IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

FILED

May 11, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

CONTEMPORARY MEDIA, INC.,
doing business as The Memphis Flyer,
and PHIL CAMPBELL,

Petitioners-Appellees,

Shelby Chancery No. 110152-2
C.A. No. 02A01-9807-CH00211

Vs.

THE CITY OF MEMPHIS,
et al,

Respondents-Appellants.

FROM THE SHELBY COUNTY CHANCERY COURT
THE HONORABLE FLOYD PEETE, JR., CHANCELLOR

Robert L. J. Spence, Jr., City Attorney
Charmiane G. Claxton, Assistant City Attorney
For Appellants

S. Russell Headrick; John S. Golwen;
John M. Campbell of Memphis
For Appellees

VACATED IN PART, AFFIRMED IN PART AND REMANDED

Opinion filed:

W. FRANK CRAWFORD
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This case concerns the Tennessee Public Records Act. Respondent, City of Memphis (City), appeals the order of the trial court awarding Petitioners, Contemporary Media, Inc., d/b/a The Memphis Flyer, and Phil Campbell (CMI), $12,033.25 in costs and attorney’s fees.

The sole issue presented for review by the City is whether the trial court erred in awarding CMI attorney's fees and costs pursuant to T.C.A. § 10-7-505(g) in the amount of $12,033.25. CMI presents for review the issue of whether the trial court erred by failing to award CMI all the costs and attorney's fees incurred.

On October 8, 1997, pursuant to the Tennessee Public Records Act, T.C.A. § 10-7-101, ***et seq.*** (Act), CMI requested from the City inspection of all documents related to a settlement agreement reached between the family of Adam Pollow and the City.[1] The Pollow family previously had filed a civil rights action in federal court against the City because of their son's death while being restrained by the City's police department. On September 16, 1997, the Pollow family executed a Release and Settlement Agreement in which the City paid the family $475,000.00 to settle the action filed against it. This agreement stated in pertinent part:

> 8. It is agreed and understood that the terms, provisions and existence of this Release of all claims shall be forever kept in strictest confidence and that [the Pollow family] will neither discuss nor in any way disclose, nor permit disclosure, of any of the terms, provisions or existence of this Release and Settlement Agreement to any person, entity or governmental body with the exception of Pollow family members . . . except that upon inquiry, the undersigned and their attorneys may disclose that the case has been settled and that the undersigned and their attorneys or other representatives may make such disclosures as are clearly required to comply with any court order and/or any law or governmental regulation. It is further agreed that if this confidentiality provision is breached by [the Pollow family], David Pollow and/or Pearl Pollow shall pay to the City of Memphis the sum of One Hundred Thousand Dollars and No/100 ($100,000.00) as liquidated damages which shall be the exclusive remedy of the City of Memphis.

The agreement was signed only by members of the Pollow family and not by the City. Moreover, the City procured a Confidentiality Order which was entered and placed under seal in federal court on September 17, 1997. This order reiterated the above-quoted confidentiality provision but did not contain the terms and conditions of the settlement agreement. Once again, this order was signed only by the Pollow family.

On October 9, 1997, the City denied CMI's request to access these documents because,

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[1] Prior to this request, on or about September 25, 1997, CMI wrote Judge Julia Gibbons, the federal judge presiding over the Pollow matter, requesting access to documents concerning the terms of the settlement and inquiring about whether the terms of such were sealed by the court. Judge Gibbons responded by letter dated September 30, 1997, that the settlement agreement is not part of the court records and the filing under seal does not include details of the settlement.

according to the City, the settlement agreement and the sealed order in federal court prohibited all parties from releasing the terms of such. Subsequently, on November 4, 1997, after repeated requests to the City to obtain the documents, CMI filed a "Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access" in the Chancery Court of Shelby County, Tennessee in which CMI requested, ***inter alia***, that it be awarded its reasonable costs and attorney's fees pursuant to T.C.A. § 10-7-505(g). Prior to CMI filing the petition, the City had decided to produce the documents but wished to discuss the matter with the Pollows' attorney. The City subsequently decided not to release the documents because the Pollows' attorney stated that the agreement was confidential and should not be released. CMI filed its petition the day after the City changed its position.

After CMI filed its petition, the City removed the action to federal court on November 5, 1997, and the case was assigned to the federal judge that entered the sealed order in the Pollow case. Subsequently, CMI's motion to remand the case to the Chancery Court was granted upon the finding that the federal court did not have jurisdiction over an action seeking disclosure under the Act.

On remand, the City filed a "Motion for Summary Judgment, or in the Alternative, for Final Determination Under the Public Records Act." On the same day, the City filed an Answer to CMI's petition in which the City admitted that the documents were public records but denied that it willfully refused to disclose such in violation of the Act since it was bound by a court order not to disclose the terms of the settlement.

