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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Gadola, P.J., and Sawyer and Riordan JJ

SPENCER WOODMAN,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

SC: 163382
COA: 353164
Court of Claims No. 17-000082-MZ

GEORGE JOSEPH,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

SC: 163383
COA: 353165
Court of Claims No. 17-000230-MZ

_____/

WOODMAN AND JOSEPH'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

HONIGMAN LLP
Robert M. Riley (P72290)
Rian C. Dawson (P81187)
Cooperating Attorneys, American Civil Liberties Union Fund of Michigan
600 Woodward Avenue
Detroit, Michigan 48226
(313) 465-7000
rriley@honigman.com
rdawson@honigman.com

and

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

Daniel S. Korobkin (P72842)
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6800
dkorobkin@aclumich.org

Attorneys for Spencer Woodman and George Joseph

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What the Michigan Department of Corrections ("MDOC") advocates for in its supplemental brief is not—and should not—be the law. Under the MDOC's view:

- a party does not prevail in full under MCL 15.240(6) when it secures a ruling that the materials fully withheld by a public body are subject to disclosure under FOIA
- pro bono counsel is worth 90% less than paid counsel when assessing a reasonable attorney fee award; and
- a public body whose articulated policy of regularly violating its FOIA mandate to individually review requested records can avoid statutory punitive damages.

The facts here and foundational legal principles embraced in Michigan and across the country demand different results. First, the Court should reverse the Court of Appeals and hold that Woodman and Joseph prevailed in full because they secured the entire audio/visual records they sought and chose not to contest any redactions to those records once the MDOC was ordered to produce them. Second, the Court should hold that the pro-bono nature of a party's representation should not be considered in assessing a reasonable fee award. Finally, the Court should reverse the Court of Appeals and find that statutory punitive damages should be assessed against the MDOC to deter other public bodies from adopting a similar policy of ignoring their clear FOIA mandate to individually review responsive records.

A. Woodman and Joseph Secured a Ruling That the Withheld Records Were Subject to Disclosure, Thereby Prevailing in Full

Michigan law is clear that "[a] plaintiff has prevailed if: (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." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 289; 713 NW2d 28 (2005) (internal quotation and citation omitted). Under this test, Woodman and Joseph no doubt prevailed in full: the MDOC refused to produce any of the requested recordings; litigation seeking the disclosure of the fully withheld recordings ensued; the

Court of Claims ordered the MDOC to produce the records; and the MDOC (eventually) complied. Without a court order, the MDOC would not have produced the requested material, so the lawsuits' "substantial causative effect on the delivery of information" to Woodman and Joseph is clear.

The MDOC claims Woodman and Joseph only prevailed in part because the MDOC ultimately produced partially redacted records. But the limited redactions that the MDOC made (and that Woodman and Joseph did not challenge) do not transform Woodman and Joseph's mandatory fee award into a permissive one, or render their lawsuits any less necessary to obtain disclosure of the fully withheld records. *Walloon Lake Water Sys, Inc v Melrose Tp*, 163 Mich App 726, 734; 415 NW2d 292 (1987), made clear that "a plaintiff 'prevails' in the action so as to be entitled to a mandatory award of costs and fees where he is forced into litigation and ***is successful with respect to the central issue that the requested materials were subject to disclosure*** under the FOIA." (Emphasis added).

In a feeble attempt to distinguish *Walloon*, the MDOC explains that "although the [*Walloon*] plaintiff did not receive the records it sought, it did prevail in receiving a ruling that the requested records [were] subject to disclosure under the FOIA," while Woodman and Joseph, "sought unredacted copies of public records, [yet] only received redacted copies of the records they sought." (Appellee's Supp Br at 32.) Not only does the MDOC confuse the facts here, but it misunderstands the holding in *Walloon*. Woodman and Joseph's lawsuits challenged the MDOC's entire withholding of the requested records, not the propriety of redactions to records produced in response to their requests. Indeed, if the MDOC had its way, Woodman and Joseph would have received ***nothing***. Ultimately, just like the plaintiff in *Walloon*, Woodman and Joseph received "a ruling that the requested records were subject to disclosure under the FOIA." (See Appellants' App'x 422a, May 30, 2019 Order.) Further, the Court of Claims' order reserved Woodman and

