COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

WORCESTER, ss. NO. 2022-P-0282

SUPERIOR COURT NO. 1885CV1526A

GATEHOUSE MEDIA, LLC,

Plaintiff-Appellant,

v.

CITY OF WORCESTER,

Defendant-Appellee

On Appeal from a Decision, Order and Judgment of the Worcester Superior Court

BRIEF OF PLAINTIFF-APPELLANT GATEHOUSE MEDIA, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Gatehouse Media, LLC, states that it is wholly owned by Gannett Co., Inc., a publicly held corporation.

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STATEMENT OF THE ISSUES

- 1. In this action under the Public Records Law for records concerning alleged police misconduct, did the Superior Court commit an abuse of discretion in awarding plaintiff Gatehouse Media, LLC, publisher of the *Worcester Telegram & Gazette*, only 46% of the reasonable attorneys' fees it requested, notwithstanding that Gatehouse achieved complete success after trial, defendant City of Worcester was found to have prolonged the litigation with bad faith legal arguments, the issues in the case were significant, and the purposes of fee-shifting under the Public Records Law are to deter government entities from wrongfully withholding records, to incentivize meritorious suits, and to fairly compensate plaintiffs?
- 2. Were the Superior Court's factual findings sufficient to justify the 54% reduction in the attorneys' fees it imposed?
- 3. Should reasonable attorneys' fees and costs be awarded for this appeal?

STATEMENT OF THE CASE

A. Nature of the Case

This is an action under the Public Records Law, G.L. c. 66, §§ 10 and 10A. The Public Records Law is intended to promote the important public policies of government transparency and accountability by requiring public entities, including municipalities, to provide access to public records unless a specific exemption permits them to be withheld. *Id*.

When a municipality denies a request for public records, the requester may bring an enforcement action in Superior Court. G.L. c. 66, § 10A. In most circumstances, including those here, a successful plaintiff is presumptively entitled to an award of reasonable attorneys' fees and costs. *Id.* This fee-shifting presumption was added to the Public Records Law in 2016 to deter government entities from violating the law and to fairly compensate plaintiffs who bring meritorious lawsuits.

In June 2018, Plaintiff Gatehouse Media, LLC, ("Gatehouse"), the owner of the *Worcester Telegram & Gazette* newspaper, submitted requests to the City of Worcester ("the City") for records relating to police internal affairs investigations. (R.A. I: 308). Binding Appeals Court precedent – of which the City was aware because it involved the Worcester Police Department itself – holds that such records are public and not exempt from disclosure as "personnel" records. G.L. c.

4, § 7, cl. 26(c). Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 9-10 (2003). Nonetheless, the City refused to provide most of the records requested. (R.A.II. 212-216). Among other asserted reasons, the City invoked the very "personnel" records exemption that this Court had previously held inapplicable. (R.A.II. 215).

Gatehouse sued. The City fought back vigorously, asserting that ten different discretionary and statutory exemptions applied to the records at issue, and making arguments the Court later found were advanced in bad faith. (R.A.II 275; 397-399). Due in large part to the City's aggressive but meritless defense, the litigation lasted three years, culminating in a four-day bench trial. (R.A.I 11-12).

On June 2, 2021, the Superior Court (Kenton-Walker, J.), issued a 35-page decision in Gatehouse's favor. (R.A.II. 211). The court held that the City's claims of exemption were legally unsound, and that the City had failed to sustain its burden of proof to withhold any record. (R.A.II. 211-245). After the decision, the City provided Plaintiff all the documents it had requested. (R.A.II. 399). In a further decision dated January 26, 2022, the Superior Court found that the City had acted in bad faith by relying on specious arguments, including its invocation of the personnel records exemption, and imposed the first-ever award of punitive damages in a public records case. (R.A.II. 396-399).

However, on the same date, the Superior Court awarded Gatehouse less than half of the attorneys' fees it had requested. (Add. 59). Gatehouse sought compensation for 582.7 hours that its attorneys spent litigating the case through a motion for a preliminary injunction, cross-motions for summary judgment, trial preparation, trial, and post-trial proceedings. (R.A.II 269-359). The Superior Court found that only 46% of this time was compensable, deeming the remainder "excessive, duplicative, and redundant." (Add. 63). The court reached this result by first deducting all time spent on two motions, and then slashing the remaining hours by 50%. (Add. 63). It did so even though it found Gatehouse's counsel to be "experienced and capable," deemed "[t]he issues at stake" to be "significant," noted that the case "presented complex factual issues," and found that some of the fees resulted from the City's litigation tactics and "bad faith reliance" on inapplicable exemptions. (Add. 61-63). The court did not explain why it decided to cut fees across the board for the whole case, nor did it explain how it determined the degree of the reduction. (*Id.*).

Gatehouse appeals from the Superior Court's unduly low award of fees, and the amount of the resulting final judgment.

B. Factual Background and Prior Proceedings

1. The Public Records Requests and the City's Responses.

On June 6, 2018, Brad Petrishen, a reporter the *Worcester Telegram & Gazette*, made two public records requests to the City of Worcester pursuant to the Public Records Law, G.L. c. 66, § 10. (R.A.II 212). The first request was for documents related to police internal affairs investigations arising out of twelve identified police incidents. (*Id.*) ("First Request"). The second request was for lists of internal affairs investigations and their outcomes – known as "concise officer histories" – for seventeen Worcester police officers. ("Second Request"). (*Id.*).

The City initially agreed to produce most of the records, subject to the payment of fees. (R.A.II. 212). On June 19, 2018, Lt. Michael Hanlon of the Worcester Police Department informed Petrishen that four of the twelve internal affairs investigations were still pending and were therefore exempt under exemption (f) to the Public Records Law, for "investigatory materials necessarily compiled out of the public view." G.L. c. 4, § 7, cl. 26(f);(R.A. II. 212). He stated that the remaining eight investigation files, and the concise officer histories, would be made available subject to redaction and payment of \$3,775 in fees. (R.A.II. 213).

Petrishen asked the City to provide a separate fee estimate for the concise officer histories, and was told their production would cost \$133. (R.A.II. 213). Petrishen paid that amount by check on July 10, 2018. (R.A. II. 213).

In July 2018, however, the City had a change of heart. City Attorney Janice Thompson testified that she learned from a lawyer in City's litigation department (she could not say which one) that the officers named in the Second Request were defendants in pending civil rights lawsuits. (R.A.II. 218). Allegedly based on that fact, the City sent a supplemental response to Petrishen dated August 7, 2018, stating that the City would withhold the concise officer histories because they "are substantially related to . . . ongoing litigation" and are therefore exempt under exemption (d) to the Public Records Law. (R.A.II. 213).

Exemption (d) to the public records law, set forth in G.L. c. 4, § 7, cl. 26(d), applies to "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." G.L. c. 4, § 7, cl. 26(d). No previous case had ever held that this "policy positions" exemption applied to police officer disciplinary histories, to internal affairs records, or to any record "related" to litigation. In addition, the City invoked exemption (f) (set forth above), and

exemption (c), relating to "personnel . . . files or information," to withhold the concise officer histories. (R.A.II 213-214).

On September 13, 2018, the City informed Petrishen that contrary to Lt. Hanlon's earlier representation it would withhold six of the twelve internal affairs investigation records subject to the First Request under exemption (d) for the same reason: they were "related" to pending court cases. (R.A.II at 214). The City stated that three other investigations were ongoing (and therefore subject to exemption (f)), but that it would release the records of the final three investigations subject to redactions. (*Id.*).

2. Gatehouse Files this Action and Moves for a Preliminary Injunction.

Gatehouse filed this action on October 2, 2018. (R.A.I. 7). With its complaint, Gatehouse submitted a motion for a preliminary injunction ordering the City to provide the concise officer histories. (R.A.I. 70-71). Gatehouse noted that the State Police routinely releases similar records, and submitted an example. (R.A.I. 34). Gatehouse also filed a 13-page memorandum of law refuting the City's claims that the records were subject to exemptions (c), (d), and (f). (R.A.I. 72-84).

On October 15, the day before the hearing on the motion for a preliminary injunction, the City filed an 18-page opposition, along with an affidavit of counsel and 67 pages of exhibits. (R.A.I 85-176). In its opposition, the City made several new arguments to support its denial of the records. Among other things, the City

asserted that protective orders governed the discovery of the requested records in pending federal civil rights cases in which the relevant officers were defendants, and thus the concise officer histories "should remain protected pursuant to the inherent powers of the federal court." (R.A.I. 96). The City also newly argued that decisions of the Supervisor of Records of the Secretary of State's Office declining to opine in cases concerning litigation supported the conclusion that documents related to litigation were subject to exemption (d); that any pending charges cannot be disclosed under exemption (f); that Gatehouse's previous efforts to modify a protective order in a prior federal case showed that the concise officer histories were exempt; and that a Superior Court decision in 2010 justified the City's invocation of the personnel records exemption. (R.A.I. 91-99).

On November 19, 2018, the court (Donatelle, J.), denied the motion for a preliminary injunction. (R.A.I. 177). The court rejected the City's argument that the concise officer histories are "personnel" files, but held that it was "not in a position to make a finding that the records at issue are subject to disclosure under the public records law" because "some of the complaint records are subject of dispute in active litigation subject to a protective order entered by the federal district court." (R.A.I. 178).

3. The City Produces Heavily-Redacted Investigation Records.

Meanwhile, on November 1, 2018, and February 22, 2019, the City provided Petrishen with three of the investigation files sought in the First Request. (R.A.II. 215-216). The City heavily redacted the records, however, including by striking their conclusions – all information about whether a charge was sustained and what discipline was imposed – invoking the "personnel records" exemption. (R.A.II. 215).

4. Gatehouse Moves for Summary Judgment on All Requested Records.

Between November 29, 2018 and June 7, 2019, Gatehouse and its attorneys worked to prepare a comprehensive motion for summary judgment as to all records Petrishen had requested in the First and Second Requests. (R.A.II 338-341). Gatehouse prepared a 20-page memorandum of law, (R.A.I. 190-210); a chart of each requested record showing its production status and the exemptions claimed by the City, (R.A.I. 211-212); an eight-page statement of undisputed material facts (R.A.I. 268-275); a six-page affidavit of Brad Petrishen (R.A.I. 287-292); and an appendix containing some 30 exhibits. (R.A.I. 293-295).

In addition to the issues covered in the preliminary injunction brief,
Gatehouse's summary judgment memorandum addressed the City's new
arguments in support of its withholdings and redactions. First, Gatehouse attached
copies of the protective orders from the eight federal civil rights cases on which the

City was relying to withhold both the concise officer histories and the investigation files. (R.A.I. 294-295). Gatehouse's memorandum of law explained why, under the terms of the protective orders and applicable precedent, they did not permit withholding the records. (R.A.I. 199-201).

Second, Gatehouse's motion briefed the question of whether the investigation records were subject to the exemption for so-called "investigatory" materials, as the City claimed.¹ (R.A.I. 202-204).

Third, Gatehouse addressed the City's argument that the conclusions of the investigation reports, which were redacted from the investigation files after the preliminary injunction ruling, were exempt under the "personnel" records exemption, G.L. c. 4, § 7, cl. 26(c). (R.A.I. 204-205).

Fourth, Gatehouse addressed the City's new argument that the names of all complaining witnesses must be redacted from any records produced in the case under the exemption for "materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." G.L. c. 4, § 7, cl. 26(c). Gatehouse pointed out that the complaining witnesses in some cases had already been publicly identified, and

¹ Gatehouse had previously briefed this issue only as to the less-detailed concise officer histories. (R.A.I. 79-81).

attached complaints and other records demonstrating as much. (R.A.I. 206, citing summary judgment exhibits 25-30).

Fifth, Gatehouse addressed the City's argument that it had properly redacted the disclosed investigation files under additional statutes, including G.L. c. 41, § 97D, for records relating to reports of sexual assault and domestic abuse; under G.L. c. 66, § 10B, for records relating to the address and telephone number (but not the names) of victims of adjudicated crimes; and G.L. c. 119, § 60A, for records about juvenile offenders. (R.A.I. 207-208).

Between November 2018 and June 2019, Gatehouse's counsel spent approximately 104.6 hours to prepare the motion for summary judgment and its related materials. (R.A.II. 338-341).

5. The City Cross-Moves for Summary Judgment.

The City cross-moved for summary judgment, filing a 20-page consolidated memorandum in support and opposition to Gatehouse's motion, along with supporting affidavits. (R.A.I. 221-240; 299-304). In turn, Gatehouse filed a reply brief and opposition to the cross-motion. (R.A.I. 241-260). Among other things, Gatehouse's memorandum addressed in more detail the City's arguments relating to the statutes supporting its redactions, (R.A.I. 253-256 § 10) argued that to the extent the Court could not determine whether a particular exemption applied to a document, it should order the production of a "*Vaughn* index," similar to a

privilege log, to give the plaintiff and the court fair notice of the factual bases for the claims of exemption. (R.A.I. 256-257). Gatehouse also corrected certain factual misstatements in the City's memorandum. (R.A.I. 257-259). Gatehouse's counsel spent 26.1 hours preparing this 20-page opposition.² (R.A.II (entries from July 15 through August 1, 2019)).

