2016 IL App (4th) 150569-U

NO. 4-15-0569

FILED
August 26, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

NAOMI LOPEZ BAUMAN and THE ILLINOIS POLICY INSTITUTE, an Illinois Not-For-Profit Corporation, Plaintiffs-Appellants, v. THE DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, Defendant-Appellee.	)))))))	Appeal from Circuit Court of Sangamon County No. 14MR479 Honorable Patrick W. Kelley, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in finding plaintiffs were ineligible for an attorney fee award under the Freedom of Information Act (FOIA) and denying their motion for fees.

¶ 2 Plaintiffs, the Illinois Policy Institute (Illinois Policy), an Illinois not-for-profit corporation, and Naomi Lopez Bauman, the director of health policy for Illinois Policy, filed an action against defendant, the Department of Central Management Services (CMS), pursuant to the Freedom of Information Act (FOIA), alleging CMS improperly denied their request for records that they had the right to inspect and copy. Ultimately, plaintiffs prevailed in their action and filed a motion for attorney fees. The trial court denied plaintiffs' motion, finding them ineligible for attorney fees under FOIA, and plaintiffs appeal. We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In November 2013, plaintiffs submitted a FOIA request to CMS, seeking records concerning the State Employees' Group Insurance Program (SEGIP) and members of the Illinois General Assembly. In particular, they sought records with information related to SEGIP enrollment, dependent coverage, and premium rates for current Illinois General Assembly members. CMS responded by providing two rate sheets, which identified both member costs and State costs for each insurance carrier/plan, as well as an Internet link to an online document with general information regarding SEGIP; however, it otherwise denied plaintiffs' request on the basis that FOIA exemptions applied.

¶ 5 In May 2014, plaintiffs filed the underlying complaint. They sought an order declaring their entitlement to the records described in their FOIA request and enjoining CMS from withholding those records. Both plaintiffs and CMS filed motions for summary judgment. In April 2015, the trial court granted both motions in part. It found plaintiffs entitled to records containing information relating to whether members of the Illinois General Assembly were enrolled in SEGIP and, if so, which health plan. It ordered CMS to provide plaintiffs with those records. However, the court held plaintiffs were not entitled to records containing information concerning legislative members' dependents.

¶ 6 Also in April 2015, plaintiffs filed a motion for attorney fees pursuant to section 11(i) of FOIA (5 ILCS 140/11(i) (West 2014)). They asserted they were entitled to an award of "reasonable attorneys' fees" because they prevailed, at least in part, in their cause of action against CMS. Plaintiffs alleged their attorneys—Jacob Huebert, Jeffrey Schwab, and Heather Niemetschek—spent 46 hours working on the case and "an appropriate *** billing rate for their

work" was $200 per hour. They requested an award of attorney fees totaling $9,200.

¶ 7 In May 2015, CMS filed a response to plaintiffs' motion. It first asserted plaintiffs were ineligible for an attorney fee award because plaintiffs and their attorneys were "the same entity." CMS also challenged plaintiffs' motion on the bases that they did not fully prevail in their case and failed to justify the amount of fees claimed.

¶ 8 With respect to its claim that Illinois Policy and their attorneys were "the same entity," CMS cited case authority for the proposition that a not-for-profit plaintiff in a FOIA action is not entitled to an award of attorney fees when it is represented by attorneys who are its own salaried employees and it is not required to spend additional funds in pursuing its FOIA requests. See *Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161, ¶ 25, 7 N.E.3d 102. It noted plaintiff Lopez Bauman was an employee of Illinois Policy and that Illinois Policy was a not-for-profit corporation. Further, it asserted the three attorneys for whom plaintiffs claimed attorney fees were all employees of the Liberty Justice Center (LJC). CMS argued LJC and Illinois Policy were "one in the same" noting LJC was "described on its own website and in numerous articles as the 'Illinois Policy Institute's free-market, public-interest litigation center.' " Thus, CMS maintained plaintiffs should be precluded from recovering any attorney fees because they did not expend any money to hire attorneys in pursuit of their FOIA request. To support its claims, CMS attached computer printouts from news websites and the LJC's website to its response.