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Joseph's right to "make further prayer for relief after [counsel's] review" of the redacted and unredacted videos if they found the redacted versions unsatisfactory. (Appellants' App'x 422a, May 30, 2019 Order; Appellants' App'x 570a, January 29, 2020 Hearing Tr 25:25-26:3.) But to facilitate an end to the litigation, and to conserve judicial resources, after their counsel reviewed the unredacted records compared with the redacted records, Woodman and Joseph declined to challenge the redactions. Put differently, redactions were not the "central issue" of this case. The central issue was disclosure at all.[1]

Thus, the Court of Claims correctly reasoned that the MDOC prevailed neither in whole nor in part because the "[MDOC] came into this case with an assertion that ***under no circumstances*** should anything be revealed. . . . [T]he overall premise was that they should not be required to present anything." (Appellants' App'x 571a-572a, Hearing Tr 28:23-29:5 (emphasis added).) Woodman and Joseph prevailed in full by showing that the circumstances called for the withheld records to be disclosed. And so Woodman and Joseph are entitled to a mandatory award of their reasonable attorneys' fees in prosecuting these actions and obtaining disclosure of the records.

B. Pro Bono and Paid Counsel Are of Equal Value, and the Pro-Bono Nature of a Representation Is Not Relevant to a Reasonable Fee Award

The MDOC contends that because Michigan's FOIA statute refers to awarding counsel

[1] The MDOC fails to recognize that the Court of Claims found redaction unwarranted as a matter of law and thus denied the MDOC's motion for reconsideration. The Court, in its discretion, permitted the MDOC to show Woodman and Joseph's counsel both redacted and unredacted records in camera, at which point Woodman and Joseph declined to seek more relief from the court. (See Appellants' App'x 421a-422a, May 30, 2019 Order; Appellants' App'x 570a, January 29, 2020 Hearing Tr 25:25-26:3.) That Woodman and Joseph did not personally walk away with unredacted recordings does not transform their total legal victory into a partial one. See *Walloon*, 163 Mich App at 734; see also *Int'l Union, United Plant Guard Workers of Am v Dep't of State Police*, 422 Mich 432, 454-455 & nn 43 & 47; 373 NW2d 713 (1985).

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"reasonable" fees rather than "actual" fees, with no carve-out for fees incurred in a pro bono representation, the "pro bono nature of an attorney's representation is an appropriate consideration in assessing the reasonableness of a fee award." (Appellee's Supp Br at 38, 41.) Not only does that argument lack a basis in any federal or Michigan fee-shifting statutes, it also runs contrary to the holdings reached by every single court that has considered the issue. If allowed to stand, the notion that a court could slash an otherwise reasonable fee award because the representation was pro bono would upend pro bono practices statewide, deter lawyers and law firms from providing pro bono services, impede access to justice, and weaken the citizenry's ability to hold public bodies and public officials accountable for violating FOIA and other statutes that have fee-shifting provisions to protect the public interest.

Contrary to the MDOC's argument, a statute's silence on whether the pro-bono nature of a representation is an appropriate consideration does not mean that it is a valid ground for the reduction of fees. If that were true, there would be many unanticipated factors that courts could read into fee award statutes, and an extraordinary lack of certainty and consistency in interpreting such statutes. The Court of Claims' decision—and the Court of Appeals' instruction on remand—subverts the principle embraced by the U.S. Supreme Court that "where there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee." *Blanchard v Bergeron*, 489 US 87, 94; 109 S Ct 939; 103 L Ed 2d 67 (1989). And as the U.S. Supreme Court also explained in the context of federal statutes, "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." *Blum v Stenson*, 465 US 886, 894; 104 S Ct 1541; 79 L Ed 2d 891 (1984).

The MDOC repeatedly asserts that "the Department does not argue that Plaintiffs' counsel

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should be prohibited from receiving a fee award because of the pro bono nature of their representation." (Appellee's Supp Br at 43-44.) But at the same time, the MDOC fails to provide a single example of a court that reduced an otherwise reasonable fee award just because of the pro-bono nature of the representation. This is because such a standard does not exist. As this Court has held time and again, the test for an award of attorneys' fees is whether the fees are reasonable—which the trial court has already determined, and which the MDOC has not disputed.