On December 11, 1997, a hearing was held in which the Chancellor ruled that the settlement agreement was a public record except to the extent that it may be encompassed by the confidentiality order. In light of the foregoing, the City filed a "Motion for Order Regarding Disclosure of Settlement Documents" in federal court on December 11, 1997, in order to ascertain the scope of the confidentiality order. Subsequently, the federal judge entered an order on January 9, 1998, finding that the language of the confidentiality order did not prohibit the City from disclosing the terms of the settlement agreement. The City then released the documents to CMI.

After the order was entered in federal court, CMI filed a "Notice of Ruling and Motion for Enforcement" in Chancery Court. Thereafter, on February 24, 1998, CMI filed a "Motion

for Reasonable Costs and Attorneys' Fees Pursuant to Tenn. Code. Ann. § 10-7-505(g)" in Chancery Court in which it claimed $27,939.08[2] in costs and attorney's fees. On June 22, 1998, the Chancellor entered an order finding that the settlement agreement was a public record within the meaning of the Act and that, pursuant to T.C.A. § 10-7-505(g), CMI was entitled to an award of reasonable attorney's fees and costs in the amount of $12,033.25.

The City appeals and the issue as presented in its brief states:

> Whether the Trial Court erred in finding as a matter of law that the City of Memphis willfully failed to disclose the records sought by Petitioners/Appellees within the meaning of Tenn. Code Ann. § 10-7-505(g) and in awarding Petitioners/Appellees attorney's fees and costs pursuant to Tenn. Code Ann. § 10-7-505(g).

CMI's issue for review as stated in its brief is:

> Did the Chancellor err by failing to award CMI "all costs involved in obtaining the record, including reasonable attorneys' fees, against" the City pursuant to Tenn. Code Ann. § 10-7-505(g) where the City failed to object to the reasonableness of the fees and expenses claimed and the Chancellor failed to articulate any basis for the reduction in the fee claimed?

CMI also requests an award pursuant to T.C.A. § 10-7-505(g) for fees and costs related to this appeal.

Since this case was tried by the trial court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

The public's right of access to records of governmental entities under the Act is very broad. ***Memphis Publ'g Co. v. City of Memphis***, 871 S.W.2d 681, 684 (Tenn. 1994). T.C.A. § 10-7-503(a) (1992 & Supp. 1998) states:

> All state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county pub
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[2] This figure represents the revised amount sought because of additional services subsequent to the date the motion was filed.

mmission in accordance with § 10-7-404, shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records sha

ll not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Moreover, T.C.A. § 10-7-505(d) (1992) declares that "[t]he court . . . shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section, and this section shall be broadly construed so as to give the fullest possible public access to public records." Thus, there is a presumption of openness to the records of governmental entities. ***Memphis Publ'g Co.***, 871 S.W.2d at 684. However, the Act does not provide that all governmental records are open to inspection by the public. ***Id.***; ***see generally*** T.C.A. § 10-7-504 (1992 & Supp. 1998). Furthermore, the burden is placed on the governmental entity to justify the nondisclosure of records. T.C.A. § 10-7-505(c) (1992).

It is conceded and admitted by the parties that the records sought by CMI are within the purview of the Act. CMI asserts that it is entitled to its incurred costs and attorney's fees.

T.C.A. § 10-7-505(g) (1992) provides:

> If the court finds that the governmental entity, or agent thereof, refusing to disclose a record knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity.

The purpose of this section is to discourage wrongful refusals to disclose public documents. ***Combined Communications, Inc. v. Solid Waste Region Bd.***, No. 01-A-01-9310-CH00441, 1994 WL 123831, at *3 (Tenn. App. April 13, 1994). Although the foregoing section has not often been judicially construed, it is by its terms a limited award provision. ***Memphis Publ'g Co.***, 871 S.W.2d at 689 (citing ***Abernathy v. Whitley***, 838 S.W.2d 211 (Tenn. App. 1992)).

Not every refusal to disclose a public record is wrongful. The statute expresses a "knowing and willful" standard which is synonymous with "bad faith." ***Capital Case Resource Ctr. of Tennessee, Inc. v. Woodall***, No. 01-A-019104CH00150, 1992 WL 12217, at *8 (Tenn. App. Jan. 29, 1992). "Bad faith" is defined as

> [t]he opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Black's Law Dictionary 127 (5th ed. 1979).

