STATE OF MICHIGAN
IN THE SUPREME COURT

TORGER G. OMDAHL,

Plaintiff/Appellee,

v

Supreme Court No. 131926

Court of Appeals No. 262532

Iron County CC No. 04-003070-CZ

WEST IRON COUNTY BOARD OF EDUCATION, ROBERT HAN, M.D., JAMES QUAYLE, DONALD AUTIO, JAMES BURKLAND, ERIC MALMQUIST, BETH VEZZETTI, AND CHRISTINE SHAMION,

Defendants/Appellants.

_____/

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BRIEF OFAMICI CURIAE

MICHIGAN ASSOCIATION OF SCHOOL BOARDS
MICHIGAN MUNICIPAL LEAGUE
PUBLIC CORPORATION SECTION OF THE STATE BAR OF MICHIGAN

IN SUPPORT OF DEFENDANTS/APPELLANTS APPLICATION FOR LEAVE TO APPEAL

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INTERESTS OF *AMICI CURIAE*

The Michigan Association of School Boards ("MASB") is a voluntary, non-profit association consisting of approximately 600 local and intermediate school district boards of education throughout the State of Michigan, which includes nearly all of the state's public school districts. Officially organized in 1949, MASB's goal is to advance the quality of public education in the state, promote high educational program standards, help school board members keep informed about education issues, represent the interest of boards of education, and promote public understanding about school boards and citizen involvement in schools. MASB is recognized as a major voice in influencing education issues at the state level and, through its affiliation with the National School Boards Association, at the national level. Consequently, for more than 56 years, MASB has worked to provide quality educational leadership services for Michigan Boards of Education and to advocate for student achievement and public education. MASB has an obvious interest in the development of clear and rational education law and recognizes its obligation to assist the courts in cases involving questions of major significance.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 516 Michigan municipalities. Since its founding in 1899, the League has brought together municipal officials to exchange information, to learn from one another, to develop unified policies on matters of municipal concern and to speak as a collective voice on those matters including, most importantly, home rule for local government.

The Public Corporation Law Section of the State Bar of Michigan is a membership section, comprised of 739 attorneys who represent the interests of government corporations, agencies, departments and boards, including townships, counties, villages, cities, schools, and charter and special authorities. Although membership in the Public Corporation Section is open to all members of the State Bar, the focus of the Section is centered on the laws and procedures relating to public law and government corporations, agencies, department and boards, including townships, counties, villages, cities, schools and charter or special authorities. The Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Public Corporation Section of the State Bar of Michigan occasionally participates in cases that are significant to governmental entities in the State of Michigan.

The *Amici* organizations have established relationships with governmental entities that are potentially subject to civil lawsuits under section 11 of the Open Meetings Act, and thus are subject to potential liability for payment of "actual attorney fees" under subsection (4) of section 11. Consequently, *Amici* have a vital interest in seeing that the judgment of the Court of Appeals is reversed. They share the concern that, as a consequence of the Court of Appeals' decision, attorneys who have no interest in defending the purpose of the Open Meetings Act will subject local governing bodies to lawsuits for personal financial gain. Consequently, if the decision of the Court of Appeals is not reversed, the members of *Amici* will be vulnerable to the costs and stress of lawsuits brought to further personal interests rather than public interests.

Thus, in their *Amicus Curiae* capacity, the MASB, Michigan Municipal League, and the Public Corporation Section of the State Bar of Michigan submit this brief in

support of the Defendants-Appellants' argument that Section 11(4) of the Open Meetings Act does not permit a an attorney appearing in propria persona to recover attorney fees for successfully obtaining relief in a civil action against a public body.

JURISDICTIONAL STATEMENT

The *Amici Curiae* concur in the Jurisdictional Statement set forth in Defendants-Appellants' Brief on Appeal, p. 1.

STATEMENT OF QUESTION INVOLVED

I. WHETHER A PLAINTIFF ATTORNEY, PROCEEDING IN PROPRIA PERSONA, IS ENTITLED TO ATTORNEY FEES AS A PREVAILING PARTY UNDER SECTION 11(4) OF THE OPEN MEETINGS ACT?

Plaintiff-Appellee Answers:	Yes
Defendants-Appellants Answer:	No
Amici Curiae Answer:	No
The Court of Appeals Answers:	Yes
The Iron County Circuit Court Answers	No

Statement of Facts

Amici Curiae rely upon the Statement of Material Proceedings and Facts on pages 3-5 of the Defendants-Appellants' Brief for Leave to Appeal.

ARGUMENT

I. A PLAINTIFF ATTORNEY, PROCEEDING IN PROPRIA PERSONA, IS NOT ENTITLED TO ATTORNEY FEES AS A PREVAILING PARTY UNDER SECTION 11(4) OF THE OPEN MEETINGS ACT.

A. Awarding attorney fees to an attorney appearing in propria persona does not further the general purpose of the Open Meetings Act.

The Open Meetings Act was passed by the Legislature in 1976 as part of a nationwide effort to make government affairs more accessible and, in theory, more responsive. Because of public interest and accessibility, local governance is "improved by open debate and the impact of diverse ideas," and, subsequently, governing bodies move "toward the needs and goals of the people and away from secrecy and potential oppressive policies." Comment, *Sunshine or Shadows?: One State's Decision*, 1977 Det Col L Rev 613 (1977).

While the Open Meetings Act contains no statement of purpose, this Court has noted that its function is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern. *Booth v Univ of Michigan Bd of Regents,* 444 Mich 211, 231, 501 NW2d 422 (1993). The overall theme of this purpose is that the Open Meetings Act promotes specific public interests by requiring transparency in government.

It can be argued that allowing a prevailing party appearing in propria persona to receive attorney fees contributes to furthering the public interests that the Open Meetings Act promotes, but this minor contribution also creates a sizable opportunity to advance private interests at the expense of local governmental entities. And, as illustrated by this case, the private benefit will likely be much greater than any incidental public benefit.

The Defendants-Appellants violated the Open Meetings Act by failing to take closed session minutes. Section 7(2) of the statute clearly requires a public body to take and maintain a separate set of minutes for closed meetings. MCL 15.267(2). The Plaintiff-Appellee enforced this requirement by filing the lawsuit that is before this Court. A lawsuit, in the opinion of *Amici,* that uses the Open Meetings Act as a vehicle for private financial gain with little regard for promoting the true purpose of the statute.

The Defendants-Appellants' violation of section 7(2) caused no harm to the public and it did nothing to threaten governmental accountability. Closed meeting minutes have little or no value to the public or a public body. Because public bodies are prohibited from making a "decision"[1] in a closed meeting, MCL 15.263(2), the minutes of such meetings are traditionally brief and include very little substance. The minutes must only include the following information: (1) date, time, and place of the meeting; (2) board members present and absent; and (3) the purpose of the closed session, which is also included in the minutes of the open meeting where the decision is made to go into closed session. OAG, 1993-1994, No 6817, p 190 (September 14, 1994). Furthermore, closed meeting minutes are not available to the public and may only be disclosed if required by court order. MCL 15.267(2). Thus, minutes of a closed session are rarely reviewed by anyone other than the public officials who attended the meeting, and the information that must be recorded in the minutes is nothing more than "housekeeping" data.

Because of the insignificance of closed meeting minutes, the Defendants-Appellants' violation had no public impact. It is safe to assume that the general public

[1] Means "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." MCL 15.262(d).

cares little about the existence of closed meeting minutes due in part to the inconsequential role that the minutes play in the grand scheme of the Open Meetings Act. Consequently, it was an attorney, who had previously represented the Defendants-Appellants, who spotted the violation, sought legal recourse, and requested an award of attorney fees as a prevailing party. If attorney fees are awarded under such circumstances, the *Amici* organizations are concerned that a "cottage industry" would be created for attorneys using the Open Meetings Act solely as a way to generate fees rather than to vindicate personal claims. This concern was also expressed by the U.S. Court of Appeals for the Sixth Circuit and the Michigan Court of Appeals in two cases where both courts declined to award attorney fees under the federal and Michigan Freedom of Information Acts to an attorney appearing in propria persona. See *Falcone v IRS,* 714 F2d 646 (CA 6, 1983), *cert denied,* 466 US 908 (1984). See *Laracey v Financial Institutions Bureau,* 163 Mich App 437, 414 NW2d 909 (1987).

Because of the myriad of technical requirements found in the Open Meetings Act, local governing bodies would be attractive targets for opportunistic attorneys if the decision of the Court of Appeals is not reversed. For example, section 9 of the act provides that a public body "shall make any corrections in the minutes at the next meeting after the meeting to which the minutes refer." MCL 15.269. Thus, if a board meets on the first and third Tuesday of each month, any corrections to the minutes of the first Tuesday meeting must be made at the third Tuesday meeting. However, if the board holds a special meeting on the second Tuesday, the corrections to the minutes of the first Tuesday meeting must be considered and adopted at the special meeting. As local governing bodies focus on complying with the act's major requirements, it is

understandable that this correction requirement could be overlooked when a board has four or five meetings in a month. While such a technical oversight would not create a public outcry, it clearly provides another opportunity for the plaintiff attorney to generate legal fees.

The *Amici* organizations do not condone violations of the Open Meetings Act. We urge our members and clients to make conscientious efforts to comply not only with the spirit and intent of the law, but also with the act's technical and procedural requirements. However, we also believe the act should not be used to promote private interests. Such interests, which could emanate from a rule that authorizes awards of counsel fees to attorneys appearing in propria persona, will have little effect on promoting governmental accountability and awareness of public concerns, which are the foundational purposes of the Open Meetings Act. An award of attorney fees is intended to relieve plaintiffs of the burden of legal costs, not reward successful claimants or penalize the government.

B. The intent of section 11(4) is not served by awarding attorney fees to an attorney appearing in propria persona.

Since its adoption over 30 years ago, the Open Meetings Act has emerged as the primary tool of citizens and public advocacy groups to exercise their rights to ensure that every meeting of a public body is open to the citizens of Michigan. The penalty provision included section 11(4) that mandates civil penalties and the award of actual attorney fees was likely intended to encourage litigation that protects the rights that citizens have under the Open Meetings Act by enabling potential plaintiffs to obtain the assistance of competent counsel. Thus, by permitting a plaintiff attorney appearing in propria persona to recover attorney fees, is the decision of the Court of Appeals

accomplishing the intent of section 11(4)? The answer from the U.S. Supreme Court is "no."

In *Kay* v *Ehrler*, 499 US 432, 111 S Ct 1435 (1991), the Supreme Court ruled that an attorney who represented himself in a successful civil rights case could not recover attorney fees under 42 U.S.C. § 1988. The Court found that the word "attorney" in the fee provision "assumes and agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under section 1988." *Id.* at 435-36. The Court further explained that the specific purpose of the fee provision was to "enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Id.* Allowing an attorney who represents him or herself to obtain attorney fees, the Court explained, does not further this goal. Indeed, an attorney who appears in propria persona "is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion dictates the proper tactical response to unforeseen developments in the courtroom." *Id.* at 437. Therefore, the Court concluded, "[t]he statutory policy of furthering the successful prosecution of meritorious claims in better served by a rule that creates an incentive to retain counsel in every such case." *Id.* at 438.

The Supreme Court's analysis in *Kay* cannot be discounted or read narrowly simply because the Court was addressing a fee provision in a federal statute. Indeed, the Court implicitly rejected a distinction between fee claims arising under section 1988 and

the federal Freedom of Information Act[2] by referring with approval to *Falcone v IRS*. *Kay, supra* at 435 n. 4. In this case, the Sixth Circuit Court of Appeals refused to award attorney fees to a plaintiff attorney appearing in propria persona because the award was intended "'to relieve plaintiffs with legitimate claims of the burden of legal costs' and 'to encourage potential claimants to seek legal advice before commencing litigation.'" *Id.* (quoting *Falcone, supra* at 647). Thus, the Supreme Court's ruling in *Kay* should be applied beyond section 1988 cases to other similar fee-shifting statutes, such as the fee-shifting provision in section 11 in Michigan's Open Meetings act. Accordingly, the Supreme Court's ruling in *Kay* necessitates this Court to reverse the decision of the Court of Appeals.

C. The plain language of the statute disallows fees.

Section 11(4) allows a prevailing party to recover "actual attorney fees." It is beyond dispute that when an attorney represents him or herself there are no attorney fees at all. No attorney fees are charged and none are paid, for there simply is no attorney-client relationship and, by definition, the term "attorney fees" implies the existence of an attorney-client relationship. *Kay, supra* at 436. Consequently, under the plain language of the statute, an attorney appearing in propria persona cannot be awarded attorney fees because there was no attorney-client relationship and there were no attorney fees incurred.

In *Laracey v Financial Institutions Bureau,* the Court of Appeals declined to award attorney fees pursuant to the Michigan Freedom of Information Act to an attorney appearing in propria persona based upon the principle that both a client and an attorney

[2] The federal Freedom of Information Act provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 USC § 552(a)(4)(E)(1994).

are necessary ingredients for an attorney fee awarded under the statute. In reaching this conclusion, the Court noted the analysis of the terms "attorney" and "pro se" by a judge from the U.S. Court of Appeals for the Eleventh Circuit in the case of *Duncan* v *Poythress,* 777 F2d 1508 (CA 11, 1985). Similar to *Kay*, the Eleventh Circuit, sitting en banc, was reviewing the issue of whether an attorney who represented him or herself in a successful civil rights case could recover attorney fees under 42 U.S.C. § 1988. The judge determined that the terms "attorney" and "pro se" are mutually exclusive based upon their plain meanings:

> For there to be an attorney in litigation there must be two people. Plaintiff here appeared pro se. The term 'pro se' is defined as an individual acting 'in his own behalf, in person.' By definition, the person appearing 'in person' has no attorney, no agent appearing for him before the court. The fact that such plaintiff is admitted to practice law and available to be an attorney for others, does not mean that the plaintiff has an attorney, any more than any other principal who is qualified to be an agent, has an agent when he deals for himself. In other words, when applied to one person in one proceeding the terms 'pro se' and "attorney' are mutually exclusive.

Laracey, *supra* at 445, n 10, quoting *Duncan, supra* at 1518 (Roney, J., dissenting).

Thus, attorney fees should not be allowed to an "attorney" appearing in propria persona because there is no actual "attorney" as the word "attorney" is commonly defined in terms of someone who acts for another, a situation that does not exist where an attorney represents him or herself.[3]

D. Denying attorney fees to attorneys appearing in propria persona would serve to promote good public policy and the sanctity of legal counsel.

Encouraging an attorney to hire an outside attorney as opposed to representing him or herself in propria persona furthers good public policy. One purpose behind an

[3] The definition of the word "attorney" in Webster's Dictionary reads as follows: "[O]ne who is legally appointed to transact business on another's behalf; *specif;* a legal agent qualified to act for suitors and defendants in legal proceedings." Webster's Collegiate Dictionary (1996)."

attorney fees provision is to encourage the hiring of competent counsel, which has the additional benefit of screening out unnecessary and unwarranted litigation. An attorney who represents him or herself may not have the objectivity and detachment that an outside attorney can provide as a check against groundless or unnecessary litigation.

In *Kay,* the Supreme Court echoes this opinion in its conclusion:

> A rule that authorizes awards of counsel fees to *pro se* litigants – even if limited to those who are members of the bar – would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Kay, supra at 438.

Thus, denying attorney fees to attorneys appearing in propria persona would serve to encourage attorney plaintiffs to hire outside counsel and would thereby promote more effective litigation.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, *Amici Curiae* submits that the Defendants-Appellants' application for leave be granted and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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STATE OF MICHIGAN
COUNTY OF INGHAM

Cheryl Huffman, being sworn, deposes and states that on February 2, 2007, she mailed copies of Brief *Amici Curiae* to, attorney Sara J. Basso for Defendants-Appellants and Torger G. Omdahl, Plaintiff-Appellee, at the addresses described in this proof of service by placing the documents in the United States mail, properly addressed, with first-class postage fully prepaid.

Cheryl Huffman

Cheryl Huffman

Subscribed and sworn to before me
on this 2nd day of February, A.D., 2007

ERIN BLENDIN KINCH
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF INGHAM
My Commission Expires July 19, 2011
Acting in the County of Eaton

Erin Blendin Kinch
Notary Public, Ingham County, Michigan
Acting in Eaton County, Michigan
My commission expires 7/19/11