6. The Superior Court Denies the Summary Judgment Motions.

On December 17, 2019, the court (White, J.) issued a three-page decision denying both summary judgment motions. (R.A.I. 305). Notwithstanding the absence of any facts in dispute, the court held that it could not determine whether the records are exempt "without further inquiry into their precise nature," and ordered the clerk to "schedule the matter for trial." (R.A.I. 306-307). The Court also ordered the City to produce a *Vaughn* index itemizing all the records in dispute, but did not set a deadline for it to do so. (R.A.I. 307).

7. Gatehouse Suggests Measures to Streamline the Proceeding.

At a final pretrial conference on January 30, 2020, the court scheduled the matter for trial nine months later, on November 2, 2020. (R.A.I. 6). At the hearing, the Court ordered the City to produce the required *Vaughn* index within 120 days, or by May 29, 2020. (R.A.II. 8). However, on April 27, 2020, the Supreme Judicial

² The City, in turn, filed a six-page reply in response to the opposition. (R.A.I. 261-266).

Court issued COVID-19-related order tolling all court-imposed deadlines "unless otherwise specifically ordered by the applicable court." (R.A.II. 9). The City informed Gatehouse that as a result it did not intend to produce its *Vaughn* index until August 14, 2020. (*Id.*).

The Public Records Law provides that "the superior court shall, when feasible, expedite [any] proceeding" to enforce the statute. G.L. c. 66, § 10A. As of spring 2020, the case had been pending for more than 18 months, without a meaningful determination of any legal issue. At the same time, the salience of the records at issue increased in May and June 2020, when the City of Worcester, like the rest of the nation, was convulsed by protests demanding increased accountability for police officers who commit misconduct. (R.A.II 9-11).

On June 16, 2020, in light of the unusual procedural history of this case, the societal context, and the statutory directive to accelerate cases of this nature, Gatehouse filed a motion to expedite the proceeding. (R.A.II. 4). The motion requested that the City be ordered to produce its *Vaughn* index by July 17 (before the August 14 date but more than 90 days after the original date set by the Court), followed by conferencing to narrow the areas of dispute, and a prompt hearing to resolve remaining issues in the case. (R.A.II. 12-13). The City opposed the motion. (R.A.II. 19). On July 7, 2020, the Court denied it, stating that the schedule for the case was "reasonable." (R.A.I 10).

On October 13, 2020, the court (Kenton-Walker, J.) held a trial assignment conference for the trial scheduled for November 2. (R.A.I. 11). At the conference, Gatehouse made another suggestion to streamline the case: that the court, based on the summary judgment briefing, make certain legal rulings about the applicability of the claimed exemptions before trial, so as to distill and narrow the issues. (R.A.II. 51). These included the question of whether conclusions of internal affairs investigations may be withheld under the "personnel" exemption, and other matters briefed by both parties in the cross-motions for summary judgment. (*Id.*).

The trial judge, however, declined to adopt this suggestion, explaining that "[if] I were to sit there and have Mr. Pyle argue in front of me his basic four core issues and I have you argue your issues, I am in a sense rehearing the motion for summary judgment . . . [B]eing deferential to my colleagues, I'm not inclined to revisit a summary judgment that's already been decided." (R.A.II. 53). The court stated: "I think we need to just sort of – I hate to say this – muddy [sic] through this, which is for people to show up here on November 2nd," the first day of trial. (*Id.*).

The court then requested that both parties produce "trial memoranda" setting forth all the legal issues for the court to decide.

And I think you can frame the issues to me in a trial memoranda -memorandum each of you can prepare, and you can do that ahead of time. And if -- and, granted, if there's stuff in the summary judgment record that is pertinent to it, great, if there might be additional things you might want to put into it. And the reason for the trial memorandum -- memoranda is each of the respective positions that you have on what you feel -- each side feels are the core issues that I have to decide.

(R.A.II. 53-54).

8. Gatehouse's Trial Memorandum and the City's Shifting Positions.

Over the next two weeks, Gatehouse's counsel prepared the trial memorandum the Court had requested. (R.A. 346-347 (billing entries from October 16 through October 27, 2020)). In substantial part, the memorandum summarized the developments in the case since the summary judgment briefing a year earlier, and addressed legal issues not previously argued. (R.A.II. 98). For example, it addressed the City's Vaughn indexes, which had been produced on August 14 and September 2, followed by a revised index on October 16. (R.A.II. 102). After producing the initial Vaughn index, on August 28, 2020, the City announced that in light of the nationwide discussion over police misconduct, it would no longer withhold the conclusions of investigation reports under the "personnel" records exemption. (R.A.II. 102-103; 120-121). However, it did not produce these conclusions to Gatehouse. Rather, in a revised index submitted on October 16, the City newly shifted the basis for withholding those records to the "policy positions" exemption in G.L. c. 4, § 7, cl. 26(d). (R.A.II. 120). Gatehouse argued in its trial memorandum that notwithstanding its "policy" change, the issue of the City's prior reliance on the personnel records exemption was not moot. (R.A.II 120-121).

In addition, the trial memorandum addressed the City's new position that it should prevail in the case if the exemptions it cited were applicable at the time it rejected the requests, even if they were no longer applicable at trial. (R.A.II. 114). Gatehouse marshalled the caselaw holding that where a claim is equitable in nature, the court's remedy must be adapted to the facts existing as of the time of judgment. (R.A.II. 114-116). It also argued that the City should not be permitted at trial to assert new exemptions beyond those listed in its *Vaughn* index (R.A.II. 109-111).

9. Trial and Proposed Findings and Rulings.

Trial was held over four non-consecutive days in November and December 2020, and January 2021. (R.A.I. 11-12]). The sole witness at trial was City attorney Janice Thompson. (R.A.II 217). The parties also prepared and delivered opening and closing arguments.

After trial, the Court asked that both parties submit proposed findings of fact and rulings of law. Gatehouse submitted its 41-page request for findings and rulings on December 23, 2020. (R.A.II. 130-170). The bulk of the work on that document consisted of preparing 14 pages of proposed factual findings based on the trial testimony and admitted exhibits, with specific reference to the date and time of the testimony cited. (R.A.II. 130-143). Counsel spent 23.6 hours preparing the proposed findings of fact and rulings of law. (R.A.II. 349 entries between

December 15 and December 23, 2020)). The City filed its own proposed findings and rulings. (R.A.I. 11).

10. The Court's Findings of Fact and Rulings of Law.

On June 2, 2021, the Court issued a 35-page decision in Gatehouse's favor. (R.A.II. 211). The Court held that City had failed to demonstrate that the principal public records exemptions it relied upon, (d) for "policy positions" or (c) for "personnel" records, applied to any portion of the records. (R.A.II. 227-231, 239-242). As to the "personnel" exemption, the Court found that the City had been aware of the controlling 2003 Appeals Court decision holding it does not apply to internal affairs records, "and should have applied it properly." (R.A.II. 242). The Court held that it could not determine the applicability of certain other exemptions, most notably the claim that the names of complainants could be redacted, without additional particularization of the issues. (R.A.II 242-243). It therefore ordered the City to produce the records to Gatehouse in redacted form and to its counsel in unredacted form subject to a protective order, and directed the parties to confer and narrow their differences before making any further application for rulings. (R.A.II 243-245).

On July 2, 2021, the City provided Gatehouse with copies of the "concise officer history" records that were the subject of the Second Request, wholly unredacted. (R.A.II. 252). Notwithstanding that the City had insisted throughout

trial that the complainant names reflected in those histories are exempt under G.L. c. 4, § 7, cl. 26(a), (c), and (f), and that their release would damage the public interest, the City did not redact the names or any other information from the documents. (*Id.*).

On August 2, 2021, pursuant to the lower court's order, the City produced the twelve internal affairs investigation files at issue. (R.A.II. 252). Eight of the files were produced wholly unredacted. (*Id.*). The other four contained minimal redactions, consisting mostly of social security numbers. (*Id.*). After reviewing the files, Gatehouse determined that it had no need to further contest the minimal redactions in those four files. (*Id.*).

11. Gatehouse Moves for Attorneys' Fees and Costs, and Seeks Punitive Damages and Injunctive Relief.

Under the Public Records Law, a requester of public records is presumptively entitled to an award of reasonable attorneys' fees and costs when the requester "obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of a complaint." G.L. c. 66, § 10A (d)(2). Having received all the records it requested by court order, Gatehouse filed a motion for attorneys' fees and costs on October 29, 2021. (R.A.II. 269).

Gatehouse's motion sought compensation for 582.7 hours of the professional time of two attorneys and one paralegal. At attorney rates ranging from \$250 to \$470 per hour, the requested fees added up to \$214,467.00. In addition, Gatehouse

sought costs of \$3,228.05. (R.A.II. 269). Gatehouse supported its motion with an affidavit of counsel setting forth counsel's qualifications, explaning what the work entailed, and stating that the hours spent were reasonably necessary to the successful prosecution of the case, (R.A.II 281-286). Gatehouse reduced its counsel's customary Boston, Massachusetts billing rates to match prevailing rates in Worcester, and supplied evidence in support of the rates requested. (R.A.II. 282-284, 294-334). Gatehouse also noted that it had eliminated from its request certain hours that were not necessary to the case. (R.A.II. 285).

On the same date, Gatehouse moved for an award of permanent injunctive relief and punitive damages under G.L. c. 66, § 10A. (R.A.II. 249). Under the Public Records Law, an award of punitive damages can be made "[i]f a requestor has obtained judgment in superior court in a case under this section and has demonstrated that the defendant agency or municipality . . . did not act in good faith" G.L. c. 66, § 10A. Such damages are payable to the "Public Records Assistance Fund" established by the legislature. *Id.* Gatehouse argued that the court's findings established that the City knowingly applied exemptions (c) and (d) in bad faith. (R.A.II. 251-262).

12. The Superior Court Finds the City Acted in Bad Faith and Imposes Punitive Damages.

On January 26, 2022, the Court granted Gatehouse's motion for punitive damages, finding that "the city did not act in good faith" when withholding

materials under exemptions (d) and (c), and ordered the City to pay \$5,000 to the Public Records Assistance Fund pursuant to G.L. c. 66 § 10A. (R.A.II. 399). The court held that "the plain language of exemption (d) does not allow a party to withhold requested documents because they are related to ongoing litigation and/or their release could impact that litigation," as the City had argued. (Id.). The court found that the City "cherry-picked certain language" from controlling cases in support of its position, "taking it out of context" and ignoring its central meaning. (Id.). "While the court appreciates that counsel may at times advance novel legal arguments to zealously represent a client, counsel may not misrepresent to the court what cases and other materials stand for." (R.A.II. 398). Further, the court ruled that the City had "acted improperly" in invoking the exemption for "personnel files, to withhold dispositions found in the investigation files." (Id.). The City, the Court held, simply disregarded the 2003 Appeals Court decision that such determinations are not "personnel" records. (Id.).

13. The Court Awards a Fraction of the Requested Attorneys' Fees.

On the same date, the Superior Court issued a six-page decision and order on Gatehouse's motion for attorneys' fees and costs. (Add. 59). The court first held that no exception to the presumption set forth in G.L. c. 66, § 10A applied, and

³ The court did not issue a permanent injunction, deeming the remedy unnecessary under the circumstances. (R.A.II. 399-400).

thus Gatehouse was entitled to its reasonable fees and costs. (Add. 59-60). The Court then made several findings that would support a fully compensatory award. "From the pleadings submitted in this case, and the court's observations during trial and motion hearings, the plaintiff's attorneys were experienced and capable." (Add. 61). Further, "[t]he issues at stake were significant. The case presented complex factual issues as to what records were exempt" from disclosure. (Add. 61). In addition, "some of the fees came from responding to the city's filings, including continually responding to the city's bad faith reliance on exemptions (c) and (d), as well as deciphering the verbose, confusing, and incomplete Vaughn [indexes]." (Id.) The court also acknowledged "that Gatehouse was successful in this litigation," and that the City "cannot complain that fees for work made necessary by its own litigation tactics are excessive in light of the results achieved." (Add. 63).

Nonetheless, the Superior Court proceeded to slash Gatehouse's requested hours by 54%, from 585.7 to 270.1. First, it excluded all of counsel's work on two specific motions. It held that the 22.2 hours Gatehouse spent on its motion to expedite the proceeding in June 2020 amounted to "tilting at windmills," relying on issues "unrelated to this case." (Add. 62 and n.2). The court also excluded the 20.3 hours counsel spent preparing Gatehouse's application for fees, stating only that the hours were "unreasonable." (R.A.II. 405).

After these deductions, the court was left with 540.2 hours. The Court then cut those hours by 50% on the ground that they were "unreasonable as excessive, duplicative, and redundant." (R.A.II. 405). The court offered only the following rationale:

A detailed review of the timesheets shows excessive hours spent on particular aspects of the case, along with duplication of work, overstaffing, and some block billing. Both Attorneys Pyle and Lambert billed for preparation and attendance on motion hearings and trial; however, only Attorney Pyle made presentations. In addition, both attorneys billed many hours for drafting the memoranda for the preliminary injunction, summary judgment, trial, and the final request for findings and rulings. Attorney Lambert spent many hours researching the applicable law. However, the legal arguments raised were virtually the same at each stage of the proceedings, and the written submissions were duplicative, such that the time spent was excessive and redundant.

