STATE OF MICHIGAN
COURT OF APPEALS

CAROL BETH LITKOUHI,

Plaintiff - Appellant,

v.

ROCHESTER COMMUNITY SCHOOL DISTRICT,

Defendant - Appellee.

Court of Appeals Case No. 364409

L/C Case No. 22-193088-CZ
Hon. Jacob J. Cunningham

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I. Acknowledgement of the initiation of discovery.

Plaintiff-Appellant acknowledges that she was incorrect to say that she did not conduct any discovery. Plaintiff-Appellant did serve and Defendant-Appellee did answer Plaintiff's First Interrogatories and Requests for Documents, prior to discovery being stayed pending motions for summary disposition. Plaintiff-Appellant apologizes to the Court and Defendant-Appellee for this error.

However, Plaintiff-Appellant would deny that Defendant-Appellee "fully responded." Defendant-Appellee's answers were evasive and required follow up inquiries which never occurred because of the stay. For example, Plaintiff-Appellant requested: "Please produce all of the classroom materials used in the subject class up to the date of the filing of this lawsuit." Defendant-Appellee replied: "Object because the term 'classroom materials' is vague. Further, to the extent the term refers to materials used by teachers in day to day classroom instruction such documents are not within the possession custody or control of the Defendant."[1] Appellant's Appendix at 84.

The point remains that that dismissal was premature because there was insufficient discovery conducted. "As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete." *Dep't of Soc Services v Aetna Cas & Sur Co*, 177

[1] At this stage, this was not a FOIA request, but was a discovery request. Yet Defendant-Appellee seems to be saying that it does not have a discovery duty to obtain relevant materials from employees if these records are not already in the possession of the administration. Such an assertion violates MCR 2.302(B)(1), "Parties may obtain discovery regarding any non-privileged matter that is relevant…" An entity has a duty to obtain information from its employees for discovery, unless a particular request is irrelevant, improper, or burdensome. See, for example, *Cabrera v Ekema*, 265 Mich App 402 (2005) where requesting employees' social security numbers were neither relevant nor proper.

Mich App 440, 446 (1989). While Plaintiff-Appellant was wrong when it asserted that it had not conducted any discovery, it is correct to say that discovery was not "complete."

Taking these incomplete discovery responses combined with the evasiveness of the Defendant-Appellee's affidavits as described in Plaintiff-Appellant's Brief at 29-30, and the trial court's alternate reason for dismissal remains inappropriate.

II. Statutory rules of construction favor Plaintiff-Appellant whether the statute is unambiguous or ambiguous.

Defendant-Appellee asserts that "FOIA unambiguously excludes public employees of public school districts from the definition of "public body…" Appellee's Br at 6. This is incorrect, as it is Plaintiff-Appellant's interpretation of FOIA that is unambiguous. The portion of the statute pertaining to local governments is clear that school districts are public bodies subject to FOIA. MCL 15.232(h)(iii) defines a public body as including: "A county, city, township, village, intercounty, intercity, or regional governing body, council, ***school district***, special district, or municipal corporation, or a board, department, commission, council, or agency thereof." (emphasis added). And records prepared or used by a public body are subject to FOIA. "'Public record' means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i). FOIA is clear: (other than the statutory exemptions) any document prepared, owned or used by the school district in performance of its official function is subject to FOIA. [2]

[2] Perhaps it shouldn't need saying, but educating students is the primary function of the Defendant-Appellee school district. Upon information and belief, Defendant-Appellee is a community school district organized pursuant to MCL 380.382, which states that it has the same powers as a general powers school district described in MCL 380.11a. Pursuant to MCL 380.11a(3)(a), the primary function of the district is "Educating pupils." It does so by "educat[ing] pupils by directly operating 1 or more public schools on its own." MCL 380.11a(3)(a)(i). Any record related to this function (unless otherwise exempt by statute) is a public record subject to FOIA.

It is the lower court's and Defendant-Appellee's interpretation which creates ambiguity where there is none. They assert that since "employees" are included in MCL 15.232(h)(i), but not MCL 15.232(h)(iii), only those employees of the state's executive branch are subject to FOIA. This, they argue, means that the exclusion of employees from the portion relevant to local governments indicates that local governments' employees' work product is not a public record under FOIA. Appellee's Br at 6. But Defendant-Appellee's reading is by no means unambiguous – they have to apply another part of the statute to interpret the provision for local governments to *create* an ambiguity. The lower court[3] and Defendant-Appellee are doing what our courts have prohibited – interpreting an unambiguous statute so as to create an ambiguity. "It is not our role to rewrite the law or substitute our own policy judgment in the face of the text of the statute, or 'to create an ambiguity where none exists in order to reach a desired result …'" *People v Harris*, 499 Mich 332, 356 (2016).

