STATE OF MICHIGAN

COURT OF APPEALS

TORGER G. OMDAHL, Plaintiff-Appellant,	FOR PUBLICATION July 13, 2006 9:00 a.m.
v	No. 262532 Iron Circuit Court LC No. 04-003070-CZ
WEST IRON COUNTY BOARD OF EDUCATION, ROBERT HAN, M.D., JAMES QUAYLE, DONALD AUTIO, JAMES BURKLAND, ERIC MALMQUIST, BETH VEZZETTI and CHRISTINE SHAMION, Defendants-Appellees.	Official Reported Version

Before: Sawyer, P.J., and Kelly and Davis, JJ.

SAWYER, P.J.

The primary question presented in the case is whether an attorney who represents himself or herself in a proceeding under the Open Meetings Act (OMA)[1] and prevails is entitled to an award of an attorney fee. Despite the general principle that a party appearing in propria persona may not receive an award of attorney fees, we hold that where that litigant is an attorney he or she is entitled to the award of attorney fees under the OMA if he or she is the prevailing party.

The trial court entered a judgment in favor of plaintiff, concluding that defendants violated the OMA for failing to record the minutes of two closed meetings.[2] Plaintiff, an attorney who has proceeded pro se throughout this litigation, requested an award of attorney fees and court costs pursuant to MCL 15.271(4). The trial court denied the request, and plaintiff appeals. We reverse and remand with instructions to enter an award of attorney fees and costs.

[1] MCL 15.261 *et seq.*

[2] MCL 15.267(2).

This case presents a question of statutory interpretation, which we review de novo.[3] The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature.[4]

Plaintiff argues that he is entitled to an award of attorney fees pursuant to MCL 15.271(4) because defendants violated the OMA. We agree. Under MCL 15.271(4), attorney fees and court costs are to be awarded as follows:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

MCL 15.271(4) mandates the award of actual attorney fees if the person bringing the OMA action "succeeds in obtaining relief." The question whether an attorney representing himself or herself may receive an award of attorney fees under the OMA appears to be one of first impression. In contexts other than the OMA, this Court has reached mixed results on whether an attorney representing himself or herself may recover an attorney fee.

For example, in *FMB-First Michigan Bank v Bailey*,[5] this Court reversed the trial court's award of attorney fees under MCR 2.114 where the attorney-defendants represented themselves. The Court noted that "[b]ecause an attorney is an agent or substitute who acts in the stead of another, a party acting in propria persona cannot truly be said to be an attorney for himself."[6] But the *Bailey* Court apparently overlooked our earlier decision in *Wells v Whinery*,[7] wherein we held that an attorney representing himself was entitled to attorney fees as part of his taxable costs.

In *Laracey v Financial Institutions Bureau*,[8] this Court has also held, in the context of the Freedom of Information Act, that an attorney representing himself is not entitled to an award of attorney fees. In so doing, the *Laracey* Court relied on the Sixth Circuit Court of Appeals holding in *Falcone v Internal Revenue Service*,[9] and in particular the rationale that to allow the recovery of attorney fees to pro se plaintiffs would create a "cottage industry" for attorneys to

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[3] *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

[4] *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005).

[5] 232 Mich App 711, 726; 591 NW2d 676 (1998).

[6] *Id.*

[7] 34 Mich App 626, 630; 192 NW2d 81 (1971).

[8] 163 Mich App 437, 446; 414 NW2d 909 (1987).

[9] 714 F2d 646 (CA 6, 1983).

generate fees when they have no real personal concern in the dispute.[10] We find that rationale unpersuasive.

First, it imputes to the Legislature a motivation that may or may not be correct—we simply do not know if the Legislature had an opinion regarding whether or not to "subsidize attorneys without clients."[11] If this was a significant concern for the Legislature, it presumably would have addressed it by actually writing such restrictions into the statute. It is at least equally as reasonable to conclude that the Legislature did not write such restrictions into the statute because it intended to create the equivalent of "private attorneys general" to enforce statutes such as FOIA and the OMA by allowing for the payment of an attorney fee. It must be remembered that the evil addressed by these statutes is secrecy in government, not the earning of a fee by an attorney. Creating such a "cottage industry" is actually more in keeping with the purpose of the statute than prohibiting it. Governmental units can easily avoid the payment of such fees merely by complying with the FOIA and OMA statutes, which is presumably the desired effect of those statutes. Similarly, governmental units need not be concerned about attorneys pursuing meritless OMA claims in search of fees because the cost of the government's defense against any frivolous claims would be reimbursable under MCR 2.625(A)(2).

Second, even if we presume that the Legislature did not want to subsidize clientless attorneys, a broad rule such as that created in *Laracey* is hardly necessary to achieve that purpose. Such a rule casts too broad a net. In the case at bar, there is no indication that plaintiff sued defendants in search of a fee rather than to vindicate a personal claim.[12]

Third, again presuming that the Legislature wished to avoid rewarding the attorney who finds the case instead of merely reimbursing the case that finds the attorney, denying fees to the pro se attorney hardly accomplishes this goal. A purely fee-seeking attorney would merely need to find a person willing to be named as the plaintiff in the suit, thus entitling the attorney to collect a fee. Plaintiff in the case at bar could easily have avoided this entire issue had he merely named a family member, friend, neighbor, or perhaps even his secretary as the plaintiff. A rule that encourages such charades is absurd.