(Add. 62).

The court did not assign any particular weight to any of these factors.

Rather, it simply ruled that, "[b]ased on all of the above, and considering the billing as a whole, the court finds that it is reasonable to reduce the number of billable hours by 50% to 270.1." (R.A.II. 405). Applying a blended hourly rate of \$365.00 per hour for the two attorneys who worked on the case, 4 the court's total

⁴ Both attorneys worked a similar number of hours on the case, so this averaged rate did not have a significant impact on the court's ultimate award. Gatehouse does not contest the blended rate here, even though it resulted in a rate below Worcester market rates for Attorney Pyle. (R.A.II. 276-278).

fee award came to \$98,586.50, or 46% of the \$214,467.00 Gatehouse requested. (R.A.II. 405).

Gatehouse timely appealed. (R.A.II. 409).

SUMMARY OF THE ARGUMENT

The Superior Court abused its discretion and committed clear error by awarding less than half of the attorneys' fees Gatehouse requested for the prosecution of this fully successful public records case. The fee-shifting provision of the Public Records Law, G.L. c. 66, § 10A, is intended to deter agencies and municipalities from withholding public records without basis, and to incentivize competent counsel to bring suit to enforce the statute. The lower court's cursory findings do not adequately support its decision to impose a 54% reduction in the requested hours. The lower court also committed an error of law and an abuse of discretion in refusing to award Gatehouse any fee for time spent on its motions for attorneys' fees and to expedite and streamline the case. The Superior Court's parsimonious award threatens the purposes of the Public Records Law by absolving the City of the financial consequences of its decision to withhold records in bad faith, and by dissuading future plaintiffs and their counsel from bringing public records cases in the future. Additionally, the Court should award appellate attorneys' fees and costs to prevent dilution of the award and to carry out the policies of the Public Records Law.

ARGUMENT

A. Standard of Review

"The basic measure of reasonable attorney's fees is a 'fair market rate for the time reasonably spent preparing and litigating a case." *Stowe v. Bologna*, 417 Mass. 199, 203 (1994), abrogated on other grounds by *Fabre v. Walton*, 441 Mass. 9 (2002), *quoting Fontaine v. Ebtec Corp.*, 415 Mass. 309, 326 (1993).

The first component of the basic measure amount is the amount of time reasonably expended on the case. The judge should begin [her] inquiry with the amount of time documented by the plaintiff's attorney. Then the judge decides whether this amount of time was reasonably expended. The judge should not only consider the plaintiff's financial interests at stake but also the plaintiff's other interests sought to be protected by the statute in question and the public interest in having persons with valid claims under the statute represented by competent legal counsel. The second component of the basic measure amount is the amount of a reasonable hourly rate. This amount should be the average rate in the community for similar work by attorneys with the same years' experience.

Stowe, 417 Mass. at 203-204 (internal citations omitted), quoted in Killeen v. Westban Hotel Venture, L.P., 69 Mass. App. Ct. 784, 790 (2007).

In addition to the "lodestar" factors set forth above, the motion judge may "consider many of the factors articulated in *Linthicum v. Archambault*, 379 Mass. 381, 388-89 (1979), i.e. the nature of the case and the issues presented, the time and labor required, the amount of damages involved, and the result obtained." *Killeen*, 69 Mass. App. Ct. at 791; *see Fontaine*, 415 Mass. at 324-25; *Heller v. Silverbranch Constr. Corp.*, 376 Mass. 621, 629 (1978).

On appeal, this Court "reviews an award of attorney's fees for abuse of discretion, and the judge's decision will be reversed only if it is clearly erroneous." *Lydon v. Coulter*, 85 Mass. App. Ct. 914, 914 (2014). "The appellate party challenging the award must demonstrate that the trial judge has traveled outside the boundaries of the range of reasonable alternative measures." *City Rentals, LLC v. BBC Co.*, 79 Mass. App. Ct. 559, 567 (2011).

B. The Fee-Shifting Provision in the Public Records Law Is Intended to Ensure Broad Access to Public Records, to Deter Violations of the Law, and to Compensate Successful Plaintiffs.

The Public Records Law is intended to protect the public's recognized "interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner." *Globe Newspaper Co. v. Police Com'r of Bos.*, 419 Mass. 852, 858 (1995), quoting *Att'y Gen. v. Collector of Lynn*, 377 Mass. 151, 158 (1979). It commands government entities to "provide broad public access to government documents subject only to limited exceptions." *General Elec. Co. v. Dep't of Envt'l Protection*, 429 Mass. 798, 802 (2002). Courts construe exemptions to the Public Records Law narrowly. *Globe Newspaper Co. v. District Attorney for Middle Dist.*, 439 Mass. 374, 380 (2003).

In 2016, Gov. Baker signed a bill amending and strengthening the Public Records Law. See St. 2016, c. 121. The bill stemmed from a broad public consensus that the law was too weak to ensure transparency into important matters

of public concern.⁵ The Center for Public Integrity had recently given

Massachusetts an "F" grade for access to public information,⁶ and the National

Freedom of Information Coalition ranked Massachusetts the eighth-worst state in
the country on access to public records.⁷

Much of the public criticism stemmed from the refusal of Massachusetts police departments to disclose records about their officers' misconduct. In March 2015, the *Boston Globe* reported that police departments were refusing to disclose incident reports and arrest records about officers who were arrested for drunk driving.⁸ In June 2015, the group Investigative Reporters and Editors gave its

⁵ "With Mass. Public Records Law in Tatters, It's Time for Reform," *Boston Globe*, March 13, 2015 (available at: https://www.bostonglobe.com/opinion/editorials/2015/03/13/with-mass-public-

https://www.bostonglobe.com/opinion/editorials/2015/03/13/with-mass-public-records-law-tatters-time-for-reform/bxvKeY9koA6himuTqBUJ5O/story.html

⁶ https://publicintegrity.org/politics/state-politics/state-integrity-investigation/massachusetts-gets-d-grade-in-2015-state-integrity-investigation/

⁷ Brad Petrishen, "Shine on? State's Public Records Laws Among Nation's Worst," *Worcester Telegram & Gazette*, March 21, 2015 (available at https://www.telegram.com/story/news/local/north/2015/03/21/shine-on-state-s-public/34940357007/).

⁸ Todd Wallack, "Ruling Allows Police to Withhold Officers' Drunken Driving Records," *Boston Globe*, March 11, 2015, (available at https://www.bostonglobe.com/metro/massachusetts/2015/03/10/state-rules-police-can-withhold-records-officers-caught-drunk-driving/vhotKuTFoaACMC23kveZ2N/story.html?event=event25&p1=Article_Inline Text Link).

tongue-in-cheek "Golden Padlock Award" – an honor given to the most secretive individual or agency in the country – to the Massachusetts State Police.⁹

Rep. Peter V. Kocot, the House chairman of the Joint Committee on State Administration and Regulatory Oversight, was the chief sponsor of the public records reform bill. (See Bills of 2015, H. 2772). In July 2015, Rep. Kocot stated in an interview that "The most important part of this bill deals with the fact that the existing law allows some officials to thumb their nose at the law." He explained that the chief way the bill would address that issue is to require awards of attorneys' fees to successful plaintiffs:

Kocot said the 'real important' part of the bill is a change that would direct the courts to award plaintiffs challenging a wrongful denial of access to public records reasonable attorney fees.

Massachusetts is one of just four states that doesn't allow for attorney fees to be recouped, including Alabama, South Dakota and Wyoming.

'So we're coming in from the prairie here,' Kocot said, adding, 'There's going to be a real incentive here for (agencies) to follow the

⁹ Kyle Scott Clauss, "Massachusetts State Police Named Most Secretive Public Agency in America," *Boston* Magazine, June 8, 2015 (available at https://www.bostonmagazine.com/news/2015/06/08/massachusetts-state-police-golden-padlock/).

¹⁰ Joshua Miller, "State Panel Advances Public Records Bill," *Boston Globe*, July 16, 2015 (available at https://www.bostonglobe.com/metro/2015/07/16/public-records-reform-push-gains-momentum/NYqZMAae0aLK9OkstuPJOL/story.html)

law. People shouldn't have to pay for a lawyer to get basic stuff their tax dollars already paid for.'11

Under the bill as ultimately enacted, "[t]here shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes" one of five special exceptions. G.L. c. 66, § 10A (d)(2). Those exceptions are limited to facts showing reasonable reliance by the government on prior authority, or that the request was made for commercial or harassment purposes. Specifically, the presumption is only lifted where:

- (i) the supervisor [of records of the Secretary of State's Office] found that the agency or municipality did not violate this chapter;
- (ii) the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts;
- (iii) the agency or municipality reasonably relied upon a published opinion by the attorney general based on substantially similar facts;
- (iv) the request was designed or intended to harass or intimidate; or
- (v) the request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.

G.L. c. 66, § 10A (d)(2).

¹¹ Matt Murphy, "Lawmaker: Bill Would 'Increase Public Access to Information," *State House News Service*, July 16, 2015 (available at https://www.wbjournal.com/article/lawmaker-bill-would-increase-public-access-to-information).

The legislature also sought to ensure that denials of fees under the Public Records Law would be justified by findings sufficient to ensure effective appellate review. "If the superior court determines that an award of reasonable attorney fees or costs is not warranted, the judge shall issue written findings specifying the reasons for the denial." G.L. c. 66, § 10A (d)(2).

Accordingly, the legislative history and text of the amendment reveal that the fee-shifting provision of the Public Records Law is intended (1) to deter public entities from violating the law; (2) to encourage the government to supply records where no existing legal authority permits withholding; (3) to compensate successful litigants who sue under the statute; and (4) to promote public transparency by removing barriers to suit by public records requesters.

C. Appellate Courts Disfavor Drastic Cuts to Attorneys' Fees Under Similar Statutes.

The purposes of fee-shifting under the Public Records Law resemble those of 42 U.S.C. § 1988, the attorneys' fees provision of the Civil Rights Act. In providing for mandatory fee awards in civil rights cases under 42 U.S.C. § 1983, "Congress . . . recognized that private enforcement of civil rights legislation relies on the availability of fee awards: 'If private citizens are to be able to assert their civil rights, and if those who violate the Nation['s] fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.'" *Moreno v. City of Sacramento*, 534

F.3d 1106, 1111 (9th Cir. 2008), *quoting* S.Rep. No. 94–1011, at 2 (1976), as reprinted in 1976 U.S.C.C.A.N. 5908, 5910.

Accordingly, appellate courts have viewed drastic reductions in requested rates and hours under § 1988 with skepticism, given that "[t]he purpose of 42 U.S.C. § 1988 is to 'ensure "effective access to the judicial process" for persons with civil rights grievances." Ohio Right to Life Soc., Inc. v. Ohio Elections Comm'n, 590 F. App'x 597, 604 (6th Cir. 2014), quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (rejecting reduction of 85% of hours billed in partiallysuccessful civil rights case because award had the effect of "discouraging attorneys from representing clients in civil rights actions for fear that their fees will be dramatically reduced by the court"); Robinson v. City of Edmond, 160 F.3d 1275, 1278 (10th Cir. 1998) (reducing fees by half undermined important principles of § 1988); Kinney v. Rothchild, 678 F.2d 658, 660 (6th Cir. 1982) (greatly reduced fees discourage lawyers from accepting discrimination cases and undermine purpose § 1988 to ensure representation); Mendoza v. Union St. Bus Co., 876 F. Supp. 8, 13 (D. Mass. 1995) (reduction due to contingent-fee arrangement undermines purpose of § 1988); Liess v. Lindemyer, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984) (greatly reduced fees discourage lawyers from accepting discrimination cases and undermine purpose of § 1988).

The same analysis applies under the Massachusetts Anti-SLAPP law, which protects litigants who are sued for their government petitioning activity. G.L. c. 231, § 59H. In *Franks v. Mitchell*, 89 Mass. App. Ct. 1131 (2016) (unpub.), a panel of this Court held that a drastic and inadequately explained reduction in requested fees by the Superior Court undermined the "deterrent and reimbursement purposes" of the Anti-SLAPP law, such that the award was "clearly erroneous." *Id.*; citing *Polay v. McMahon*, 468 Mass. 379, 389 (2014) (fee-shifting "affords deterrence against SLAPP suits").

This Court should review the Superior Court's 54% reduction in the fees requested here with similar skepticism. As we will show below, the lower court's drastic reduction rests on clearly erroneous factual findings, and in important respects is wholly unsupported and arbitrary. If affirmed, the decision will threaten the important policies of the Public Records Law.

D. The Lower Court's Across-the-Board Percentage Reduction of Hours Was an Abuse of Discretion and Clearly Erroneous.

The Superior Court's across-the-board reduction of 270.1 hours from the requested total was an abuse of discretion. Some of the court's factual findings supporting it are clearly erroneous, and as explained below, none of them support the decision to reduce all hours in the case, or justify the extent of the reduction.

1. Attendance of Two Attorneys at Motion Hearings and Trial.

As its first example of "excessive hours" supporting its across-the-board reduction, the court noted that Attorney Jeffrey Pyle and his more junior associate, Michael Lambert, attended motion hearings and the trial, whereas only Attorney Pyle had a speaking role. (Add. 62). However, where a supporting attorney has a central role in the litigation, his or her silent presence in the courtroom alone has not generally been deemed a basis for a reduction in hours. *Rogers v. Cofield*, 935 F. Supp. 2d 351, 380 (D. Mass. 2013) (holding counsel did not overstaff case by having two lawyers present at trial where only one examined witnesses and argued, given centrality of the assisting lawyer to the case).

Here, the time sheets reflect that Attorney Lambert was extensively involved in this case. He helped develop Gatehouse's factual and legal arguments in response to the City's claimed exemptions, and had an important role in the crossmotions for summary judgment and the four-day bench trial. (R.A.II. 336-351 (bills)). As such, Attorney Lambert's presence in the courtroom at substantive hearings, including the motion for preliminary injunction, summary judgment, and trial, was reasonable. (R.A.II. 338, 342, 347, 349). This is particularly so given the lower court's other factual findings: that "[t]he issues at stake were significant," and that the City's own litigation tactics needlessly complicated the case. (Add. 62-63). "After setting such a militant tone and forcing the plaintiff[] to respond in

kind, it seems disingenuous for the [City] to castigate the plaintiff[] for putting too many troops into the field." *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 298 (1st Cir. 2001) (approving fees by four lawyers on one case).

Regardless, the billing records reflect that the time Attorney Lambert spent traveling to and attending hearings totaled 32.3 hours. (R.A.II. 338 (4.1 hours for preliminary injunction); 342 (5.7 hours for summary judgment); 346 (2.2 hours for trial assignment conference); 348 (7.1 hours for day 1 of trial); 348 (6.8 hours for trial day 2); 349 (3.2 hours for trial day 3; 3.2 for trial day 4)). Exclusion of all that time would support only a small portion of the Court's 270.1-hour reduction.

2. <u>Time Spent Researching and Drafting Legal Memoranda.</u>

Next, the Court noted that Attorneys Pyle and Lambert spent "many hours" researching and drafting "the memoranda for the preliminary injunction, summary judgment, trial, and the final request for findings and rulings." (Add. 62). That much is true. As the lower court found, the "[t]he issues at stake were significant" and Gatehouse wanted to win, so it devoted significant time to research and prepare its prevailing legal arguments. (Add. 62).

The court, however, committed clear error when it found that the time spent on the four identified memoranda was excessive because "the legal arguments raised were virtually the same at each stage of the proceedings, and the written submissions were duplicative, such that the time spent was excessive and

redundant." (Add. 62) (emphasis supplied). As the briefs themselves show,
Gatehouse presented new legal arguments and issues at each stage of the case in
response to the City's ever-changing claims and arguments.

Plaintiff's 13-page preliminary injunction memorandum, filed in October 2018, addressed only disclosure of the short concise officer histories, not the hundreds of pages of internal affairs investigation records. (R.A.I. 72-84). Further, it did not brief all of claims of exemption that would later be asserted by the City as to those histories. (*See* pages 15-20 *supra*). By contrast, the combined 40 pages of summary judgment briefing Gatehouse filed in August 2019 addressed all the records that were the subject of the case, and marshaled an extensive factual record of some 30 exhibits. (R.A.I 187-212; 241-260; 268-298). The summary judgment briefs covered issues not addressed in Gatehouse's preliminary injunction memorandum, including the federal protective orders, the redaction of complainant names, and additional statutes the City newly asserted as a grounds for redactions. (*Id.*).

Likewise, the pre-trial legal memorandum, which the lower court specifically requested, addressed developments in the year after the summary judgment briefing, including the *Vaughn* indexes and the City's new mootness argument. (*See* pages 23-24, *supra*). And, of the 23.6 hours counsel spent on the request for findings of fact and rulings of law (which the trial judge also

requested), most was spent drafting the 14 pages of proposed factual findings based on the trial testimony in November and December 2021 and January 2022—briefing that, by definition was not a mere repetition of prior filings. (R.A.II. 130-143).

Even to the extent the briefs did repeat legal arguments, however, the repetition was necessary and does not furnish a basis for the reduction. (R.A.II. 404). At every stage of the case prior to trial, the court had simply declined to rule on the City's central claims of exemption. (R.A.I. 177, 305). At the trial assignment conference, Gatehouse suggested that the court decide some of the purely legal issues underlying those claims before trial, based on the existing summary judgment briefing. (R.A.II. 51-53). The judge demurred, instead

¹² The lower court also erred when it asserted that Gatehouse "recognized the duplicity" of its briefing in its reply in support of its motion for attorneys' fees. The City had argued that Gatehouse should not receive any fees at all for the work performed on the cross-motions for summary judgment because Gatehouse's motion was "unsuccessful." (R.A. II. 381-382). In its reply, Gatehouse pointed out that it had successfully opposed the City's cross-motion for summary judgment, and that the research and writing at summary judgment "ultimately contributed to Gatehouse's Trial Memorandum and Request for Findings of Fact and Rulings of Law," and thus "was time well-spent." (R.A.II. 393). The Superior Court erroneously interpreted this statement as Gatehouse "recogniz[ing] the duplicity" of the hours spent on the trial memorandum and proposed findings and rulings. (Add. 62). Not so: the bills reflect that the trial memorandum and proposed rulings of law took substantially less time than the summary judgment briefing, due to the prior work. (Compare R.A.II 338-341, reflecting 104.6 hours for summary judgment memorandum, with R.A.II. 349 (reflecting 23.6 hours on 41-page proposed findings and rulings that included summary of trial testimony). That is not a showing of wasted time—it is the opposite.

requesting "trial memoranda" setting forth the parties' "respective positions that you have on what . . . each side feels are the core issues that I have to decide." (R.A.II. 53). The court then imposed an across-the board cut in hours based on her criticism that this very brief and the requested post-trial memorandum, were "duplicative" and "redundant." (Add. 62). It was, in short, an abuse of discretion for the lower court to specifically ask for repetitive briefing and then slash Gatehouse's attorney's fees because those briefs were repetitive.

The lower court also asserted that the legal issues in this case were "reasonably straightforward" given the state of the law in Massachusetts. (R.A.II. 403). This, too, is an insufficient justification for such a drastic cut. The case involved some claims of exemption, such as the City's "interpretation" of exemption (d), that no Massachusetts court had yet specifically rejected. As the lower court found, the City misrepresented what cases and other materials stood for in the course of advancing its "novel" interpretations. (R.A.II. 399). The City's arguments nonetheless muddied the waters sufficiently to cause the court at the preliminary injunction and summary judgment stages to deny relief. (R.A.I. 177, 305). The time and effort it took to unravel and refute the City's arguments is reflected in the extent and depth of Gatehouse's briefing on the cross-motions for summary judgment, (R.A.II 187-260), and the pre- and post-trial memoranda. (R.A.II. 98-124, 130-210). If the legal issues seemed "reasonably straightforward"

to the lower court, it may have been because these briefs were of high quality. Time reasonably spent writing high-quality briefs in a case of significant public importance is fully compensable. *Kennedy v. Kennedy*, 20 Mass. App. Ct. 559, 563-64 (1985) (reversing and remanding where "[e]ven if one assumes that some part of counsel's efforts may have been superfluous or duplicative, and that such part as was not, may to some extent have been routine rather than novel, still, on a superficial view, the amount allowed seems inadequate."); *see also Yip v. Little*, 519 F. App'x 974, 976-77 (9th Cir. 2013) (in ERISA case, holding that "[t]he court's cursory explanation that the 'nature and complexity' of the case warranted the reduction" of 50% of plaintiff's claimed hours "was insufficient given the magnitude of its cut.").

Gatehouse does not dispute that the Superior Court would have been within its discretion to impose *some* percentage-based reduction on the hours spent researching legal issues and drafting memoranda in this case. However, the court committed error not only by imposing a cut that was unjustifiably large, but by imposing it on *all* stages of the case without explaining why. *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1150 (9th Cir. 2001) (where district court decides to "reduce the lodestar hours on a pure across-the-board basis, we need an explanation for that choice if we are meaningfully to review the fee award for abuse of discretion."). The lower court effectively halved significant time about

which it had no criticism, such as preparation of the complaint, factual development for summary judgment, settlement efforts, trial preparation, the trial itself, and Gatehouse's successful motion for punitive damages. (R.A.II. 336-351). The lower court did not determine what portion of the total hours in the case were spent researching and briefing legal issues; instead, it simply declared, without explanation, that it would be "reasonable" to impose a 50% reduction on the (already-reduced) hours spent on the entire case. (Add. 63). This, too, was clearly erroneous and an abuse of discretion. *Ferland*, 244 F.3d at 1149 (reversing where district court "simply announced a bottom-line number of compensable hours, with no attempt to calibrate the number chosen to demonstrable inefficiency in carrying out particular tasks.")

E. The Court Erred by Deducting All Time Spent on the Fee Application and the Motion to Expedite.

In lower court found that "the 20.3 hours spent on preparing [Gatehouse's] fee petition" were "unreasonable," and then denied those fees in their entirety.

(Add. 63). That was an additional error of law and an abuse of discretion.

¹

¹³ Similarly, the lower court did not quantify the effect of its only other specific criticism of the bills: that the records show "some block billing." (Add. 62). The court did not make any finding that any block-billed entries frustrated its review of the reasonableness of the time spent, and such entries do not necessarily do so where they "concern the same subject matter." *Rogers v. Cofield*, 935 F. Supp. 2d 351, 367 (D. Mass. 2013). The absence of such a finding further frustrates appellate review.

In Stratos v. Department of Public Welfare, 387 Mass. 312 (1982), the Supreme Judicial Court held that "[a]s a general rule, time spent in establishing and defending a fee . . . should be included in the final calculation of the award."

Id. at 325. "Exclusion of such services," the court explained, "would dilute the value of the award, and so frustrate the purpose of the act authorizing fees." Id.

Failure to include such fees in an award has been held sufficient grounds for reversal. Stowe v. Bologna, 417 Mass. 199, 206 (1994) (remanding to single justice "for a determination of a reasonable fee and expenses for the presentation of the plaintiffs' fee case in compliance with Stratos.").

Here, the Superior Court gave no explanation for its decision to depart from *Stratos* and deprive Gatehouse of any award for the time spent on the fee application. *Id.* It did so notwithstanding its recognition that Gatehouse bore the burden of establishing that its attorneys' requested rates were consistent with the relevant market, and that the hours they spent were reasonable. (Add. 61), citing *Haddad v. Wal-Mart Stores*, 455 Mass. 1024, 1026 (2010). Clearly, the party with the burden of proof on a motion must reasonably spend *some* time on it.

Further, the lower court erred in deeming the time Gatehouse spent on the fee petition "unreasonable." The submission appropriately included a nine-page memorandum of law showing Gatehouse's entitlement to reasonable fees and costs, which the City contested; evidence about the qualifications of counsel;

materials demonstrating the reasonableness of counsel's hourly rates; a breakdown of the billing records by each phase of the case; and a supporting 6-page affidavit. (R.A.II. 269-359). Gatehouse also submitted a five-page reply brief in response to the City's arguments opposing any fee award whatsoever or in the alternative requesting an 80% reduction, notwithstanding its own bad faith conduct. (R.A.II. 389). Considering the amount of time and effort this case required over three years—due in no small part, as the lower court found, to the City's bad faith arguments—Gatehouse's counsel had every reason to devote time and energy to establishing that its fee application was reasonable.

The lower court also erred in denying fees for Gatehouse's request to expedite the proceeding in June 2020. As noted above, the Public Records Law provides that "the superior court shall, when feasible, expedite [any] proceeding" to enforce the statute. G.L. c. 66, § 10A. Gatehouse's motion explained why and how it would be "feasible" to expedite the case so that it could be resolved without a trial: through particularization of the issues with a *Vaughn* index and the resolution of the City's claims of exemption with further argument. (R.A.II. 4-15).

Nor was the Court correct that the motion amounted to "tilting at windmills" because it was partly based on the increased societal need for transparency and accountability over police misconduct in the wake of the murder of George Floyd.

(Add. 62). Contrary to the Court's ruling, that pressing national (and local) issue

was not "unrelated to this case"; in fact, the need to ensure that police departments effectively identify and discipline officers who, like Derek Chauvin, abuse their power is exactly why internal affairs records are public. *Worcester Telegram & Gazette Corp.*, 58 Mass. App. Ct. at 9-10.

F. The Court's Findings Are Inadequate to Ensure Meaningful Appellate Review, and Fail to Consider the Effect of the Award on the Policy Behind the Public Records Law.

The appellate courts have long held that specific factual findings are necessary to enable appellate review of fee awards. See Irwin v. Appleton, 76 Mass. App. Ct. 1109 (2010) (unpub.) ("without the aid of findings we are unable to determine that the fee award is supported by the record," and remanding "for a further determination of an appropriate attorney's fee award based on findings grounded in the evidence and sufficiently detailed to support the analysis"); Martignetti v. Haigh-Farr Inc., 425 Mass. 294, 318 n. 40 (1997) ("No evidentiary hearing was required, but the judge's memorandum should have offered a more detailed justification" for award); Kennedy v. Kennedy, 400 Mass. 272, 275 (1987)(lower court's "findings are inadequate to support [the] conclusion" that "the amount of time the attorneys attributed to the litigation was unreasonable," and "[o]n that basis alone, the award of fees cannot stand."); see also Moreno, 534 F.3d 1106, 1113 (9th Cir. 2008) ("While we accord deference to the district court's explanation of why a requested fee is excessive, we can only do so if the district court provides an explanation that we can meaningfully review.").

As we have established above, the lower court's findings do not support its conclusion that 54% of the hours Gatehouse's attorneys recorded in this case were wasted. Rather than explaining how each of its criticisms contributed to the extent of the cut, the court simply declared that its chosen reduction was "reasonable," "considering the billing as a whole." (Add. 63). Such a broad-brush, generalized finding does not permit this Court to meaningfully assess the award, or the reasoning behind it.¹⁴ Ohio Right to Life Soc., Inc., 590 F. Appx at 604–05 (finding drastic reduction in requested fees was abuse of discretion, and stating that because across-the-board reduction was based on multiple factors, court was unable to apply meaningful appellate review without disaggregation); Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1151 (9th Cir. 2001) (reversing and remanding where "the district court did not explain except at the most general level why it reduced

¹⁴ The lower court's findings are particularly questionable when one considers that the overall amount sought — about \$214,000 for three years of litigation involving a motion for a preliminary injunction, summary judgment, a bench trial, and posttrial briefing and motions—was well within the normal bounds of what litigation costs. Greenberg v. Barros, 97 Mass. App. Ct. 1109 (2020) (affirming award of \$144,413 in attorney's fees for litigation of property dispute resolved at summary judgment, noting that time charges derived from defendant's aggressive litigation approach); Brady v. Citizens Union Sav. Bank, 91 Mass. App. Ct. 160, 161 (2017) (affirming Probate and Family Court award of \$350,680.80 in attorneys' fees for case resolved at summary judgment on statute of limitations grounds).

by more than half the number of attorney hours for which [plaintiff] could be compensated, and did not explain at all the particular level of reduction" chosen). At the very least, the court should have explained why it chose to reduce all hours spent on the entire case rather than discounting the time spent on research and writing, and how much of a percentage reduction was attributable to each purported deficiency it identified. *Ferland*, 244 F.3d at 1151; *Ohio Right to Life Soc., Inc.*, 590 F. App'x at 604–05.

Equally important, the lower court was required to consider the effect that its award would have on the important policies behind the Public Records Law.

Stowe, 417 Mass. at 203-204 ("[t]he judge should not only consider the plaintiff's financial interests at stake but also the plaintiff's other interests sought to be protected by the statute in question and the public interest in having persons with valid claims under the statute represented by competent legal counsel.") As explained above, the fee-shifting provision is intended to serve the transparency and accountability purposes of the Public Records Law by deterring violations and "attract[ing] competent counsel" to sue when necessary. Stratos, 387 Mass. at 322.

As the courts have held, adequate fee awards are of particular importance for cases like this that "are not likely to pay for themselves, but are nevertheless desirable

because they vindicate important rights." *Stratos*, 387 Mass. at 323, quoted in *LaChance v. Comm'r of Correction*, 475 Mass. 757, 763 (2016). 15

The Superior Court failed to consider these public policies at all. That alone is a sufficient ground for reversal. *Franks v. Mitchell*, 89 Mass. App. Ct. 1131 (2016) (remanding "parsimonious fee award[]" for consideration of deterrent and reimbursement purposes of Anti-SLAPP statute); *Ohio Right to Life Soc., Inc.*, 590 F. App'x at 604 (reversing where affirmance of major reduction would "work against [the statutory] purpose by discouraging attorneys from representing clients . . . for fear that their fees will be dramatically reduced by the court.").

The Superior Court also failed to consider whether it would frustrate the purposes of the Public Records Law to relieve the City of the consequences of its own bad faith. As explained above, the attorneys' fee provision was intended to deal with "the fact that the existing law allows some officials to thumb their nose at

¹⁵ The cost impediment to bringing public records lawsuits is particularly salient now, when finances of local news outlets are under severe pressure, a fact of which this Court may take judicial notice. Kami Rieck, "Commission will explore ways to support local journalism in Massachusetts," *Berkshire Eagle*, Feb. 15, 2021 (reporting on legislative commission looking at response to decline of local news outlets in Massachusetts) (available at https://www.berkshireeagle.com/news/local/commission-will-explore-ways-to-

https://www.berkshireeagle.com/news/local/commission-will-explore-ways-to-support-local-journalism-in-massachusetts/article_87716e98-6fa8-11eb-af13-6340300c6258.html)

the law."¹⁶ The City could have avoided attorneys' fees altogether if it had simply adhered to the 2003 *Worcester Telegram & Gazette* decision and produced the records. 58 Mass. App. Ct. at 9-10. Instead, as the lower court found, the City threw up every possible exemption it could think of, including the long-rejected "personnel" exemption, and then "misrepresent[ed] to the court what cases and other materials stand for." (R.A.II. 398). The court's decision to nonetheless absolve the City of most of its financial responsibility for the attorneys' fees Gatehouse incurred to respond to this conduct severely undermines the policy behind the statute.

G. The Court Should Award Reasonable Attorneys' Fees and Costs for This Appeal.

Consistent with this Court's approach to other fee-shifting statutes, appellate attorneys' fees and costs should be awarded for this in the event of reversal.

In *Stratos*, a case under the Civil Rights Act, the Supreme Judicial Court held that "[a]s a general rule, time spent in establishing and defending a fee, or objecting to an unduly small award, should be included in the final calculation of the award. Exclusion of such services would dilute the value of the award, and so

¹⁶ Joshua Miller, "State Panel Advances Public Records Bill," *Boston Globe,* July 16, 2015 (available at

https://www.bostonglobe.com/metro/2015/07/16/public-records-reform-push-gains-momentum/NYqZMAae0aLK9OkstuPJOL/story.html)

frustrate the purpose of the act authorizing fees." *Stratos*, 387 Mass. at 325 (emphasis supplied). The SJC has followed the same approach with the Anti-SLAPP Law, G.L. c. 231, § 59H. *Polay v. McMahon*, 468 Mass. 379, 390 (2014) (awarding appellate attorneys' fees "as to the costs and fees incurred in defending the fee award.").

These holdings are consistent with the general principle that "statutory provisions for a 'reasonable attorney's fee,' would ring hollow if it did not necessarily include a fee for the appeal." *Yorke Management v. Castro*, 406 Mass. 17, 19 (1989) (the "right to appellate attorney's fees under these statutes is beyond dispute."); *Fabre v. Walton*, 436 Mass. 517, 525 (2002) (allowing request for fees on appeal from denial of anti-SLAPP motion).

Here, all of counsel's time in this appeal was spent "objecting to an unduly small award" of attorney's fees. *Stratos*, 387 Mass. at 325. Depriving Gatehouse of any fees for that work would "dilute the value" of any award Gatehouse receives on remand, and "so frustrate the purpose" of the Public Records Law. *Id.* Further, if time spent on appeals like this were not compensable, defendants in public records suits would have an incentive to appeal even from reasonable fee awards,

in the hopes of wearing down the plaintiff and ultimately paying cents on the dollar. Such a result would not be in the public interest.¹⁷

CONCLUSION

For the foregoing reasons, the Superior Court's decision and order on Gatehouse Media, LLC's Motion for Attorneys' Fees and Costs and the resulting amount of the judgment should be reversed and remanded for further proceedings, and the Court should award Gatehouse its reasonable attorneys' fees and costs for this appeal.

Respectfully submitted,

GATEHOUSE MEDIA, LLC

By its attorney,

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Date: May 23, 2022

¹⁷ Inclusion of a request for appellate costs and fees in a party's brief "is the appropriate procedure for a party seeking costs and fees for appellate work." *McLarnon v. Jokisch*, 431 Mass. 343, 350 (2000).

RULE 16(k) CERTIFICATE OF COMPLIANCE

I, Jeffrey J. Pyle, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

Counsel further certifies that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the Times New Roman, 14-point proportional font, and created on Microsoft Word 365. According to the word count function of Microsoft Word 365, it contains 10,889 non-excluded words. I have relied on the word count feature in the word processing software for this word count.

/s/ Jeffrey J. Pyle
Jeffrey J. Pyle

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13 and the Massachusetts Rules of Electronic Filing, Rule 7, I hereby certify that on May 23, 2022, I have made service of this Brief upon the attorney of record for each party via the Electronic Filing System and/or e-mail on the following:

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Jeffrey J. Pyle

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Massachusetts Appeals Court Case: 2022-P-0282 Filed: 5/24/2022 11:06 AM

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT CIVIL ACTION NO. 1885CV1526A

GATEHOUSE MEDIA, LLC

<u>vs</u>.

CITY OF WORCESTER

DECISION AND ORDER ON PLAINTIFF'S MOTION FOR ATTORNEY'S FEES & COSTS

The plaintiff, Gatehouse Media, LLC (Gatehouse or plaintiff), has moved for an award of attorney's fees and costs. Specifically, Gatehouse seeks \$214,467.00 in attorney's fees and \$3,228.05 in costs.

General Laws c. 66, § 10A(d)(2), provides as follows:

The superior court may award reasonable attorney fees and costs in any case in which the requester obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of a complaint. There shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes that:

- (i) the supervisor found that the agency or municipality did not violate this chapter;
- (ii) the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts;
- (iii) the agency or municipality reasonably relied upon a published opinion by the attorney general based on substantially similar facts;
 - (iv) the request was designed or intended to harass or intimidate; or
- (v) the request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.

In its June 2021 decision, this court entered an order in favor of Gatehouse, establishing a presumption in favor of an award of fees and costs. After a thorough review of the respective pleadings and relevant law and following a hearing, the defendant, City of Worcester (city or defendant), has not established the existence of any of the exceptions necessary to overcome that

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presumption. See G. L. c. 66, § 10A(d)(2). The court finds that the plaintiff is entitled to an award of reasonable fees and costs.

"While the amount of a reasonable attorney's fee is largely discretionary, a judge 'should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 429-430 (2005), quoting Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979). "No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required." Twin Fires, 445 Mass. at 430, quoting Berman v. Linnane, 434 Mass. 301, 303 (2001).

In any fee award against an opposing party, "there must be a relationship 'between the depth of the services provided and what is at stake" (citations omitted). *Hanover Ins. Co.* v. *Sutton*, 46 Mass. App. Ct. 153, 176 (1999). Also, in the usual case, "[w]hen legal expenses are collected from a party other than the one who received the legal services, a degree of conservatism in fee determination is in order. . . . As between lawyer and client, the case stands differently; courts then are less conservative because the amount of the fee is ordinarily something that has been discussed and agreed upon." *Smith* v. *Consalvo*, 37 Mass. App Ct. 192, 196 (1994). See *Price* v. *Cole*, 31 Mass. App. Ct. 1, 7 (1991).

The basic measure of reasonable attorney's fees is a "fair market rate for the time reasonably spent preparing and litigating a case." *Fontaine* v. *Ebtec Corp.*, 415 Mass. 309, 326 (1993). This method is known as the "lodestar" method and, "as its name suggests, [has] become the guiding light of our fee-shifting jurisprudence." *Perdue* v. *Kenny A.*, 559 U.S. 542,

551 (2010), quoting Gisbrecht v. Barnhart, 535 U.S. 789, 801 (2002). See Fontaine, 415 Mass. at 325-326.

"The plaintiff bears the burden of establishing and supporting the number of hours billed." Haddad v. Wal-Mart Stores, Inc., 455 Mass. 1024, 1026 (2010). Gatehouse is only entitled to recover reasonable attorneys fees, not to recover for every hour its lawyers chose to spend working on the matter. "In determining time reasonably spent on a matter, the court must be mindful of 'the difficulty of the case' and 'the results obtained,' . . . and 'compensable hours may be reduced if the time spent was wholly disproportionate to the interests at stake'" (citations omitted). Killeen v. Westban Hotel Venture, LP, 69 Mass. App. Ct. 784, 792 (2007). A request for attorney fees must be reduced where "[t]he time and labor devoted to the case [are] excessive" in light of "the difficulty of the legal and factual issues, and the amount at stake."

Rex Lumber Co. v. Acton Block Co., 29 Mass. App. Ct. 510, 521 (1990). Accord Haddad, 455 Mass. at 1027.

From the pleadings submitted in this case, and this court's observations during trial and motion hearings, the plaintiff's attorneys were experienced and capable. The issues at stake were significant. This case presented complex factual issues as to what records were exempt from the plaintiff's request; however, considering the case law in the Commonwealth, the legal issues were reasonably straightforward.

From the affidavit of Attorney Jeffrey Pyle ("Attorney Pyle"), and the time sheets submitted, Attorney Pyle, along with Attorney Michael Lambert ("Attorney Lambert") and paralegal Janine Sheehan ("Ms. Sheehan"), worked on this case for a total of 582.70 hours beginning mid-August of 2018 through early October of 2021. Over the three plus years this case was pending, the hourly rates for the attorneys ranged from an average of \$272.50/hour for

Attorney Lambert up to an average of \$447.50/hour for Attorney Pyle. The city does not contest the reasonableness of the hourly rates; however, the standard of reasonableness depends not on what the attorney usually charges, but on what his services are objectively worth. Based on the combined experience of counsel and the geographic area, the court finds that a blended hourly rate of \$365.00/hour is reasonable and appropriate, and the rate this court will apply in this case. See *Haddad*, 455 Mass. at 1026. See also *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Commonwealth* v. *Ennis*, 441 Mass. 718, 722 (2004); *Society of Jesus of New England*, 411 Mass. 754, 759 n.11 (1992); *Stratos* v. *Department of Pub. Welfare*, 387 Mass. 312, 323-325 & n.12 (1982).