The MDOC has not cited a single case that stands for the proposition it is encouraging the Court to adopt: that a reduction in attorneys' fees just because an attorney undertakes the representation pro bono would be a reasonable exercise of a court's discretion. Instead, the MDOC cites cases that do not apply, and risks misleading the Court by making critical omissions in the caselaw it does cite. For example, the MDOC argues that "the Third Circuit has explained that although a reduction is not mandatory and should not be routinely applied, 'a district court may, in its discretion, reduce an award because the prevailing party's attorneys were publicly funded[.]'" *Inmates of Allegheny County Jail v Pierce*, 716 F2d 177, 180 (CA 3, 1983). (Appellee's Supp Br at 42-43.) But *Inmates of Allegheny County Jail* is neither persuasive nor on point: it pre-dated *Blum* and *Blanchard*; it involved a governmental official as a defendant owing legal fees to an already publicly funded public agency; it does not address a private practitioner's pro bono services; and the quoted passage is dicta because the Third Circuit ruled that the district court did ***not*** err in refusing to reduce or deny the fee award.

As another example, the MDOC cites the Connecticut Supreme Court's decision in *Benavides v Benavides*, arguing:

> [T]he Connecticut Supreme Court reversed a lower court's fee reduction to a pro bono attorney because the court "made no effort to establish how a reduction in half of attorney's fees solely because of the nonprofit status of the plaintiff's counsel was appropriate[.]" 11 Conn App 150, 156 (1987). However, the court

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> acknowledged that trial courts, "in the exercise of [their] inherent equitable powers[,] may consider factors other than those enumerated in the statutes if such factors are appropriate[.]" *Id.*

(Appellee's Supp Br at 45.) But the MDOC omits the next—and critical—language in the court's decision; the Connecticut Supreme Court went onto hold that "***[w]e therefore cannot consider such a reduction to be anything other than arbitrary and erroneous.***" *Benavides v Benavides*, 11 Conn App 150, 156 (1987) (emphasis added). Though *Benevides* involved an award of fees to a legal services organization and not a private practice attorney representing a party pro bono, the message remains consistent that there is no valid basis for the reduction of attorneys' fees based on whether a party's counsel is paid or pro bono.

Finally, the MDOC's citation to *Betancourt v Guiliani* is in fact consistent with Woodman and Joseph's argument. (Appellee's Supp Br at 43.) The MDOC correctly notes that in *Betancourt*, the district court determined that the reasonable average hourly rate for Paul, Weiss, Rifkind, Wharton & Garrison LLP attorneys should be reduced to $200 per hour. *Betancourt v Guiliani*, 325 F Supp 2d 330, 333 (SDNY, 2004). The reason for this reduction, however, was not the pro-bono nature of the representation, but that the court determined that "Defendants persuasively argue that [the unreduced] rates far exceed the typical rates at which a civil rights attorney would actually charge a paying client." *Id.* But here, the Court of Claims determined that Woodman and Joseph's pro bono counsel's rates ***were*** reasonable for this representation. Under the *Betancourt* decision's logic, Woodman and Joseph's pro bono counsel's fees would not have been reduced.

In sum, there is simply no basis for the Court to embrace the pro-bono nature of a representation as a legitimate ground to reduce an otherwise reasonable fee award. None of the cases the MDOC cites supports such a finding, and no other courts have held that the pro-bono

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nature of the representation should be considered in such circumstances. Michigan should not be an outlier.[2]

C. The MDOC's Practice of Denying FOIA Requests without Review Is Inherently Arbitrary and Capricious and Requires Statutory Punitive Damages

The MDOC attempts frame the issue of whether punitive damages should be assessed against it as an inquiry into whether its "disclosure determination was based on concerns for the security of its penal institution and for the safety of its employees and the inmates in its custody." (Appellee's Supp Br at 45.) That is not the right inquiry.

The question before the Court is whether the Court of Claims clearly erred when it declined to assess punitive damages against the MDOC given its entrenched policy of not conducting an individualized review of requested records. MCL 15.240(7) mandates that a court ***must*** award punitive damages to a FOIA plaintiff if the "public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record." This is exactly what the MDOC did here.