On the other hand, we do ask: Why should an attorney who chooses to represent himself or herself not be awarded a fee upon prevailing? He or she had to invest his time and effort into the case. And, as Abraham Lincoln is quoted as saying, "a Lawyer's time and advice are his stock in trade."[13] We see no reason why plaintiff should be expected to give away his stock in trade merely because he is seeking to redress a wrong on his own behalf, and in which the public always has an interest, instead of on behalf of a third party. Whether representing himself or a client, he is investing the time. It is time he could have invested on behalf of another client who would have paid a fee.

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[10] *Laracey, supra* at 446.

[11] *Id.*

[12] *Id.* at 446.

[13] See *Jones v Barnett*, 236 Ark 117, 125; 365 SW2d 241 (1963) (Johnson, J., dissenting in part).

What if plaintiff had hired another attorney to pursue this case? Presumably there would be no debate that a fee paid the other attorney could be recovered. Perhaps instead of attorney Omdahl naming his secretary as the plaintiff in this case as we suggested above, he merely should have chosen to be represented by his law partner. For that matter, an interesting question that plaintiff could have posed, but did not, is whether he truly did appear in propria persona in this case. Although he so states on some documents, some of those same documents also claim to be in the name of the firm. And other documents, such as the judgment, merely indicate that plaintiff was represented by Fisher & Omdahl. And, according to the cover page on plaintiff's brief, Fisher & Omdahl is a PLLC, a separate legal entity. Perhaps Torger Omdahl is not entitled to an attorney fee, but Fisher & Omdahl, PLLC, is entitled to one.

But we are not inclined to decide this case on the highly technical point of plaintiff's firm not generating a bill to plaintiff personally. To hold that plaintiff is not entitled to the recovery of a fee merely because a physical bill was not generated would again result in the creation of an absurd rule that exalts form over substance. Indeed, if that were the critical fact in resolving this case, we would merely remand the matter to the trial court with instructions to require plaintiff to present such a bill from his firm.

Finally on this point, we acknowledge that an argument might be made that, under the language of MCL 15.271(4), only an "actual attorney fee" is recoverable and that there is none in a case in which an attorney represents himself. That would be true only if an "actual attorney fee" meant an actual, physical bill from a law firm or the actual payment of a fee by a client to his or her attorney. We do not believe the term "actual attorney fee" can be read so narrowly. Taking the second point first, that the client has had to actually pay the attorney, we are aware of no rule that the fee may not be recovered until after the client has paid the bill. And as for whether the attorney had to actually bill the client, we again dismiss such a requirement as exalting form over substance. Such a requirement could easily be satisfied if Fisher & Omdahl would generate a bill to Mr. Omdahl.

Rather, again turning to the wisdom of President Lincoln, an attorney's stock in trade is his or her time. The actual attorney fee is the actual time invested by the attorney in the case multiplied by his or her billing rate. As used in the statute, the term "actual" is in contrast to the term "reasonable" (the term used under FOIA[14]). It reflects, we believe, not the Legislature's concern with whether a bill has been generated, but with its intent that the full value of the attorney's time be recompensed and not abridged by what a trial judge might deem reasonable. That is, while a plaintiff in an FOIA case may not get his or her full attorney fee reimbursed by the defendant because the attorney charged a fee subject to downward adjustment by a judge, the plain meaning of the OMA provision is that the full attorney fee incurred is to be paid subject only to a demonstration of time spent and customary billing practice.

For the above reasons, we conclude that, under the plain meaning of MCL 15.271(4), plaintiff was entitled to recover attorney fees. He is a person who commenced a civil action to enforce the OMA and he prevailed. Accordingly, MCL 15.271(4) directs that he "shall recover

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[14] MCL 15.240(6).

court costs and actual attorney fees for the action." The amount of the actual attorney fees is the value of the professional time that he invested in the case; that is, the actual number of hours times his actual billing rate.

Furthermore, the trial court erred in not awarding him court costs pursuant to MCL 15.271(4). The statute plainly provides that a prevailing person is entitled to an award of court costs incurred during the course of litigation. Even if we were to agree with defendants and the trial court that no attorney fees are awardable because there was no actual attorney fee incurred, clearly court costs were still incurred and there is no reason not to award them. In other words, where court costs were paid, a cost award is merited. Indeed, under the statute it is mandatory.

The trial court concluded that defendants violated MCL 15.267(2), and plaintiff was obviously a "person" under MCL 15.271(4) who incurred court costs. Further, plaintiff 's action included his amended pleadings because the claim asserted in his amended pleadings arose out of the conduct set forth, or attempted to be set forth, in the original pleading; therefore, those amendments relate back to the date of the original pleading.[15] Accordingly, regardless of the initial difficulty plaintiff had in stating a claim for relief, plaintiff is entitled to all court costs that he incurred as a result of the litigation.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

Davis, J., concurred.

/s/ David H. Sawyer
/s/ Alton T. Davis

[15] See MCR 2.118(D).