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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1498-15T4
A-1639-15T4

RICHARD RIVERA,

Plaintiff-Respondent,

v.

MIDDLESEX COUNTY PROSECUTOR'S
OFFICE, JAMES E. O'NEILL, in
his capacity as Records
Custodian for Middlesex County
Prosecutor's Office, TOWNSHIP
OF OLD BRIDGE, and PATRICIA
A. GREEN, in her capacity as
Records Custodian for the
Township of Old Bridge,

Defendants-Appellants.

COLLENE WRONKO,

Plaintiff-Respondent,

v.

MIDDLESEX COUNTY PROSECUTOR'S
OFFICE, JAMES E. O'NEILL, in
his capacity as Records
Custodian for Middlesex County
Prosecutor's Office, TOWNSHIP
OF OLD BRIDGE, and PATRICIA
A. GREEN, in her capacity as
Records Custodian for the

Township of Old Bridge,
Defendants-Appellants.

Submitted January 23, 2018 – Decided March 20, 2018

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket Nos.
L-1939-15 and L-1951-15.

Florio Kenny Raval, LLP, attorneys for
appellants (Christopher K. Harriott, of
counsel and on the briefs).

Pashman Stein Walder Hayden, PC, attorneys for
respondents (CJ Griffin, of counsel and on the
briefs; Ranit Shiff, on the briefs).

PER CURIAM

Defendants, the Middlesex County Prosecutor's Office (MCPO) and James E. O'Neill, the records custodian for MCPO (collectively, MCPO or defendants), appeal from a November 13, 2015 order awarding counsel fees and costs to Richard Rivera and Collene Wronko as prevailing parties in two separate actions brought under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13.¹ We affirm.

¹ Defendants filed two appeals, one from the order as it related to the action brought by Rivera, and a second from the order as it related to the action brought by Wronko. We address both appeals in a consolidated opinion because defendants are appealing from the same order, and they make the same arguments in both appeals.

I.

On January 14, 2015, a police officer shot and killed a man inside his home after the police responded to a report of a domestic disturbance. The following day, on January 15, 2015, plaintiffs filed separate OPRA requests with MCPO and Old Bridge Township, where the shooting occurred.

Plaintiffs are New Jersey citizens who have concerns about, and seek to investigate, the use of force by police officers. Accordingly, Rivera sought fifteen categories of records related to the police-related shooting on January 14, 2015. Wronko sought seven categories of records related to the same incident. Both plaintiffs sought copies of all 911 calls, computer-aided dispatch (CAD) reports, and police dispatch reports. Rivera also sought copies of standard operating procedures and policies (SOPs) currently in effect, except those with security exemptions, and OPRA requests made by other persons or entities related to the shooting.

On February 17, 2015, MCPO responded to both plaintiffs' requests for itself and the township. MCPO granted plaintiffs access to certain records, but denied access to other records. In terms of the denials, MCPO refused to produce the 911 call, the CAD reports, the police dispatch reports, the SOPs, and the OPRA requests made by other persons. MCPO informed plaintiffs that

those requested records were exempted from disclosure under OPRA's criminal investigatory records and security interest exemptions, N.J.S.A. 47:1A-1.1; ongoing investigation exemption, N.J.S.A. 47:1A-3; and privacy interest exemption, N.J.S.A. 47:1A-1.

Rivera and Wronko each filed a verified complaint on April 1, 2015. In their complaints, plaintiffs challenged MCPO's denial of the request for access to the 911 call, the CAD reports, the police dispatch reports, the SOPs, and the OPRA requests made by other persons. Plaintiffs went on to allege that MCPO violated OPRA by "[f]ailing to redact any exempt information from the records responsive to plaintiff's requests while permitting access to the nonexempt portions, in violation of N.J.S.A. 47:1A-5(g)." Plaintiffs also requested that the trial court "review the records in camera and then require [d]efendants to delete or excise from the records the portion(s) which are exempt from public access and promptly permit access to the remainder of the record[.]"