If a statute is truly unambiguous, "this court must not engage in judicial construction." *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 134 (2003), citing *In re MCI Telecom*, 460 Mich 396, 411 (1999). "However, judicial construction is appropriate when reasonable persons could interpret a statute differently. *Id*. at 135. To reach the meaning posited by the lower court and Defendant-Appellee, one must necessarily engage in judicial construction. The "negative-implication canon," or *expressio unius est exclusio alterius*, used by Defendant-Appellee and discussed by Plaintiff-Appellant (Appellant's Br at 23-24) is judicial construction. "The doctrine of *expressio unius est exclusio alterius* 'does not subsume

[3] See the lower court's final order at page 5 of Appellant's Appendix: "Because the Legislature specifically did not indicate individual employees of school districts are within the meaning of 'public bodies,' the Court is left with a conviction that the Legislature did not intend for a public school's employees to be included in the definition of 'public bodies' relative to FOIA."

the plain language of the statute when determining the intent of the Legislature.' It has been described as 'a rule of construction that is a product of logic and common sense.'" *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 456 (2009) (internal citations omitted). Yet Defendant-Appellees want it both ways. They claim that the statute is unambiguous, but the only way they can get their desired reading of the statute is to use a tool that is only properly applicable when a statute is ambiguous. They import a word from another part of the statute (applicable to the executive branch) and conclude that its absence from the relevant portion (applicable to local governments) expresses a clear intent for a different result.

If the statute is unambiguous, it reads as Plaintiff-Appellant has maintained – that school districts are public bodies and all documents prepared, owned, or used by the school district are public records subject to FOIA. The only way to conclude otherwise is to determine that FOIA is, in fact, ambiguous, and requires interpretation. But as shown by Plaintiff-Appellant, if we are using methods of judicial construction, the absurdity doctrine forecloses the logic of Defendant-Appellee's position. Appellant's Br at 24-27. And our courts, when considering matters using both doctrines, have concluded that the absurdity doctrine is the superior method of statutory interpretation. See *Lutrell v Department of Corrections*, 421 Mich 93, 106-09 (1984), where the court evaluated both doctrines of statutory interpretation, and decided that the absurdity doctrine was the appropriate method there.

III. The absurdity doctrine is currently used by this Court.

Defendant-Appellee contends that the absurdity doctrine is not currently used by this Court. Appellee's Br at 14. Defendant-Appellee contends that "Plaintiff-Appellant claims that the rule has since been resurrected in *Cameron v Auto Insurance*, 476 Mich 55 (2006). However, what Plaintiff-Appellant leaves out of her brief is that the language she relies upon as the basis for

claiming the resurrection of the rule is not in the decision of the Court, rather it is in the dissent." Appellee's Br at 14. This is a misreading of Plaintiff-Appellant's Brief and the cases cited. Plaintiff-Appellant cited *Detroit International Bridge Co v Commodities Export Co*, 279 Mich App 662 (2008), for the holding that this on-again-off-again doctrine is, in fact, currently used by this Court. Appellant's Br at 24 and n 7. It was a direct quote from *Detroit International Bridge* which cited the dissent from Justice Kelly which described the on-again-off-again nature of the doctrine. Plaintiff-Appellant merely quoted the opinion accurately, including its internal citations. In *Detroit International Bridge*, this Court held that a majority combination of opinions in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006) revived the doctrine:

> Historically, Michigan followed the absurd-results rule, which dictates that a statute "should be construed to avoid absurd results that are manifestly inconsistent with legislative intent...." See *Cameron v Auto Club Ins Ass'n*, 476 Mich. 55, 110–112, 718 N.W.2d 784 (2006) (Kelly, J). In *People v McIntire*, 461 Mich 147, 155–156 n 2, 599 NW2d 102 (1999), the Michigan Supreme Court retreated from this doctrine and indicated that a statute must be applied literally even if the application leads to an absurd result. Several years later, however, a majority of Supreme Court justices repudiated that holding in *Cameron*, *supra* at 79, 718 NW2d 784 (Markman, J), 103–104 n 12, 718 NW2d 784 (Cavanagh, J), 104 n 1, 718 NW2d 784 (Weaver, J), 109, 718 NW2d 784 (Kelly, J). As noted in *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001), if the Supreme Court discusses and decides an issue germane to a controversy, even if it is not decisive of the controversy, the decision constitutes binding precedent. "A decision of the Supreme Court is authoritative with regard to any point decided if the Court's opinion demonstrates application of the judicial mind to the precise question adjudged, regardless of whether it was necessary to decide the question to decide the case." *Id*. (citation and quotation marks omitted). Accordingly, we accept the conclusion of Justices Markman, Cavanagh, Weaver, and Kelly as authoritative.

Id. at 674.

Therefore, *Detroit International Bridge* is the last word on this matter and is binding on this Court.