A detailed review of the timesheets shows excessive hours spent on particular aspects of the case, along with duplication of work, overstaffing, and some block billing. Both Attorneys Pyle and Lambert billed for preparation and attendance on motion hearings and trial; however, only Attorney Pyle made presentations. In addition, both attorneys billed many hours for drafting the memoranda for the preliminary injunction, summary judgment, trial, and the final request for findings and rulings. Attorney Lambert spent many hours researching the applicable law. However, the legal arguments raised were virtually the same at each stage of the proceedings, and the written submissions were duplicative, such that the time spent was excessive and redundant.

Of particular note, the court found the 22.2 hours spent on a motion to expedite resolution (Paper #18) unreasonable, in that the motion was based on issues unrelated to this case.² and

¹ In its reply to the city's opposition, Gatehouse recognized the duplicity when it argued that the time spent on the motion for summary judgment was well-spent because it contributed to Gatehouse's trial memoranda and request for findings and rulings.

² From this court's reading of the motion, despite the denial of the motion for summary judgment, Gatehouse sought an "expedited" order in its favor. Plaintiff's grounds for this request were the public's need to be aware of potential problem officers, and what the Worcester Police department had done to address incidents of police misconduct, because of the death of George Floyd.

because a final pre-trial conference had already determined, with the parties' agreement, a pre-trial and trial schedule.³ The court finds the time spent on that motion to be nothing more than "tilting at windmills," and it is the duty of the court to exclude that time. See *Gay Officers*Action League v. Puerto Rico, 247 F.3d 288, 296 (1st Cir. 2001). The court also finds the 20.3 hours spent on preparing this fee petition unreasonable, and those fees are denied in their entirety. After deducting those hours, the total remaining hours are 540.2 at the blended rate of \$365/hour for a total remaining fee of \$197,173.00.

The court recognizes that some of the fees came from responding to the city's filings, including continually responding to the city's bad faith reliance on exemptions (c) and (d), as well as deciphering the verbose, confusing, and incomplete *Vaughn* affidavits. The court also recognizes that Gatehouse was successful in this litigation. The city cannot complain that fees for work made necessary by its own litigation tactics are excessive in light of the results achieved. See *A.C. Vaccaro*, *Inc.* v. *Vaccaro*, 80 Mass. App. Ct. 635, 643 (2011). Even taking into account the defendant's behavior, the court still finds the 540.2 hours to be unreasonable as excessive, duplicative, and redundant. Based on all of the above, and considering the billing as a whole, the court finds that it is reasonable to reduce the number of billable hours by 50% to 270.1. At the blended rate of \$365/hour, the total fee awarded will be \$98,586.50.

In reviewing the costs, the court determined that the photocopying costs had two rates, \$.15/page for black and white and \$.75/page for color. Given the nature of the case, there appears to be no reason for color photocopies, and if there were any, it was unreasonable.

Therefore, the photocopying costs will be reduced to \$791.25. The legal research costs incurred on July 22, 2019, and October 15, 2020, will be denied, as there is no corresponding time record

³ The court further notes that, despite the COVID-19 pandemic, this matter proceeded to trial on the scheduled trial date.

that research was performed on those days. The legal research cost incurred on August 12, 2021, will be denied as it appears to relate to research for the fee petition. The legal research cost, therefore, will be reduced to \$1,036.23. The total costs approved are \$2,362.63.

ORDER

Based on the foregoing, the court <u>ORDERS</u> the city to pay Gatehouse its reasonable attorney's fees in the amount of \$98,586.50, together with costs of \$2,362.63, for a total of \$100,949.13.

lanet Kenton-Walker

Justice of the Superior Court

Dated: January 26, 2022

Massachusetts Appeals Court Case: 2022-P-0282 Filed: 5/24/2022 11:06 AM

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT CIVIL ACTION No. 1885CV1526A

GATEHOUSE MEDIA, LLC

<u>vs</u>.

CITY OF WORCESTER

JUDGMENT

This matter having been adjudicated by this court, and this court having issued an order dated June 2, 2021 (June 2021 decision), requiring the defendant, the city of Worcester (city), to provide public records to the plaintiff, Gatehouse Media, LLC (plaintiff), and all remaining issues having been rendered moot by the city's compliance with the June 2021 decision, and in accordance with this court's subsequent orders on the plaintiff's motion for a permanent injunction, entry of judgment, and punitive damages, and on the plaintiff's motion for attorney's fees and costs, it is hereby ORDERED, ADJUDGED, and DECREED that:

- Judgment shall enter in favor of the plaintiff on counts I and II of the complaint insofar as
 the court declares that the materials requested by the plaintiff and referenced in the June
 2021 decision were public records and that the city violated the Massachusetts Public
 Records Law, G. L. c. 66, § 10, by failing to produce them.
- 2. Pursuant to G. L. c. 66, §10A(d)(2), the court orders the city to pay \$100,949.13 in attorney's fees and costs.
- 3. Pursuant to G. L. c. 66, §10A(d)(3), any fees assessed by the city under G. L. c. 66, §10(d) are waived.

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4. Pursuant to G. L. c. 66, § 10A(d)(4), the court orders the city to pay \$5,000 in punitive damages to the Public Records Assistance Fund established by G. L. c. 10, § 35DDD.

lanet Kenton-Walker

Justice of the Superior Court

Dated: January 26, 2022

Part I ADMINISTRATION OF THE GOVERNMENT

Title X **PUBLIC RECORDS**

Chapter 66 **PUBLIC RECORDS**

Section 10 INSPECTION AND COPIES OF PUBLIC RECORDS; REQUESTS;

WRITTEN RESPONSES; EXTENSION OF TIME; FEES

Section 10. (a) A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that:

- (i) the request reasonably describes the public record sought;
- (ii) the public record is within the possession, custody or control of the agency or municipality that the records access officer serves; and
- (iii) the records access officer receives payment of a reasonable fee as set forth in subsection (d).

A request for public records may be delivered to the records access officer by hand or via first class mail at the record officer's business address, or via electronic mail to the address posted by the agency or municipality that the records access officer serves.

- (b) If the agency or municipality does not intend to permit inspection or furnish a copy of a requested record, or the magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that the agency or municipality is unable to do so within the timeframe established in subsection (a), the agency or municipality shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records. The written response shall be made via first class or electronic mail and shall:
- (i) confirm receipt of the request;
- (ii) identify any public records or categories of public records sought that are not within the possession, custody, or control of the agency or municipality that the records access officer serves;
- (iii) identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;
- (iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law;
- (v) identify any public records, categories of records, or portions of records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records sought;

(vi) identify a reasonable timeframe in which the agency or municipality shall produce the public records sought; provided, that for an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records and for a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records; and provided further, that the requestor may voluntarily agree to a response date beyond the timeframes set forth herein;

- (vii) suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably;
- (viii) include an itemized, good faith estimate of any fees that may be charged to produce the records; and
- (ix) include a statement informing the requestor of the right of appeal to the supervisor of records under subsection (a) of section 10A and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.
- (c) If the magnitude or difficulty of a request, or the receipt of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that an agency or municipality is unable to complete the request within the time provided in clause (vi) of subsection (b), a records access officer may, as soon as practical and within 20 business days after initial receipt of the request, or within 10 business days after receipt of a determination by the supervisor of public records that the requested record constitutes a public record, petition the supervisor of records for an extension of the time for the

agency or municipality to furnish copies of the requested record, or any portion of the requested record, that the agency or municipality has within its possession, custody or control and intends to furnish. The records access officer shall, upon submitting the petition to the supervisor of records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the supervisor of records may grant a single extension to an agency not to exceed 20 business days and a single extension to a municipality not to exceed 30 business days. In determining whether the agency or municipality has established good cause, the supervisor of records shall consider, but shall not be limited to considering:

- (i) the need to search for, collect, segregate or examine records;
- (ii) the scope of redaction required to prevent unlawful disclosure;
- (iii) the capacity or the normal business hours of operation of the agency or municipality to produce the request without the extension;
- (iv) efforts undertaken by the agency or municipality in fulfilling the current request and previous requests;
- (v) whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency or municipality; and
- (vi) the public interest served by expeditious disclosure.

If the supervisor of records determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the supervisor of records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought.

General Law - Part I, Title X, Chapter 66, Section 10

The supervisor of records shall issue a written decision regarding a petition submitted by a records access officer under this subsection within 5 business days following receipt of the petition. The supervisor of records shall provide the decision to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.

- (d) A records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. The reasonable fee shall not exceed the actual cost of reproducing the record. Unless expressly provided for otherwise, the fee shall be determined in accordance with the following:
- (i) the actual cost of any storage device or material provided to a person in response to a request for public records under subsection (a) may be included as part of the fee, but the fee assessed for standard black and white paper copies or printouts of records shall not exceed 5 cents per page, for both single and double-sided black and white copies or printouts;
- (ii) if an agency is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested, the records access officer may also include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee (A) shall not be more than \$25 per hour; (B) shall not be assessed for the first 4 hours of work performed; and (C) shall not be assessed for time

spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

- (iii) if a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce a record requested, the records access officer may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce the record requested but the fee (A) shall not be more than \$25 per hour unless such rate is approved by the supervisor of records under clause (iv); (B) shall not be assessed for the first 2 hours of work performed where the responding municipality has a population of over 20,000 people; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);
- (iv) the supervisor of records may approve a petition from an agency or municipality to charge for time spent segregating or redacting, or a petition from a municipality to charge in excess of \$25 per hour, if the supervisor of records determines that (A) the request is for a commercial purpose; or (B) the fee represents an actual and good faith representation by the agency or municipality to comply with the request, the fee is necessary such that the request could not have been prudently completed without the redaction, segregation or fee in excess of \$25 per hour and the amount of the fee is reasonable and the fee is not designed to limit, deter or prevent access to requested public records; provided, however, that:

- 1. in making a determination regarding any such petition, the supervisor of records shall consider the public interest served by limiting the cost of public access to the records, the financial ability of the requestor to pay the additional or increased fees and any other relevant extenuating circumstances;
- 2. an agency or municipality, upon submitting a petition under this clause, shall furnish a copy of the petition to the requestor;
- 3. the supervisor of records shall issue a written determination with findings regarding any such petition within 5 business days following receipt of the petition by the supervisor of public records; and
- 4. the supervisor of records shall provide the determination to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court;
- (v) the records access officer may waive or reduce the amount of any fee charged under this subsection upon a showing that disclosure of a requested record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor, or upon a showing that the requestor lacks the financial ability to pay the full amount of the reasonable fee;
- (vi) the records access officer may deny public records requests from a requester who has failed to compensate the agency or municipality for previously produced public records;

(vii) the records access officer shall provide a written notification to the requester detailing the reasons behind the denial, including an itemized list of any balances attributed to previously produced records;

- (viii) a records access officer may not require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver; and
- (ix) as used in this section "commercial purpose" shall mean the sale or resale of any portion of the public record or the use of information from the public record to advance the requester's strategic business interests in a manner that the requester can reasonably expect to make a profit, and shall not include gathering or reporting news or gathering information to promote citizen oversight or further the understanding of the operation or activities of government or for academic, scientific, journalistic or public research or education
- (e) A records access officer shall not charge a fee for a public record unless the records access officer responded to the requestor within 10 business days under subsection (b).
- (f) As used in this section, "employee time" means time required by employees or necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed by the municipality.

Part I ADMINISTRATION OF THE GOVERNMENT

Title X PUBLIC RECORDS

Chapter 66 PUBLIC RECORDS

Section 10A PETITION FOR DETERMINATION OF VIOLATION OF SEC. 10;

ENFORCEMENT BY ATTORNEY GENERAL; CIVIL ACTIONS

Section 10A. (a) If an agency or municipality fails to comply with a requirement of section 10 or issues a response the requestor believes in violation of section 10, the person who submitted the initial request for public records may petition the supervisor of records for a determination as to whether a violation has occurred. In assessing whether a violation has occurred, the supervisor of records may inspect any record or copy of a record in camera; provided, however, that where a record has been withheld on the basis of a claim of the attorney-client privilege, the supervisor of records shall not inspect the record but shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed. If an agency or municipality elects to provide a record, claimed to be subject to the attorney-client privilege, to the supervisor of records for in camera inspection, said inspection shall not waive any legally applicable privileges, including without limitation, the attorney- client privilege and

General Law - Part I, Title X, Chapter 66, Section 10A

the attorney work product privilege. The supervisor of records shall issue a written determination regarding any petition submitted in accordance with this section not later than 10 business days following receipt of the petition by the supervisor of records. Upon a determination by the supervisor of records that a violation has occurred, the supervisor of records shall order timely and appropriate relief. A requestor, aggrieved by an order issued by the supervisor of records or upon the failure of the supervisor of records to issue a timely determination, may obtain judicial review only through an action in superior court seeking relief in the nature of certiorari under section 4 of chapter 249 and as prescribed in subsection (d).