¶ 9 In June 2015, plaintiffs filed a reply. They argued their attorneys were not employees of Illinois Policy, the case law relied upon by CMS was not binding authority on the trial court, they had "prevailed" in their claim as contemplated by FOIA, and they sufficiently justi-

fied the amount of fees claimed. Regarding CMS's claim that Illinois Policy and LJC were the "same entity," plaintiffs argued they were two different organizations with different boards of directors that shared only one common member. Further, they maintained their current attorneys, Huebert and Schwab, were not employees of Illinois Policy and Niemetscheck, plaintiffs' former attorney who now worked for Illinois Policy, worked exclusively for LJC when working on the case at bar.

¶ 10 In support of their claims, plaintiffs attached a certified statement from Huebert to their reply. In his statement, Huebert asserted he was "Senior Attorney" at LJC and "responsible for managing all of [LJC's] litigation." He described LJC as a "non-profit organization and a public-interest law firm that brings lawsuits to protect constitutional rights and enforce limits on government power in Illinois." Huebert maintained LJC was a separate organization from Illinois Policy. Further, he acknowledged Illinois Policy provided LJC "with some staff support, office facilities, and funding" but asserted it did not control LJC. Huebert stated Niemetscheck worked for LJC from September 2014 to February 2015 but performed no work for LJC after leaving. Additionally, Huebert asserted LJC's attorneys spent the majority of their time working for clients other than Illinois Policy. He maintained that working on FOIA cases on behalf of Illinois Policy required LJC to expend resources that it could have otherwise spent on other cases and activities that would advance its mission.

¶ 11 Plaintiffs also attached the certified statement of Kristina Rasmussen to their reply. Rasmussen stated she was Illinois Policy's executive vice president and responsible for managing its day-to-day operations. She described Illinois Policy as a non-profit organization and a separate organization from LJC. Rasmussen agreed Illinois Policy provided LJC "with

some staff support, office facilities, and funding" because it supported LJC's mission, but she also stated Illinois Policy did not control LJC, asserting it made "no decisions regarding the conduct of [LJC's] litigation except in its capacity as a client in cases such as this one." She further asserted Huebert and Schwab were not employees of Illinois Policy and Niemetschek became a "government affairs staff attorney [for Illinois Policy] in February 2015." Rasmussen stated Niemetschek's position with Illinois Policy involved no job duties related to LJC or its cases.

¶ 12 In July 2015, the trial court entered its decision in the matter. It denied plaintiffs' motion for attorney fees, finding Illinois Policy and its attorneys' law firm, LJC, were "sufficiently linked such that Plaintiffs are not entitled to an award of attorneys' fees pursuant to the Illinois Appellate Court's holding in *Uptown*."

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Plaintiffs appeal, arguing the trial court erred in denying their motion for attorney fees. They contend *Uptown* is inapplicable because Illinois Policy and LJC are separate, independent organizations. Alternatively, plaintiffs argue this court should reject *Uptown* and permit FOIA attorney fee awards to nonprofit entities represented by their own employees.

¶ 16 A. Standard of Review

¶ 17 Initially, we note the issues raised by plaintiffs on appeal present both issues of fact and law. The trial court's factual determinations regarding the nature of the relationship between Illinois Policy and LJC will not be overturned unless they are against the manifest weight of the evidence. *Brazas v. Ramsey*, 291 Ill. App. 3d 104, 109, 682 N.E.2d 476, 478 (1997). "A factual determination is against the manifest weight of the evidence only where the opposite con-

clusion is clearly evident or where the determination is unreasonable, arbitrary, and not based on the evidence presented." *Id*. at 109, 682 N.E.2d at 479. However, whether this court should apply *Uptown* to bar plaintiffs from obtaining a FOIA attorney fee award presents a question of law that is subject to *de novo* review. See *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 542, 866 N.E.2d 137, 144 (2007) (stating that, outside administrative review, the standards of review applicable in civil cases are the *de novo* standard for legal issues and the manifest-weight-of-the-evidence standard for factual issues).

¶ 18 B. FOIA's Attorney Fee Provision and Judicially Recognized Exceptions

¶ 19 FOIA's attorney fee provision provides: "If a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under [section 11(i) of FOIA], the court shall award such person reasonable attorneys' fees and costs." 5 ILCS 140/11(i) (West 2014). Although section 11(i) contains mandatory language, certain plaintiffs have been deemed ineligible for an attorney fee award.

¶ 20 In *Hamer v. Lentz*, 132 Ill. 2d 49, 63, 547 N.E.2d 191, 198 (1989), the supreme court determined that an attorney plaintiff who proceeded *pro se* in a FOIA action was ineligible for a fee award under a previous version of FOIA. The court first noted that the purpose of the attorney fee provision was "to ensure enforcement of the FOIA" and not "as either a reward for successful plaintiffs or as a punishment against the government." *Id*. at 61-62, 547 N.E.2d at 197. It concluded that "a lawyer representing himself or herself simply does not incur legal fees" and, therefore, "legal fees do not present a barrier to a *pro se* lawyer seeking to obtain information." *Id.* at 62, 547 N.E.2d at 197.

¶ 21 Second, the supreme court found it was "self-evident that one of the goals of the

Illinois fee provision [was] to avoid unnecessary litigation by encouraging citizens to seek legal advice before filing suit." *Id.* It determined "that the lack of objectivity that results from self-representation w[ould] not further this goal." *Id.* A third and final basis for the court's decision was the fear that the fee provision would be abused by lawyers with inactive practices for the sole purpose of generating fees. *Id.* It concluded "[t]he most effective way to deter potential abusive fee generation [was] to deny fees to lawyers representing themselves." *Id.* at 62-63, 547 N.E.2d at 198.

¶ 22 In *Brazas*, 291 Ill. App. 3d at 110, 682 N.E.2d at 479, the Second District relied on *Hamer* in concluding "that nonlawyer *pro se* litigants are also barred from collecting attorney fees under section 11(i) of [FOIA]." It found "no appreciable difference between a lawyer and a nonlawyer representing himself in a *pro se* complaint" as, "in either case, neither litigant incurs any legal fees in the prosecution of his action." *Id.* at 110, 682 N.E.2d at 480. The court noted that, in the case before it, the plaintiff did not incur any attorney fees which could be reimbursed by FOIA's attorney fee provision. *Id.* Additionally, it found that such a rule would further FOIA's goal of avoiding unnecessary litigation by encouraging potential plaintiffs to seek legal advice before filing suit. *Id.*

¶ 23 Finally, in *Uptown*, 2014 IL App (1st) 130161, ¶ 25, 7 N.E.3d 102, the First District held *Hamer*'s reasoning "prohibits a not-for-profit legal [services] organization from being awarded legal fees that were not actually incurred in pursuing a FOIA request on the organization's behalf." It noted that, in that case, the plaintiff was an artificial entity represented by salaried employees and "not required to spend additional funds specifically for the purpose of pursuing FOIA requests." *Id.* The court further stated as follows:

> "[L]egal fees were never a burden that [the plaintiff] was required to overcome in order to pursue its FOIA requests. In addition, [the plaintiff's attorneys] had no expectation of receiving additional fees from [the plaintiff] for performing this work. [Citation.] As a result, providing [the plaintiff] with legal fees for pursuing FOIA requests would not compensate [the plaintiff]. On the contrary, an award of fees would reward [the plaintiff]. Moreover, it would encourage salaried employees working for a not-for-profit organization to engage in fee generation on the organization's behalf." *Id*.

