plaintiffs their "costs on appeal" under MCL 600.2445(2) because they *improved their position* on appeal but, contrary to plaintiffs' claim, the order does not state that they prevailed in full under MCL 15.240(6).

Second, as discussed above, the test of whether one "prevails" in litigation under the FOIA is whether "(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." *Local Area Watch*, *supra* at 149. Here, it is undisputed that plaintiffs were seeking four categories of documents: (1) several intentionally deleted exhibits—G, U, AA, T, V, W, BB, GG, MM, NN, and PP, but only G, U, and AA existed to disclose, (2) two side letters, (3) global readings, which did not exist, and (4) site plans, which did not exist.

If plaintiffs had filed, and could have filed, separate FOIA actions for each requested document, as they have repeatedly asserted, they would have filed 15 actions. They would only have "prevailed" on five of the 15 actions because only five actions would have "had the substantial causative effect on the delivery of the information." Thus, they could have recovered their fees, under the mandatory provision of MCL 15.240(6), on only those five actions. The statute specifically contemplates the situation that occurred here by providing for the discretionary award of reasonable attorney fees and costs, if one prevails in part, of "all or any appropriate portion" of such reasonable fees and costs. MCL 15.240(6). As this Court held in *Booth Newspapers, Inc*, *supra* at 759-760, "[w]hen the plaintiff prevails only as to a portion of the request, the award of fees should be 'fairly allocable' to that portion." Thus, plaintiffs' argument that they were entitled to recover their attorney fees for this entire action, as if they had prevailed on the entire action, is without merit.

Finally, plaintiffs argue that the trial court abused its discretion in assessing an attorney fee rate not supported by the testimony and required evidence pursuant to *Smith*, *supra*. We disagree.

As discussed above, *Smith*, *supra*, had not yet been decided at the time the trial court issued its ruling on this matter. And it was plaintiffs' burden to prove the reasonableness of their requested attorney fees. *Id*. at 529, 531. In support of their claim for a rate of $380 an hour, plaintiffs' counsels merely offered their own testimony, which included Wilson's testimony that he researched case law and found in a lower court record that Herschel Fink requested $380 an hour and Cameron Evans requested $275 an hour for work on a FOIA matter in *Detroit Free Press*, *Ins*, *supra*. On cross-examination, however, Wilson admitted that he did not know if either Fink or Evans were actually awarded their requested fees. The record evidence showed that plaintiffs' counsels' typical rate was $140 an hour, until January of 2007, when it became $155 an hour. Fisher testified that, if fees were awarded, the rate should be, at most, $140 an hour. Ternan testified that, based on his familiarity with the relevant legal market, a reasonable rate would be $175 an hour. The trial court held that a rate of $165 was reasonable. In consideration of the record evidence, the trial court did not abuse its discretion in assessing this rate, i.e., it was not outside the range of reasonable and principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In conclusion, there is no precise formula for assessing the reasonableness of an attorney fee, but in "Michigan the trial courts have been required to consider the totality of special circumstances applicable to the case at hand," including the *Wood* factors. *Smith*, *supra* at 529. The *Wood* factors, however, are not exclusive and additional relevant factors may be considered. *Id*. at 530. As our Supreme Court held in *Tax Mgt Services Co*, *supra*, while evidence regarding a reasonable rate of compensation and a reasonable number of hours for the completion of the case may assist the trial court, "the court [is] nonetheless obliged to make an *independent* determination with regard to a reasonable amount of fees." *Id*. at 511 (emphasis in original).

Based on the record facts, it is plainly apparent that the trial court, which had presided over this entire matter from its inception, fulfilled its obligation here.

Affirmed. Costs to defendant as the prevailing party. See MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis