

CONSOLIDATED WITH

NO. 2016 CA 1029

MARY ROPER

VERSUS

ANTHONY "BUDDY" AMOROSO, IN HIS INDIVIDUAL CAPACITY
AND IN HIS OFFICIAL CAPACITY AS COUNCILMAN, EAST BATON
ROUGE PARISH METROPOLITAN COUNCIL


CONSOLIDATED WITH

NO. 2016 CA 1030

MARY ROPER

VERSUS

JEWEL E. "TRAE" WELCH, III, IN HIS INDIVIDUAL
CAPACITY AND IN HIS OFFICIAL CAPACITY AS COUNCILMAN,
EAST BATON ROUGE PARISH METROPOLITAN COUNCIL

 **GUIDRY, J., dissents in part, concurs in part, and assigns reasons for dissent in part.**

GUIDRY, J., dissenting in part.

I dissent from that portion of the majority opinion that affirms the award of attorney fees assessed only against Councilwoman Marcelle. The majority finds that Ms. Roper prevailed on some, but not all, of her claims and that the award of attorney fees was at the trial court's discretion; however, Ms. Roper prevailed on those claims against all of the defendants and not just Councilwoman Marcelle. Therefore, to hold that Councilwoman Marcelle alone should be punished for the wrongdoings of the entire Council is clearly an abuse of discretion, and as such, I would find the trial court erred in only levying the award of attorney fees against her.

The trial court's determination that Councilwoman Marcelle's conduct was arbitrary and capricious is only relevant for awarding actual damages and civil

penalties. See La. R.S. 44:35(E)(1). Moreover, the plain language of La. R.S. 44:35(E)(2), read *in pari materia* with La. R.S. 44:35(E)(1), mandates that upon finding that a custodian acted "unreasonably or arbitrarily," the custodian can only be held *personally* liable for *actual damages*.

Additionally, with respect to costs, Councilwoman Marcelle is no more responsible for those costs than the other parties, as her actions that were found to be arbitrary and capricious, if that is relevant to the costs inquiry, did not relate to the documents reviewed by Patterson. Therefore, I additionally dissent from that part of the majority opinion that affirms singling out Councilwoman Marcelle for the amount of costs assigned to her by the trial court.

The trial resumed on November 3, 2015, and concluded on November 5, 2015. Loupe, Delgado, Welch, and Amoroso each testified that upon receipt of the August requests for public records, they provided the requests to either the parish administrator or to Foster's office to prepare a response. Marcelle offered conflicting testimony, initially stating that she turned the matter over to the parish attorney's office, but later, when pressed, testified she could not remember if she routed the request to the parish attorney and confirmed she did not give it to Foster's office. Marcelle also acknowledged that when Roper emailed the August request to her, Marcelle responded with an email calling Roper's actions "harassment," apparently because the email was sent to Marcelle's place of employment. When Marcelle was subsequently served with Roper's petition, she threw the pleading on the floor in front of the deputy sheriff who served her.

After taking the matter under advisement, the trial court issued written reasons for judgment finding:

1. The defendants provided Roper with all non-exempt records; therefore, her request for a writ of mandamus is moot;
2. The defendants did not arbitrarily or capriciously fail to respond to the requests for public records, except for Marcelle, against whom the trial court imposed a civil penalty of \$12,000.00, plus attorney fees of \$19,707.50, and one-sixth of the court costs;
3. The defendants unreasonably failed to provide the notice required by Louisiana Revised Statute 44:32D, and, based on that finding, the trial court assessed a civil penalty of \$4,000.00 against each of the defendants;
4. Roper failed to prove any actual damages; and
5. The defendants are not entitled to reimbursement of the costs incurred to comply with the August requests.

This provision requires a mandatory award of reasonable attorney fees in favor of a plaintiff who prevails in an action under the Act; however, if the plaintiff only prevails in part, an award of attorney fees is discretionary with the court. See *Aswell*, 196 So. 3d at 94.

Although a request for a writ of mandamus may be rendered moot by the production of the requested records, an award of attorney fees is still permissible under Subsection 44:35D if the production occurred after suit was filed. See *Aswell*, 196 So. 3d at 94; *Thibodeaux v. Field*, 09-0241, 2009WL2225443, p. 3 (La. App. 1 Cir. 7/27/09). Here, although some records were provided or made available before Roper filed suit, the defendants do not dispute that additional responsive records were provided after she filed suit. The mootness of Roper's mandamus claim did not preclude an award of attorney fees.