In fact, punitive damages are ***especially*** appropriate here because the MDOC's lawless FOIA denials are not limited to these cases; this litigation uncovered the MDOC's systemic failure to follow FOIA's mandate that every request be individually considered. This is precisely the type

[2] The MDOC's argument that the Court of Appeals [sic—Court of Claims] misapplied *Smith* and *Pirgu* related to the reasonableness of the hours worked and billing rates requested (Appellees Supp Br at 34-37) is not properly before the Court. The MDOC did not appeal the Court of Claims' factual findings that the hours worked and rates charged are reasonable; its Court of Appeals cross-appeal was limited to whether Woodman and Joseph prevailed in full. (Appellants' Supp App'x 646a ("[T]he Department, as cross-appellant, only challenges the lower court's legal determination that Plaintiffs prevailed completely.").) See *Kemp v Farm Bureau Gen Ins Co of Michigan*, 500 Mich 245, 254 n 26; 901 NW2d 534 (2017) (holding that, where the "defendant did not contest [an issue] in the lower courts, and we did not request briefing on the issue," the Court will not consider the arguments "because they are unpreserved.").

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of conduct that punitive damage awards are designed to deter. The Court of Claims recognized the MDOC's rampant FOIA abuses for what they are, and ruled that the MDOC's "actions were arbitrary. Arbitrary, apparently, and habitual." (Appellants' App'x 573a, Hearing Tr 29:12-13.) Despite that factual finding—the MDOC's clear failure to discharge its statutory duties—the Court of Claims and Court of Appeals refused to award statutory punitive damages.

This Court should reject the Court of Appeals' reasoning that, just because the MDOC articulated some post-hoc, hypothetical basis for the records' nondisclosure, it did not behave arbitrarily or capriciously. To the contrary, the Court of Claims already made a factual finding that it did. The MDOC's belated contention in a vague, post-deposition affidavit that the facility had allegedly received threats from the deceased inmate's family, tried to invoke security concerns to retroactively justify its position that Woodman and Joseph's FOIA requests had been properly denied, is unavailing. That proffered rationale had nothing at all to do with, and made no reference to, the content of the materials requested, and there is no suggestion that it motivated the MDOC's decision to deny the requests. FOIA requires that exemption claims reflect the content of the material, after a thorough review. Had the MDOC reviewed the content of the records and determined that there were specific security concerns as a result of that review, the Court of Appeals' conclusion about punitive damages might be tenable. But that is not what the MDOC did here—or ever, as evidenced by the testimony of its FOIA coordinator. The MDOC conducted no review of these materials at all. If that is not an arbitrary and capricious response to legitimate FOIA requests, it is hard to imagine what would qualify for an award of punitive damages.

For these reasons, Woodman and Joseph request that the Court reverse the Court of Appeals' judgment and (i) hold that Woodman and Joseph prevailed in full and are entitled to a mandatory fee award; (ii) hold that the pro-bono nature of a representation is not an appropriate

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consideration in the determination of a reasonable attorneys' fee award, (iii) hold that a state agency's failure to review records responsive to a FOIA request before responding to that request is an arbitrary and capricious practice and subject to statutory punitive damages, and (iv) remand these cases to the Court of Claims for entry of an order:

a. Reinstating the Court of Claims' ruling that Woodman and Joseph prevailed in full in their FOIA cases;

b. Awarding Woodman and Joseph 100% of their attorneys' fees;

c. Awarding Woodman and Joseph $1,000 each in punitive damages under MCL 15.240(7); and

d. Awarding Woodman and Joseph such further relief that the Court considers just and equitable.

Dated: August 5, 2022

Respectfully submitted,

HONIGMAN LLP

By: /s/ Robert M. Riley
Robert M. Riley (P72290)
Rian C. Dawson (P81187)
Cooperating Attorneys, American Civil Liberties Union Fund of Michigan
600 Woodward Avenue
Detroit, Michigan 48226
(313) 465-7000
rriley@honigman.com
rdawson@honigman.com

and

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
Daniel S. Korobkin (P72842)
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6800
dkorobkin@aclumich.org

Attorneys for Spencer Woodman and George Joseph

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2022, I electronically filed the foregoing using the MiFile/TrueFiling System which will send notification of such filing to all registered counsel of record.

Date: August 5, 2022

Respectfully submitted,

HONIGMAN LLP

By: /s/ Robert M. Riley
Robert M. Riley (P72290)
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226
(313) 465-7000
rriley@honigman.com

Attorneys for Spencer Woodman and George Joseph