(b) If an agency or municipality refuses or fails to comply with an order issued by the supervisor of records, the supervisor of records may notify the attorney general who, after consultation with the supervisor of records, may take whatever measures the attorney general considers necessary to ensure compliance. If the attorney general files an action to compel compliance, the action shall be filed in Suffolk superior court with respect to state agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The attorney general shall designate an individual within the office of the attorney general to serve as a primary point of contact for the supervisor of records. In addition to any other duties the attorney general may impose, the designee shall serve as a primary point of contact within the office of the attorney general regarding notice from the supervisor of records that an agency or municipality has refused or failed to comply with an order issued by the supervisor of records.

- (c) Notwithstanding the procedure in subsections (a) or (b), a requestor may initiate a civil action to enforce the requirements of this chapter. Any action under this subsection shall be filed in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The superior court shall have available all remedies at law or in equity; provided, however, that any damages awarded shall be consistent with subsection (d).
- (d)(1) In any action filed by a requestor pursuant to this section:
- (i) the superior court shall have jurisdiction to enjoin agency or municipal action;
- (ii) the superior court shall determine the propriety of any agency or municipal action de novo and may inspect the contents of any defendant agency or municipality record in camera, provided, however, that the in camera review shall not waive any legally applicable privileges, including without limitation, the attorney- client privilege and the attorney work product privilege;
- (iii) the superior court shall, when feasible, expedite the proceeding;
- (iv) a presumption shall exist that each record sought is public and the burden shall be on the defendant agency or municipality to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law.
- (2) The superior court may award reasonable attorney fees and costs in any case in which the requester obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of

a complaint. There shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes that:

- (i) the supervisor found that the agency or municipality did not violate this chapter;
- (ii) the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts;
- (iii) the agency or municipality reasonably relied upon a published opinion by the attorney general based on substantially similar facts;
- (iv) the request was designed or intended to harass or intimidate; or
- (v) the request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.

If the superior court determines that an award of reasonable attorney fees or costs is not warranted, the judge shall issue written findings specifying the reasons for the denial.

(3) If the superior court awards reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it shall order the agency or municipality to waive any fee assessed under subsection (d) of section 10. If the superior court does not award reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it may order the agency or municipality to waive any fee assessed under said subsection (d) of said section 10. Whether the superior court determines to waive any fee assessed under said subsection (d) of said section 10, it shall issue findings specifying the basis for such decision.

General Law - Part I, Title X, Chapter 66, Section 10A

(4) If a requestor has obtained judgment in superior court in a case under this section and has demonstrated that the defendant agency or municipality, in withholding or failing to timely furnish the requested record or any portion of the record or in assessing an unreasonable fee, did not act in good faith, the superior court may assess punitive damages against the defendant agency or municipality in an amount not less than \$1,000 nor more than \$5,000, to be deposited into the Public Records Assistance Fund established in section 35DDD of chapter 10.

(e) Notwithstanding any other provision of this chapter, the attorney general may, at any time, file a complaint in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located, to ensure compliance with this chapter and may further intervene as of right in any action filed in accordance with this section. In any action filed or in which the attorney general has intervened under this subsection, paragraphs (1) and (4) of subsection (d) shall apply and any public records the court orders produced shall be provided without a fee.

54 N.E.3d 607

KeyCite Yellow Flag - Negative Treatment
Review Granted in Part by Franks v. Mitchell, Mass., November 4,
2016

89 Mass.App.Ct. 1131 Unpublished Disposition NOTICE: THIS IS AN UNPUBLISHED OPINION. Appeals Court of Massachusetts.

Thomas C. FRANKS & others ¹
v.
Thomas A. MITCHELL.

No. 15–P–858.

July 5, 2016.

By the Court (KATZMANN, MALDONADO & BLAKE, JJ. ²).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 This case involves the allowance, within four months of the suit's filing, of a special motion to dismiss pursuant to

G.L. c. 231, § 59H, the anti-SLAPP (Strategic Litigation Against Public Participation) statute. Thomas A. Mitchell, the successful special movant, appeals arguing that the amount of attorney's fees awarded is unduly low. ³ There is no cross-appeal.

On appeal, Mitchell asks this court to adopt Federal case law requiring detailed factual findings in cases that involve significant reductions in the amount of fees requested. We see no need to do so. Suffice it to say that in light of the statutory purposes undermined by the amount of the award and the inadequate findings underpinning it, the award was "clearly

erroneous," and cannot stand. North Am. Expositions Co., Ltd. Partnership v. Corcoran, 452 Mass. 852, 872 (2009).

The plaintiffs commenced this SLAPP suit to punish Mitchell, a retired school teacher, for exercising his constitutional rights. See **Duracraft Corp. v. Holmes Prod. Corp., 427

Mass. 156, 161–162 (1998). On remand, the judge should consider not only the deterrent and reimbursement purposes of G.L. c. 231, § 59H, but also the important underlying interests that statute seeks to protect. See Fabre v. Walton, 436 Mass. 517, 525 (2002); Polay v. McMahon, 468 Mass. 379, 388–389 (2014). As parsimonious fee awards scare away competent attorneys, the judge should also consider the public interest in attracting capable counsel to defend these disfavored cases. See Haddad v. Wal–Mart Stores, Inc. (No. 2), 455 Mass. 1024, 1025 (2010).

In determining the amount of reasonable time spent on the case, the judge appropriately considered the difficulty of the issues. On remand, he may also consider other factors typically applied by the courts in fee-shifting cases.

See Linthicum v. Archambault, 379 Mass. 381, 388–389 (1979). For example, Mitchell's attorneys achieved complete success for their client. In addition, the plaintiffs' aggressive litigation tactics may warrant a more substantial time allocation. A See North Am. Expositions Co., Ltd. Partnership v. Corcoran, supra. On the other hand, the judge may make some downward adjustment for any excessive and unnecessary time and duplication of effort. See Ibid. (finding no reason to disturb fifteen percent reduction for "moderately excessive" time expended).

The plaintiffs did not question the reasonableness of the hourly rates authenticated below. After noting the "extensive" and "considerable" experience of Mitchell's attorneys, however, the judge reduced their rates without providing any reasonable explanation. ⁵ On remand, the judge should support such reductions, if any, with sufficient findings.

So much of the judgment addressing the amount of attorney's fees awarded is vacated and that matter is remanded for further proceedings consistent with this memorandum and order. In all other respects the judgment is affirmed. ⁶

*2 So ordered.

All Citations

89 Mass.App.Ct. 1131, 54 N.E.3d 607 (Table), 2016 WL 3587413

Massachusetts Appeals Court Case: 2022-P-0282 Filed: 5/24/2022 11:06 AM

Franks v. Mitchell, 89 Mass.App.Ct. 1131 (2016)

54 N.E.3d 607

Footnotes

- Mark Monroe, Steven LaMantia, and Clifford Hagberg. The plaintiffs are sued individually and as trustees of the Royal Coachman Condominium Trust and the Sandcastle Condominium Trust.
- The panelists are listed in order of seniority.
- The motion judge concluded that thirty hours of the 98.7 hours sought was a fair and reasonable amount of time to have "effectively pursued" the entire matter. Mitchell has not challenged the amount of costs awarded in this appeal.
- 4 On the same day that the plaintiffs filed their multi-count complaint against Mitchell, they also filed a motion for a preliminary injunction and sought a hearing. Notwithstanding attempts by Mitchell's attorneys to secure the withdrawal of the motion (backed by case law showing the futility of the position), the plaintiffs insisted on forging ahead. As a result of the intransigence, Mitchell was forced to incur additional legal fees.
- The judge praised the attorneys' skills, finding that the special motion to dismiss and accompanying oral argument were "models of effective, concise legal writing and oral advocacy."
- 6 Mitchell's request for appellate attorney's fees is denied.

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920 N.E.2d 88

76 Mass.App.Ct. 1109 Unpublished Disposition NOTICE: THIS IS AN UNPUBLISHED OPINION. Appeals Court of Massachusetts.

Kenneth R. IRWIN

v.

Cheryl APPLETON; Donna J. Wilson–Irwin & Newburyport Bed & Breakfast, third-party defendants.

No. 08–P–1636.

Jan. 25, 2010.

West KeySummary

1 Pretrial Procedure ← Dismissal or Default Judgment

Pretrial Procedure ← Dismissal or Default Judgment

Trial court did not abuse its discretion when it entered a default judgment and dismissed a tenant's counterclaim against her landlords. Tenant repeatedly failed to comply with discovery obligations and failed to appear at scheduled depositions. The trial court issued a warning to tenant before entering judgment, which went unheeded by tenant.

By the Court (DUFFLY, MILLS & MEADE, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 Cheryl Appleton used and occupied an apartment in the home of Kenneth and Donna Wilson–Irwin, who operated a bed and breakfast out of that home. The tenancy arrangement deteriorated and Kenneth Irwin (landlord) commenced a summary process action for possession and to recover unpaid rent. In response, Appleton pressed claims of damages against him and third-party defendants Donna J. Wilson–Irwin and Newburyport Bed and Breakfast (together with Kenneth Irwin, the defendants), alleging she was owed compensation

and rent relief for work she performed at the bed and breakfast.

Under a mutual agreement for judgment, Appleton eventually vacated the premises. The remaining portions of the summary process action for unpaid rent (later amended to include claims for breach of contract and waste) went forward, along with Appleton's counterclaims and third-party claims. The judge granted the defendants' motion to dismiss Appleton's claims due to her failure to comply with discovery obligations and entered a default judgment against her for the unpaid rent and waste claims. After a hearing, the judge awarded the defendants \$205.95 in costs for dismissal of the counterclaims and third-party claims. A second judgment awarded the landlord \$81,023.46 against Appleton, which included damages, costs and interest, and an award of attorney's fees in the amount of \$72,359. Appleton appeals, contending that the judge (1) should have recused himself; (2) failed to act on her motion to dismiss the summary process action; (3) erred in entering the default judgment against her and dismissing her counterclaims and third-party claims; and (4) erred in awarding attorney's fees. We affirm in part and reverse in part.

1. Recusal. Appleton moved for recusal largely on the basis of certain ex parte communications between the judge and a United States Congressman. These communications consisted of three letters of inquiry from the Congressman to the judge requesting information concerning events unrelated to the subject matter of the litigation. We consider these communications as the only factual predicate for Appleton's recusal argument. Other assertions of bias are insufficiently supported in the record to be considered. See *Demoulas* v. Demoulas, 432 Mass. 43, 53 n. 7, 732 N.E.2d 875 (2000) ("[B]efore evaluating the merits of assertions in materials supporting a recusal motion, the judge [or the reviewing court] has to determine the legal sufficiency of the information. If the information is based on inadmissible materials, or is otherwise legally insufficient, it does not have to be accepted").

The abuse of discretion standard is employed in reviewing a judge's denial of a motion to recuse. See Haddad v. Gonzalez, 410 Mass. 855, 862, 576 N.E.2d 658 (1991). The record consistently demonstrates that the judge acted fairly, impartially, and without bias. See Commonwealth v. Eddington, 71 Mass.App.Ct. 138, 143–144, 879 N.E.2d 1261 (2008). We give little credence to Appleton's claims of bias,

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given that she created the appearance of bias and then relied solely upon those actions as the ground for recusal. The judge did not abuse his discretion in denying the motion for recusal. In these circumstances, the judge was not required to follow the two-prong procedure. Compare Demoulas v. Demoulas Super Mkts., Inc., 428 Mass. 543, 552, 703 N.E.2d 1141 (1998).

*2 2. Motion to dismiss the summary process action.

- Appleton next claims that the judge erred by failing to act on her motion to dismiss the summary process action. There was no error because, under the joint agreement for judgment, Appleton had voluntarily vacated the premises, and, as a result, the landlord's complaint for possession was moot. See **Hodge v. Klug, 33 Mass.App.Ct. 746, 749, 604 N.E.2d 1329 (1992); **Federal Natl. Mort. Assn. v. Therrian, 42 Mass.App.Ct. 523, 524, 678 N.E.2d 193 (1997); **Tamber v. Desrochers, 45 Mass.App.Ct. 234, 235, 696 N.E.2d 969 (1998). The landlord was entitled to go forward on his claims in the action for unpaid rent and waste. See **Miskolczi v. Wilson, 6 Mass.App.Ct. 861, 861, 374 N.E.2d 342 (1978).
- 3. Default judgment and dismissal of counterclaims. After Appleton repeatedly failed to comply with her discovery obligations, including failing to appear at scheduled depositions, the defendants moved to dismiss the counterclaims and third-party claims. The judge held a hearing on this motion and denied it without prejudice, specifically warning that further failures would result in reconsideration of the motion. After an additional round of such failures, the defendants renewed their motion to dismiss. This motion was allowed, and the judge dismissed Appleton's claims against the defendants. The judge further defaulted her on the unpaid rent and waste claims. Appleton moved to remove the default ² pursuant to Mass.R.Civ.P. 60(b)(1), 365 Mass. 828 (1974), based on excusable neglect. ³ This motion was denied, and, after a hearing, the judge awarded \$205.95 in costs on the counterclaims and third-party claims, and \$81,023.46 on the summary process action.