Because Roper prevailed on some, but not all, of her claims, an award of attorney fees was discretionary with the trial court under Subsection 44:35D. Appellate review of such discretionary decisions is conducted under the "abuse of discretion" standard of review. *Quality Environmental Processes, Inc. v. IP Petroleum Company, Inc.*, 16-0230 (La. App. 1 Cir. 4/12/17), 219 So. 3d 349, 375, writ denied, 17-00915 (La. 10/9/17), 227 So. 3d 833. Generally, an abuse of discretion results from a conclusion reached capriciously or in an arbitrary manner. *Id.*

The trial court chose to award attorney fees only against Marcelle, citing her conduct in response to Roper's requests. While the testimony was conflicting, the evidence suggests Marcelle failed to route the August request through the usual channels for a response, sent Roper an email accusing her of harassment, and, when served with Roper's petition, angrily threw the pleading on the floor in the presence of the deputy sheriff. In contrast, the other defendants testified they

promptly routed the August requests to the proper personnel for a response, checked any personal devices and accounts for communications that might be responsive to the requests, and generally cooperated in the efforts to respond to the requests. The evidence demonstrates a distinct difference in the actions undertaken by Marcelle, in comparison to the other defendants, that amply supports the trial court's discretionary decision to impose an award of attorney fees against her only.⁸

Both parties argue the amount of the award should be modified. A trial court has much discretion in fixing an attorney fee, and its award will not be modified on appeal absent an abuse of that discretion. *Crawford v. Blue Cross Blue Shield of Louisiana*, 99-2503 (La. App. 1 Cir. 11/3/00), 770 So. 2d 507, 518, writ denied, 00-3267 (La. 2/16/01), 786 So. 2d 98. Roper's total attorney fees through the trial date were \$118,245.00. The trial court awarded \$19,707.50 of that amount, representing one-sixth of the total, against Marcelle. In making the award, the trial court noted that most of the requested documents were provided or made available to Roper prior to the suit, yet she chose not to review the information and filed suit instead.

Arguing the amount should be lower, the defendants contend the hourly rate charged by Roper's attorneys exceeds the limit allowed by Subsection 44:35F, which provides that an "award" of attorney fees "shall not exceed the amounts approved by the attorney general for the employment of outside counsel." The defendants' emphasis on the hourly rate charged by Roper's attorneys fails to

⁸ The trial court made a specific finding that Marcelle's actions rose to the level of an "arbitrary or capricious" failure to respond to the requests. We recognize the evidence sufficiently distinguishes Marcelle's conduct from the other defendants to support the trial court's discretionary award of attorney fees against Marcelle; however, we premit consideration of whether Marcelle's conduct constituted an arbitrary or capricious withholding of the requested records. That specific finding is essential only to Roper's claim for actual damages under Subsection 44:35E(1). Having already affirmed the denial of Roper's damage claim based on a lack of causation, we need not further consider the legal elements of that claim.

prevailed in part in this matter, we likewise find no abuse of discretion in the trial court's refusal to award attorney fees to the defendants pursuant to Subsection 44:35E(2).

CONCLUSION

The award of a civil penalty in the amount of \$12,000.00 against C. Denise Marcelle is reversed. In all other respects, the February 4, 2016 judgment is affirmed. Costs of this appeal in the amount of \$14,773.00 are allocated one-half (1/2) to Mary E. Roper and one-half (1/2) to the City of Baton Rouge/Parish of East Baton Rouge; Casey Cashio in his official capacity as Council Administrator-Treasurer for the City of Baton Rouge/Parish of East Baton Rouge; J. Chandler Loupe, in his official capacity as Mayor *Pro Tempore*, East Baton Rouge Parish Metropolitan Council; Juan Manual Delgado, in his official capacity as Councilman, East Baton Rouge Parish Metropolitan Council; Jewel Welch III, in his official capacity as Councilman, East Baton Rouge Parish Metropolitan Council; C. Denise Marcelle, in her official capacity as Councilwoman, East Baton Rouge Parish Metropolitan Council; and Anthony Amoroso, in his official capacity as Councilman, East Baton Rouge Parish Metropolitan Council.

REVERSED IN PART; AFFIRMED IN PART.