The City asserts that its conduct did not amount to a willful refusal to disclose the terms of the settlement agreement in violation of the Act. Because of questions concerning exactly what parties and documents were covered by the ambiguous confidentiality order that was sealed in federal court, the City properly withheld disclosing the documents in fear of being in contempt of the confidentiality order until such questions could be clarified. Moreover, the City submits that once it was provided clarification as to the scope of the confidentiality order, it readily complied with the Act and the Chancellor's order by releasing the documents to CMI. Thus, the City asserts that, given the circumstances, its conduct was not the type of conduct that would warrant an award of costs and attorney's fees pursuant to the Act.

On the other hand, CMI asserts that the Chancellor correctly concluded that it was entitled to an award of costs and attorney's fees pursuant to T.C.A. § 10-7-505(g), because there was a knowing and willful refusal to allow inspection of the documents. CMI also argues that the City's assertions that it was bound by the agreement and order are flawed in that the agreement and order only bound the Pollow family to confidentiality and that the City was not a party to either document since it did not sign either one.

To reiterate, the Act requires that "[a]ll state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee . . . ." As noted above, the City admits and the Chancellor found that the settlement agreement is a public record, therefore bringing it within the purview of the Act and subject to disclosure. The Act requires that all public records be open for inspection. T.C.A. § 10-7-503(a). A governmental entity can be liable for costs and attorney fees if the entity refuses to allow inspection and "knew such record was public and willfully refused to disclose it." T.C.A. § 10-7-505 (g). Thus, the first inquiry is to determine whether the City knew that the record was public. To answer this question, we must determine if the City could make an agreement to treat the record confidentially.

In ***Cleveland Newspaper, Inc. v. Bradley County Memorial Hospital Board of Directors***, 621 S.W.2d 763 (Tenn. App. 1981), the newspaper sought information from defendant-board concerning its employees and their salaries. The board refused to disclose the information on the basis that the records were confidential by virtue of a policy established by the board which provides: "[A]ll personnel records, including wage and salary information, shall at all times be held in the strictest of confidence. . . ." ***Id.*** at 765. The action of the board resulted from a requirement for accreditation by the Joint Commission of Accreditation of Hospitals. The trial court determined that the board had the authority to designate its records confidential and that when so declared the records were exempted from inspection. This Court, in reversing the trial court, stated:

> We do not so read the Act. We read the Act and the Code as now codified to say that those records which have been declared by the legislature to be confidential shall be so treated by the agencies maintaining them whether they be active or in storage and to also provide a method of destruction of such confidential records. ***We also read the statute to provide that only the legislature can declare certain records to be confidential***. We think the power conferred upon the board of directors by the Private Act of 1953 is broad enough to give them power to designate their records confidential if they were not otherwise subject to the provisions of T.C.A. § 10-7-503, but they cannot avoid the provisions of the Code by so designating their personnel records.

621 S.W.2d at 765 (emphasis added).

Cases from other jurisdictions are generally in agreement. In ***State ex rel. Sun Newspapers v. Westlake Board of Education***, 601 N.E.2d 173 (Ohio App. 1991), the Court of

Appeals of Ohio was faced with a similar set of circumstances as we have before us. The Westlake Board of Education had reached a settlement agreement in litigation between itself and a former employee. The settlement agreement required both parties to keep the terms of the agreement confidential. Sun Newspapers subsequently requested that the Board of Education release the terms of the settlement agreement. After the Board of Education refused to disclose the settlement based on the confidentiality agreement, Sun Newspapers filed a complaint against the Board of Education requesting that the agreement be released since the agreement constituted a public record. Finding that the agreement constituted a public record, the court held that a public entity could not enter into enforceable promises of confidentiality with respect to public records. ***Id.*** at 175 (citing ***State ex rel. Dwyer v. City of Middletown***, 557 N.E.2d 788 (Ohio App. 1988); ***State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland***, 1991 WL 30252 (Ohio App. March 1, 1991)).

Although not controlling in this Court, the Attorney General of Tennessee, has opined that "[a]n agreement by a governmental agency to restrict public access to public records that are not exempt under state law violates public policy and is unenforceable." ***Tenn. Atty. Gen. Op. No. 96-144*** (December 3, 1996). The Attorney General stated that by entering into an agreement to restrict access to public records for which no statutory exemption is available, a governmental entity would be attempting to create a new exemption from the Act and that such a contract is against public policy and unenforceable. ***Id.***

Under the above authorities, we hold that a governmental entity cannot enter into confidentiality agreements with regard to public records. The idea of entering into confidentiality agreements with respect to public records is repugnant to and would thwart the purpose and policy of the Act. Thus, the City could not lawfully enter into the agreement which it entered into with the Pollow family to keep the terms of the public record confidential. Even if the City could have legally entered into such an agreement, the fact remains that the only party bound by the confidentiality provision of the agreement was the Pollow family.