IV. Defendant-Appellee is wrong to assert that teachers are employees of the bargaining unit.

Defendant-Appellee makes an assertion, based on its affidavits submitted in the lower court, which seems to claim that the teachers are employees of the bargaining unit of which they are a member, rather than the school district. Appellee's Br at 4. These affidavits seem to further suggest that the terms and conditions of teachers' employment, perhaps including their duties under FOIA, are determined by the collective bargaining agreement. Appellee's Br at 4. Neither of these assertions would be legally correct. The teachers are employees of the school district, not their union or bargaining unit, and a collective bargaining agreement cannot supersede the FOIA law. A collective bargaining agreement is an agreement between the district and the employees' union. It establishes certain terms and conditions of employment as allowed by statute. See, e.g., MCL 423.215 (prohibiting certain terms and conditions of employment from being considered in collective bargaining). These agreements cannot supersede FOIA (or for that matter, any other Michigan law). Our Supreme Court has stated the law on this very clearly:

> Separately, [the union] contends that the FOIA permits public bodies to exempt the deliberative process of their subordinates from public scrutiny. Both parties agreed in their collective bargaining agreement that the evaluation of school administrators would be conducted according to the appellee school district's Administrative Performance Review Handbook. The handbook's evaluation form declares that "[t]his evaluation document will be reviewed only by appropriate administrative personnel of the Lansing School District."
>
> We agree with the Court of Appeals that the defendant school district cannot "eliminate its statutory obligations to the public merely by contracting to do so with plaintiff [union]." The FOIA requires disclosure of all public records not within an exemption. ***No exemption provides for a public body to bargain away the requirements of the FOIA***.

Bradley v Saranac Cmty Sch Bd of Educ, 455 Mich 285, 303 (1997) (emphasis added).

V. Public records in the personal possession of employees are subject to FOIA.

Defendant-Appellee states that it is absurd to require public employees to search "their pockets, notebooks, personal computers, etc." Appellee's Br at 15. This is not at all absurd, this

is the law. If the public's records are held by the employee in their personal possession or on their personal device, they are subject to disclosure under FOIA. This was discussed in *Hopkins v Duncan Township*, 294 Mich App 401 (2011). The crux of the matter in *Hopkins* was whether a public official's notes in his personal notebook were subject to FOIA. "At the heart of this case is whether Pentti's notes were taken in the performance of an official function. If so, then the notes are subject to disclosure under FOIA." *Id*. at 410. In *Hopkins*, the notes were found to have not been used in performance of the note taker's official function, and therefore were not subject to FOIA. *Id*. at 416. Compare that to the situation here, where Plaintiff-Appellant is seeking records teachers used in performance of their official function when teaching students as employees of the school district.

Walloon Lake Water Systems v Melrose Township, 163 Mich App 726 (1987) is also instructive. In *Walloon*, a personal letter that had been read into the record at a public meeting became a public record subject to FOIA because it had been used by public officials in performing their duty. *Id*. at 729. Even personal records can be subject to FOIA if those records are used in furtherance of an employee's official public duties.

When evaluating the requirements of Michigan's FOIA, analogous requirements under the federal FOIA can be instructive. Under the federal FOIA, administrative regulations are explicit that text messages sent to or from a personally-owned device are subject to FOIA if they involve the public's business: "Text messages (including the contextual information such as the sender, recipient, date, and time) that are sent or received by Department employees with government-issued ***or personally-owned devices*** must be collected and processed for potential release under the FOIA if they pertain to agency business and are responsive to a pending FOIA request." FOIA Bulletin Number: 21-01, attached in Appellant's Appendix at page 87 (emphasis added). The

Bulletin continues and provides additional guidance for public employees: "Accordingly, as employees, we are responsible for retaining and archiving text messages and conversations that are evidence of the conducting of government business pursuant to the requirements of the Federal Records Act (44 USC § 3301)." *Id*., Appellant's Appendix at 89.[4]

It should be clear from the purpose of FOIA and the parallels with the federal statute that employees' personal possession or a record does not insulate it from disclosure under FOIA.

VI. Conclusion

For these reasons and the reasons stated in Plaintiff-Appellant's Brief, this Court should reverse and remand the lower court with instructions that public records that are produced and held by a teacher or curriculum creator should be provided under FOIA by the school district (unless these records are covered under an applicable FOIA exemption).

Dated: August 24, 2023

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[4] Michigan Courts will look to the federal FOIA and related authority for interpretive assistance. "This Court has recognized that the Michigan FOIA is patterned after the federal FOIA." *Bradley v Saranac Comm Sch Bd of Educ*, 455 Mich 285 (1997). "Thus, a federal court decision on whether an item is an 'agency record' under the federal FOIA is persuasive in evaluating whether a record is a 'public record' under the Michigan FOIA." *Hoffman v Bay City Sch Dist*, 137 Mich App 333 (1984). Plaintiff-Appellant would argue that an interpretative rule directly on point should likewise be persuasive.

CERTIFICATE OF WORD COUNT

Pursuant to MCR 7.212(G), Plaintiff-Appellant hereby certifies that the word count of this reply brief is 2,793, as counted by Microsoft Word, this being less than the 3,200 words allowed.

Dated: August 24, 2023 Signed: /s/ Derk A. Wilcox

CERTIFICATE OF SERVICE

Plaintiff-Appellant hereby certifies that he served a copy of this Reply Brief on Defendant-Appellee via the TrueFiling electronic filing system.

Dated: August 24, 2023 Signed: /s/ Derk A. Wilcox