On appeal, Appleton claims that the judge erred in denying her rule 60(b) motion. In reviewing a grant or denial of a motion to vacate judgment under rule 60(b), we review for abuse of discretion. See Scannell v. Ed. Ferreirinha & Irmao, Lda., 401 Mass. 155, 157–158, 514 N.E.2d 1325 (1987). In this context, an abuse of discretion is "characterized by arbitrary determination, capricious

disposition, whimsical thinking, or idiosyncratic choice." *Greenleaf v. Massachusetts Bay Transp. Authy.*, 22 Mass.App.Ct. 426, 429, 494 N.E.2d 402 (1986).

In this case, Appleton failed to comply with her written discovery obligations and failed to appear on two separate occasions for scheduled depositions. She claims that these failures were the result of excusable neglect based upon scheduling conflicts and advice from an unnamed court clerk.

She produced no support for these assertions. See Cullen Enterprises, Inc. v. Massachusetts Property Ins. Underwriting Assn., 399 Mass. 886, 894, 507 N.E.2d 717 (1987) (in a rule 60[b] motion, "the moving party bears the burden of justifying the motion"). See also Smith & Zobel, Rules Practice § 55.8, at 261 (2d ed.2007) (a defendant seeking to set aside a default judgment must submit "an affidavit detailing the facts and circumstances ... upon which the motion rests"). In considering Appleton's repeated failures to comply with various discovery obligations, her failure to support the claims of excusable neglect, and the judge's earlier warning, we conclude that discretion was not abused in denying the rule 60(b) motion.

*3 4. Attorney's fees and costs. Appleton's final claim is that the judge improperly ⁴ or excessively awarded attorney's fees. Mindful that "[w]hat constitutes a reasonable fee is a question that is committed to the sound discretion of the judge[,]" Berman v. Linnane, 434 Mass. 301, 302–303, 748 N.E.2d 466 (2001), we conclude that without the aid of findings we are unable to determine that the fee award is supported by the record.

On the landlord's summary process action, the judge awarded damages of \$6,840 for unpaid rent, \$520.85 for waste, \$72,359 for attorney's fees, and \$300 for costs. ⁵ The attorney's fees sought and recovered in this case appear to fall well outside the norm for a case of this nature. "This is not a case ... in which responsibility, novelty, difficulty, unusual skill, standing at the bar, or spectacular results achieved need be placed in the equation." *Olmstead v. Murphy*, 21 Mass.App.Ct. 664, 665, 489 N.E.2d 707 (1986). The docket reflects an inordinate number of pleadings and motions filed by Appleton, which a judge might view as obfuscating the issues rather than assisting in just resolution. Notwithstanding, the generality and repetition of billing entries invite the conclusion that time was duplicative or far too generously expended. See *Berman v. Linnane*, 434 Mass.

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Irwin v. Appleton, 76 Mass.App.Ct. 1109 (2010)

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at 303, 748 N.E.2d 466; *Aroesty v. Cohen,* 62 Mass.App.Ct. 215, 222–223 n. 13, 815 N.E.2d 639 (2004). ⁶

So ordered.

Conclusion. The award of \$72,359 in attorney's fees is vacated, and the matter is remanded for a further determination of an appropriate attorney's fee award based on findings grounded in the evidence and sufficiently detailed to support the analysis. In all other respects, the judgments are affirmed.

All Citations

76 Mass.App.Ct. 1109, 920 N.E.2d 88 (Table), 2010 WL 246118

Footnotes

- By order of the judge, on his own initiative, these brief correspondences were made a part of the trial record.
- In this motion, Appleton also argued that her counterclaims should be reinstated.
- In her motion to remove the default, Appleton alleged that she believed she did not need to appear at various hearings and depositions due to a conversation she had had with an unnamed individual at the clerk's office of another Housing Court. No affidavit was filed in support of this motion.
- Appleton's argument that G.L. c. 231, § 6F, controls or is otherwise relevant is mistaken. The basis for an award of attorney's fees in this case is language in the lease. Thus, her claim that the Housing Court lacked jurisdiction, as well as her claim that the award was invalid due to the lack of a hearing as required under G.L. c. 231, § 6F, must fail.
- 5 That is, the award of attorney's fees is almost ten times the value of the underlying judgment.
- The defendants argue that the fee award was not excessive because attorney's fees allocated to defending the counterclaims are recoverable under the language in the lease. Although the judge commented at the hearing concerning fees, "I think they're entitled to bill for the counterclaims," he made no findings and provided no analysis on whether defending the counterclaims occurred "in connection" with recovering past due rents within the meaning of the lease.

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144 N.E.3d 306

97 Mass.App.Ct. 1109 **Unpublished Disposition**

Greenberg v. Barros, 97 Mass.App.Ct. 1109 (2020)

NOTICE: THIS IS AN UNPUBLISHED OPINION. NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008). Appeals Court of Massachusetts.

> Mark GREENBERG & another 1 Manuel C. BARROS.

> > 19-P-209 Entered: April 3, 2020

By the Court (Wolohojian, Milkey & Shin, JJ.)²

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The defendant, Manuel C. Barros, incorporated the Bass River Tennis Corporation (Bass River) in 2007. Bass River operated on property in Beverly owned by a related entity, 31 Tozer LLC (Tozer). Barros initially owned one hundred percent of both entities. In the ensuing years, the plaintiffs Mark Greenberg and Michael LaPierre loaned Bass River significant funds to keep it afloat. Pursuant to a securities purchase agreement (SPA) that the plaintiffs entered into with Barros, Bass River, and Tozer in 2010, the plaintiffs eventually converted the debts owed to them into equity interests in Bass River that collectively amounted to eighty percent of the corporation. The SPA also gave the plaintiffs an option to acquire a pro rata share of Tozer, and it is the exercise of that option that is the subject of this appeal.

At Barros's direction, Tozer filed for bankruptcy in 2016. As Barros openly has acknowledged, this was done in an effort to try to block the plaintiffs from exercising their option to acquire eighty percent of Tozer. The plaintiffs intervened in the bankruptcy action and sought to have it dismissed or, in the alternative, to have the exercise of their option exempted from the automatic stay. The Bankruptcy Court judge entered an order that stated that "the automatic stay does not apply to prevent the [plaintiffs] from exercising their rights under Article IV, Section 4.1(e) of the SPA." That order also directed the parties to "obtain a judicial determination in [S]tate court of the [petitioners'] rights under the SPA and the various parties' equity interests in [Tozer]." The judge suspended all proceedings in the bankruptcy case pending the outcome of the contemplated State court case. Barros appealed the Bankruptcy Court judge's order to Federal District Court, which eventually affirmed it.

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Meanwhile, as contemplated by the Bankruptcy Court order, the plaintiffs filed the current action in Superior Court to resolve the parties' respective ownership interests in Tozer in accordance with the terms of the SPA. On cross motions for summary judgment, a Superior Court judge ruled in the plaintiffs' favor and issued a judgment that, in pertinent part, stated as follow: "[P]laintiffs are the owners of [eighty percent] of the membership interests of Tozer, with Greenberg owning [forty-seven percent] and Pierre owning [thirty-three percent]. Barros is hereby ORDERED to amend the [o]perating [a]greement of Tozer to reflect the correct ownership interests." On Barros's appeal of that judgment, we affirm.

As Barros points out, the plaintiffs' acquisition of eighty percent of Tozer theoretically could be accomplished through one of two routes. The first pathway would be to have Barros transfer eighty percent of his existing interest in Tozer to the plaintiffs. The second pathway would involve Tozer's issuing certificates of membership interest, documents which indisputably do not currently exist.³ Under the second pathway, Barros would receive twenty percent of the certificates (to memorialize the twenty percent interest that he would retain) and the rest would go to the plaintiffs. According to Barros, the judge effectively chose the first pathway and this was error. Specifically, he maintains on various grounds that although the SPA does not specify which pathway should be followed, a close reading of the SPA indicates that the second pathway must have been intended. 4 He further argues that this erroneous choice had major consequences, because if the plaintiffs' acquisition 144 N.E.3d 306

of the agreed-upon eighty percent required action by Tozer (the issuance of new certificates of membership interest), this would have implicated Tozer's bankruptcy rights, and it thereby would have allowed Tozer a basis to shed its obligations under the SPA.

*2 There are at least three independent flaws in this argument. ⁵ First, Barros's premise that the Superior Court judgment he appealed resolved which pathway to follow is not accurate. The judgment did not order Barros to transfer eighty percent of his existing interest in Tozer; it simply resolved the respective ownership interests that resulted from the plaintiffs' exercise of their option under the SPA (the question left open by the Bankruptcy Court).

Second, the bankruptcy implications of the parties' dispute were for the Bankruptcy Court to address. Having heard the same arguments that Barros is making now, the Bankruptcy Court judge decided to leave resolution of who owned what share of Tozer to the State courts. Barros's avenue of redress was to appeal the Bankruptcy Court judge's having left this issue to State courts. Barros pursued such an appeal, but lost.

Finally, Barros is unable to demonstrate how the choice between the two specific pathways makes any substantive difference. Putting aside the de minimus question of what happens to the one dollar paid by each of the plaintiffs to exercise their option to acquire eighty percent of Tozer, the two pathways for the plaintiffs to effectuate their acquiring those interests are mathematically equivalent. Under both scenarios, Barros would end up with twenty percent and the plaintiffs eighty percent, and neither Tozer's capitalization nor its obligations to third parties would change. In other words, under the circumstances presented, Barros has not demonstrated how Tozer itself had any interest in who owns its equity; rather, that is a dispute solely between the plaintiffs and Barros. 6 In the current litigation between the plaintiffs and Barros about their respective shares, any dispute about which specific pathway to follow is simply not material. The judge did not err in granting summary judgment in the plaintiff's favor or in issuing the relief included in the

judgment. See G. L. c. 231A, § 5. See also <u>Essex Co.</u> v. <u>Goldman</u>, 357 Mass. 427, 434 (1970).

In addition, we uphold the judge's award of \$144,413 in attorney's fees and \$3,108.04 in costs. Under the express terms of § 7.6 of the SPA, Barros agreed to hold the plaintiffs

harmless against losses, including court costs and reasonable attorney's fees, arising from "any failure by ... Barros to perform any covenant or obligation ... Barros set forth in the [SPA]." Thus, under the express terms of the SPA, the parties agreed to fee shifting if the plaintiffs were compelled to pursue litigation to enforce the SPA. The judge was correct to conclude that legal expenses incurred by the plaintiffs in contesting Barros's efforts to block them from exercising their option to purchase eighty percent of Tozer falls well within this language. As the plaintiffs aptly put it in their brief, their attorney's fees here were for work done "in response to Barros's admitted attempt to thwart plaintiffs' exercise of a right that he granted to him."

*3 Nor do we discern any abuse of discretion as to the amount of costs and attorney's fees awarded. See McGrath v. Mishara, 386 Mass. 74, 87 (1982) (award of attorney's fees subject to abuse of discretion standard). Barros does not challenge the hourly rate charged by the plaintiffs' lawyers; he challenges only the number of hours for which they seek reimbursement. However, the number of hours they spent was a direct result of the procedural and substantive complexity injected into this case by Barros's actions and arguments. As the United States Supreme Court has put it, a defendant "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff[s] in response." Riverside v. Rivera, 477 U.S. 561, 580 n.11 (1986), quoting Copeland v. Marshall, 641 F.2d 880, 904 (1980).

Pursuant to § 7.6 of the SPA, the plaintiffs are entitled to an award of reasonable appellate attorney's fees and costs. Within fourteen days of issuance of the decision, the plaintiffs shall submit a statement of their appellate attorney's fees and costs in accordance with procedure specified in Fabre v. Walton, 441 Mass. 9, 10-11 (2004), and within fourteen days thereafter, Barros may submit an opposition to the amount requested.

Judgment affirmed.

All Citations

97 Mass.App.Ct. 1109, 144 N.E.3d 306 (Table), 2020 WL 1651699

Footnotes

- Michael LaPierre.
- 2 The panelists are listed in order of seniority.
- 3 Including, notably, any certificate issued by Tozer to reflect Barros's original one hundred percent interest.
- For example, Barros argues that because the option provision in the SPA employs the term "purchaser" and the SPA generally defines that term to include him, then it necessarily follows that Tozer is a "seller" of the interests to be acquired, with the eighty percent coming from it, not transferred directly from Barros to the plaintiffs.
- The plaintiffs additionally argue that Barros failed to preserve his arguments in Superior Court. We pass over that issue. We also do not reach the plaintiffs' claim that Barros has no standing to assert Tozer's bankruptcy rights.
- We additionally note that Barros's suggestion that the issuance of ownership interests in Tozer to the plaintiffs somehow would dilute Tozer's capital and interfere with Tozer's ability to raise new capital from third parties was addressed and rejected by the Federal District Court.
- The existence of § 7.5 does not create an ambiguity about this issue. Read in context, that section (entitled "expenses") plainly was intended to signify that each party to the SPA was to bear its own expenses and legal fees in drafting and executing the terms of the SPA. See Downer & Co., LLC v. STI Holding, Inc., 76 Mass. App. Ct. 786, 792 (2010) (contractual language should not be read in isolation because "meaning and ambiguity are creatures of context").
- We do not rely on the plaintiffs' argument that Barros's failure to contest the award of attorney's fees in earlier litigation about the SPA precludes him from raising such a challenge here.

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