On April 30, 2015, MCPO provided Rivera with copies of the OPRA requests submitted by other persons. MCPO thereafter gave both plaintiffs redacted versions of the 911 call. MCPO, however,

did not give plaintiffs a Vaughn index or any other document explaining why redactions were made.²

On June 10, 2015, the trial court heard oral argument on plaintiffs' requests for access to the records. The trial court also heard arguments on two related matters, where media organizations sought access to the 911 call for the January 14, 2015 police shooting. See NJ Advance Media, LLC v. Middlesex Cty. Prosecutor's Office, No. L-2022-15 (Law Div. Nov. 6, 2015); Home News Tribune v. Middlesex Cty. Prosecutor's Office, No. L-1938-15 (Law Div. Nov. 4, 2015).³ At oral argument, it became apparent that when the media organizations received copies of the redacted 911 call, they also were given a Vaughn index explaining the redactions and a certification. Thus, the trial court ordered MCPO to provide Rivera and Wronko with the Vaughn index and certification.

² Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). "A Vaughn index is comprised of affidavits containing a 'relatively detailed' justification for the claim of privilege being asserted for each document." Paff v. Div. of Law, 412 N.J. Super. 140, 161 n.9 (App. Div. 2010).

³ MCPO appealed the trial court's rulings in the NJ Advance Media and Home News Tribune matters. We have issued a separate opinion addressing those appeals. See Middlesex Cty. Prosecutor's Office v. NJ Advance Media, LLC, No. A-1276-15 (App. Div. Mar. 2, 2018).

On June 12, 2015, the trial court read into the record its decision regarding access to the 911 call. The trial court explained that it had reviewed the full 911 call in camera, and it concluded that the call only needed to be produced in redacted form. In that regard, the court found that the privacy interests of the person making the call exempted the unredacted portions from disclosure under OPRA. The court went on to explain that it was permitting plaintiffs to file fee applications because the redacted version of the call was produced only after the lawsuits were filed. An order memorializing the court's decision was entered on June 24, 2015.

On July 13, 2015, the trial court issued written findings of fact and conclusions of law regarding plaintiffs' requests for the CAD reports, the police dispatch reports, and the SOPs. An order memorializing that decision was entered on August 7, 2015. The trial court ordered MCPO to produce the SOPs and "a Vaughn [i]ndex of CAD entries and dispatch reports that they believe should be redacted or withheld in their entirety, . . . or alternatively, produce those CAD entries and dispatch reports which 'do not discuss or relate to the criminal investigation[.]'" In response to that order, MCPO elected to produce the redacted CAD and dispatch reports, but did not produce a Vaughn index.

Thereafter, plaintiffs, who were represented by the same law firm, filed a joint application for counsel fees. MCPO filed a late response and argued that any award of counsel fees should be reduced because plaintiffs did not obtain unredacted copies of the requested documents and large portions of the documents were exempted from disclosure.

The trial court rejected MCPO's arguments and, on November 13, 2015, it awarded plaintiffs \$20,812.50 in attorney's fees and \$924.65 in costs. The court explained the reasons for its ruling in a written decision. Specifically, the trial court found plaintiffs to be the prevailing parties. The court also rejected defendants' argument that the fee award should be limited because of plaintiffs' alleged "limited success." The trial court noted that as a result of plaintiffs' lawsuits, plaintiffs obtained access to portions of all the records that were initially withheld. The court also found that the number of hours that plaintiffs' attorneys spent on both matters was reasonable and their hourly rates were reasonable.

MCPO filed notices of appeal from the November 13, 2015 order.

II.

In both the Rivera and Wronko appeals, MCPO makes the same two arguments. First, it contends that the trial court erred in ordering the production of redacted CAD and dispatch reports under

OPRA. Second, it argues that the trial court erred in awarding plaintiffs attorney's fees and costs. The first argument was not preserved for this appeal and the second argument lacks merit.

1. The Issue on Appeal

MCPO did not appeal from the trial court's August 7, 2015 order compelling MCPO to either produce redacted CAD and dispatch reports or provide a Vaughn index.

In both notices of appeal, MCPO only identified the November 13, 2015 order as the order being appealed. Moreover, in the accompanying civil case information statements, MCPO confirmed that it was only appealing the November 13, 2015 order. In response to the request to identify the order being appealed, MCPO stated: "Order entered on November 13, 2015, by the Honorable [Judge] awarding attorney[']s fees in the amount of \$20,812.50, plus \$924.65 in costs."

Only judgments or orders designated in the notice of appeal are subject to appeal. See R. 2:5-1(f)(3)(A); 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004) ("[I]t is only the judgment or orders designated in the notice of appeal which are subject to the appeal process and review[.]" (citation omitted)). Further, an appeal of the August 7, 2015 order would be moot because MCPO has already produced the redacted documents in compliance with that order.