¶ 24 C. Plaintiffs' Argument

¶ 25 As stated, plaintiffs argue the trial court erred in finding them ineligible for attorney fees under FOIA. They first argue that Illinois Policy and LJC are separate and distinct organizations such that the relationship between Illinois Policy and LJC's attorneys must be characterized as one of independent legal representation. They maintain the evidence was insufficient to establish otherwise and, as a result, the First District's decision in *Uptown* does not apply. For the reasons that follow, we agree that the trial court's factual findings were against the manifest weight of the evidence.

¶ 26 As stated, an award of attorney fees is required under section 11(i) of FOIA when a plaintiff prevails in his or her cause of action. In this instance, plaintiffs prevailed, at least in part, in their action against CMS and filed a motion for attorney fees. CMS objected on the basis that plaintiffs were ineligible for a fee award under *Uptown*. It argued Illinois Policy and LJC were the same entity and, therefore, plaintiffs' attorneys were essentially Illinois Policy employ-

ees. Before the trial court, CMS relied on online descriptions of LJC as Illinois Policy's "free market public-interest litigation center" from LJC's website and the websites of two news organizations.

¶ 27 On appeal, CMS asks this court to take judicial notice of additional online information from both Illinois Policy's website and LJC's website, maintaining that it provides further support for its argument. However, we agree with plaintiffs' assertion that a reviewing court should not take judicial notice of critical evidentiary material that was not presented to the trial court, especially when that evidence may be significant in the proper determination of the issues between the parties. *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166, 449 N.E.2d 812, 815 (1983) (quoting *Ashland Savings & Loan Ass'n v. Aetna Insurance Co.*, 18 Ill. App. 3d 70, 78, 309 N.E.2d 293, 299 (1974)). Thus, we decline to take judicial notice of new factual evidence which CMS did not present in connection with its objection to plaintiffs' motion for attorney fees and which plaintiffs did not have the opportunity to address before the trial court.

¶ 28 In response to CMS's objection, plaintiffs filed a reply and attached certified statements from Huebert, one of their attorneys and a "Senior Attorney" at LJC, and Rasmussen, Illinois Policy's executive vice president. According to those statements, Illinois Policy and LJC were separate organizations, both organizations had different boards of directors with only one common member, and Illinois Policy did not control LJC's operations. Although Huebert and Rasmussen acknowledged Illinois Policy provided LJC "with some staff support, office facilities, and funding," they denied that plaintiffs' attorneys were employed by Illinois Policy when working on the case at bar.

¶ 29 We find the evidence before the trial court was insufficient to establish that Illi-

nois Policy and LJC were "one in the same" for purposes of applying *Uptown*'s FOIA exception. In *Uptown*, the plaintiff's attorneys were its own salaried employees. Here, the evidence failed to show that Illinois Policy and LJC were the same entity or that plaintiffs' attorneys were Illinois Policy employees. Rather, the evidence showed Illinois Policy and LJC were distinct and separately controlled organizations. Thus, under the specific circumstances presented, we find the trial court erred in holding that Illinois Policy and LJC were "sufficiently linked" such that the exception set forth in *Uptown* applied. We reverse the court's denial of plaintiffs' motion for attorney fees. Because the trial court erred in its factual finding, we need not address plaintiffs' alternative argument that the holding in *Uptown* should be rejected.

¶ 30 Finally, we note that CMS disputed the reasonableness of the fees claimed by plaintiffs before the trial court. However, given its resolution of the matter, the court did not address that issue. Thus, we remand the matter to the trial court so that it may make a determination as to the reasonableness of the fees claimed by plaintiffs before entering an appropriate fee award.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we reverse the trial court's judgment and remand the matter to the trial court so that it may award plaintiffs reasonable attorney fees pursuant to section 11(i) of FOIA.

¶ 33 Reversed and remanded with directions.