In light of the Court's 1981 opinion in ***Cleveland Newpaper, supra***, supported by the 1996 Attorney General's Opinion, the City must be deemed to have known that it cannot make public records confidential by agreement. Moreover, even if by any stretch of the imagination the City could make such records confidential, the City did not do so in the instant case because

it was not bound by the agreement. The City simply has not presented any evidence that it did not know that the record was public and it did not willfully withhold the inspection thereof. Furthermore, the City has not offered any explanation as to what legitimate governmental purpose might be served by withholding this settlement agreement from public scrutiny. Therefore, the Chancellor correctly awarded CMI its costs and attorney's fees pursuant to T.C.A. § 10-7-505(g).

We now reach CMI's issue of whether the Chancellor erred in only awarding CMI a part of its attorney's fees incurred. CMI asserts that the Chancellor erred by awarding it only a portion of its costs and attorney's fees incurred when the Chancellor failed to articulate the basis or rationale for reducing its fee claim and the City failed to object to its fee request. CMI argues that T.C.A. § 10-7-505(g) provides for recovery of all reasonable costs including reasonable attorney's fees upon finding that a governmental entity willfully refused to disclose a known public record, that the Chancellor erred by not awarding all of its substantiated fees in accordance with the Act, and that the Chancellor erred in failing to apply the factors in D.R. 2-106(B) in awarding attorney's fees. Thus, CMI requests that this Court enter a judgment for it for the full $27,939.08 claimed and remand the case for an award of attorney's fees and expenses incurred in this appeal.

While the City does not waiver from its contention that it did not willfully refuse to disclose the requested documents, the City asserts that the award of attorney's fees is within the discretion of the trial judge and that the Chancellor did not abuse his discretion in awarding CMI a portion of its fees claimed. The City argues that while the Chancellor may be guided by the Code of Professional Responsibility, the Chancellor is not restricted by such in his determination of an award of attorney's fees. Finally, the City contends that CMI is not entitled to fees and expenses related to this appeal pursuant to T.C.A. § 10-7-505(g) because this appeal is not related to its attempt to obtain the records but merely whether it is entitled to any fees at all.

The award of attorney's fees pursuant to T.C.A. § 10-7-505(g) is within the discretion of the trial court. The court's decision will not be reversed or altered unless there has been an abuse of that discretion. ***See Threadgill v. Threadgill***, 740 S.W.2d 419, 426 (Tenn. App. 1987) ("The trial court is vested with wide discretion in matters of the allowance of attorney's fees, and this Court will not interfere except upon a showing of an abuse of that discretion.").

> Unless a trial court has applied an incorrect legal standard, or it affirmatively appears on the record that a trial court abused its discretion, appellate reversal is not warranted. Discretion denotes the absence of a hard and fast rule. When invoked as a guide for judicial action, it requires that the trial court view the factual circumstances in light of the relevant legal principles and exercise considered discretion before reaching a conclusion. Discretion should not be arbitrarily exercised. The applicable facts and law must be given due consideration. ***Langnes v. Green***, 282 U.S. 531, 541, 51 S. Ct. 243, 247, 75 L. Ed. 520, 526 (1931). An appellate court should not reverse for "abuse of discretion" a discretionary judgment of a trial court unless it affirmatively appears that the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining. ***Douglas v. Estate of Robertson***, 876 S.W.2d 95, 97 (Tenn. 1994); ***Foster v. Amcon Intern.***, 621 S.W.2d 142, 145 (Tenn. 1981).

Ballard v. Herzke, 924 S.W.2d 652, 661 (Tenn. 1996).

The trial court does not explain its reasoning in awarding CMI only a portion of its requested attorney's fees. The City's actions amounted to a willful refusal to disclose a known public record and justify an award of attorney's fees. A brief review of the itemized bill indicates some charges for advice to the client that could properly be disallowed. Moreover, the trial court should consider all of the factors set forth in D.R. 2-106(B), Code of Professional Responsibility. The trial court must consider all relevant circumstances pertaining to the fee. The record is insufficient for this Court to adequately review the trial court's decision regarding the fee award, and thus is a proper case for the application to T.C.A. § 27-3-128 (1980) which provides:

> **27-3-128. Remand for correction of record**. - The court shall also, in all cases, where, in its opinion, complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight without culpable negligence, remand the cause to the court below for further proceedings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right.

Accordingly, that part of the trial court's order awarding attorney's fees and costs is vacated, and the case is remanded for further proceedings to award reasonable fees and costs. The order is in all other respects affirmed.

We do not deem this a frivolous appeal, and therefore no fee shall be awarded for the appeal. Costs of the appeal are assessed to appellant.

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W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

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ALAN E. HIGHERS, JUDGE

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DAVID R. FARMER, JUDGE