2. The Award of Attorney's Fees and Costs

We review awards of counsel fees under an abuse of discretion standard. McGowan v. O'Rourke, 391 N.J. Super. 502, 508 (App. Div. 2007). Determinations regarding counsel fees "will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Ibid. (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)).

An OPRA "requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. A requestor is entitled to attorney's fees "[i]f the court determines that the custodian [of the record] unjustifiably denied access to the record in question[.]" New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 153 (2005). The purpose of the fee shifting provision of OPRA is to ensure "that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving an infringement of statutory rights[,] . . . and to ensure justice for all citizens." Coleman v. Fiore Bros., Inc., 113 N.J. 594, 598 (1989).

Our courts use the "catalyst theory" to determine whether a plaintiff is a prevailing party in a litigation. A plaintiff must demonstrate: "(1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the

relief ultimately secured by plaintiffs had a basis in law.'" Mason v. City of Hoboken, 196 N.J. 51, 76 (2008) (citing Singer v. State, 95 N.J. 487, 494 (1984)).

In determining the amount of counsel fees to award, the court calculates the "lodestar," which is the number of hours reasonably expended by the successful party's counsel, multiplied by a reasonable hourly rate. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009). In calculating the "lodestar," the court considers:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent.

[Id. at 387 (citing R.P.C. 1.5(a)).]

The lodestar may be reduced "if the level of success achieved in the litigation is limited as compared to the relief sought." Death Penalty Moratorium, 185 N.J. at 154 (quoting Rendine v. Pantzer, 141 N.J. 292, 336 (2005)). An award of counsel fees should not, however, be reduced "simply because the plaintiff failed to prevail on every contention raised in the lawsuit." Ibid. (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)). To determine a plaintiff's degree of success, the court "should conduct a qualitative analysis that weighs such factors as the number of documents received versus the number of documents requested, and whether the purpose of OPRA was vindicated by the litigation." Id. at 155. "[S]uccess under [] OPRA—even a high degree of success—might be acquiring 'that one smoking gun record hidden amongst hundreds of pages or . . . it may be the absence of any records.'" Ibid. (citations omitted).

MCPO argues that plaintiffs were not prevailing parties, because plaintiffs requested unredacted copies of the 911 tape, the SOPs, and the CAD reports, and instead received redacted copies of the documents. In other words, MCPO contends that plaintiffs were not awarded their requested relief because the documents that

they ultimately received were redacted. That argument is factually inaccurate and lacks merit.

Plaintiffs did not specifically demand that the requested documents be "unredacted." Their complaints alleged that MCPO violated OPRA by "[f]ailing to redact any exempt information from the records responsive to [p]laintiff's requests while permitting access to the nonexempt portions, in violation of N.J.S.A. 47:1A-5(g)." Moreover, plaintiffs requested that the trial court "review the records in camera and then require [d]efendants to delete or excise from the records the portion(s) which are exempt from public access and promptly permit access to the remainder of the record[.]" Thus, the trial court found that "[b]ased on the language in their respective [c]omplaints, this [c]ourt does not find that Wronko or Rivera were exclusively seeking unredacted versions of their requests."

The trial court also found that, as a direct result of the litigation, MCPO was compelled to produce all of the documents requested by plaintiffs. In their complaints, plaintiffs requested, and ultimately received, the 911 call recording and Vaughn index, the SOPs, the CAD and dispatch reports, and OPRA requests filed by others concerning the shooting. Many of the documents ultimately received were redacted. Nevertheless, the trial court concluded that "making redactions to records does not

limit the success achieved[.]” We discern no abuse of discretion in that ruling and no error of law. McGowan, 391 N.J. Super. at 508.

Finally, the trial court found that counsel's hourly rates and the number of hours expended by counsel were reasonable. Consequently, the court awarded plaintiffs \$21,737.15, consisting of \$20,812.50 in fees and \$924.65 in costs. The record demonstrates that the application for fees and counsel's certification of services were thorough. The certification outlined counsel's qualifications, hourly rate, and compensation in similar matters, and provided a detailed chart of the work counsel performed and the time expended. Accordingly, we discern no abuse of discretion in the amount of fees and costs awarded.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION