STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

SHANNON BITTERMAN
Plaintiff Appellant

v

CHERYL D. BOLF
Defendant Appellee

Supreme Court No. 151520
Court of Appeals No. 319663
Lower Court No. 13-019397-CZ-2

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AMICUS CURIAE BRIEF OF THE PUBLIC CORPORATION LAW SECTION JOINED BY THE MICHIGAN MUNICIPAL LEAGUE REVISED 12/30/2015

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STATEMENT OF INTEREST

The Amicus Curiae Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 672 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The Public Corporation Law Section (PCLS) provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The PCLS is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the PCLS participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous Amicus Curiae briefs in state and federal courts.

The Public Corporation Law Section Council, the decision-making body of the Section, is currently comprised of 21 members. The filing of this Amicus Curiae Brief was authorized at the December 5, 2015 regular meeting of the Council. Fourteen members of the Council were present at the meeting, and the motion passed unanimously, with 2 abstentions. The position expressed in this Amicus Curiae Brief is that of the Public Corporation Law Section only and is not the position of the State Bar of Michigan.

Amicus Curiae Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund"). The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

Support for the PCLS amicus curiae brief was authorized by the Legal Defense Fund's Board of Directors, whose membership includes the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Clyde J. Robinson, city attorney, Kalamazoo; John C. Schrier, city attorney, Muskegon; Lori Grigg Bluhm, city attorney, Troy; Catherine M. Mish, city attorney, Grand Rapids; Eric D. Williams, city attorney, Big Rapids; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; Thomas R. Schultz, city attorney, Farmington and Novi; Lauren Trible-Laucht, city attorney, Traverse City; and William C. Mathewson, general counsel, Michigan Municipal League.

STATEMENT OF QUESTION PRESENTED

HOW SHOULD THE SUPREME COURT DEFINE THE TERM "PUBLIC OFFICIAL" UNDER SECTION 13(1) OF THE OPEN MEETINGS ACT?

APPELLANT SAYS	"Dictionary"
APPELLEE SAYS	"Member of Public Body"
AMICI PCLS AND MML SAY	"Member of Public Body"

INTRODUCTION

The Public Corporation Law Section (PCLS) accepted the Supreme Court's invitation to file an amicus curiae brief on the definition of a "public official" "who intentionally violates the act" and "shall be personally liable" for the violation according to MCL 15.273(1) of the Open Meetings Act. The Michigan Municipal League joined in the amicus curiae brief of the PCLS.

The amici are interested in the correct interpretation of Section 15.273 of the Open Meetings Act that will advance the purposes of the OMA without inviting a flood of litigation against individual public officials over the accuracy of the minutes of meetings of public bodies throughout the State. The definition of "a public official" should not be expanded to enforce public office duties not established by the OMA. The definition of "a public official" in MCL 15.273(1) should be framed by the legal duties established by the OMA for public bodies, which are exactly the same legal duties for which a public official who intentionally violates the act shall be personally liable. These are public officials with the capacity and authority to comply with or violate the OMA as members of public bodies.

Reading Section 15.273(1) in the context of the entire Open Meetings Act reveals the necessity of defining "[a] public official" who "shall be personally liable for violating" the OMA as "a public official" bound by the legal duties imposed on public bodies by the OMA. These public officials are members of public bodies regulated by the OMA.

This particular case presents a question of legal duty disguised as a definition of the class of people subject to personal liability for breach of a legal duty established in the OMA. The amici recommend defining members of the class (of public officials) as those who have a specific legal duty under the OMA for which personal liability can be imposed. These public officials are members of public bodies. The Court of Appeals reached the correct result, effectively defining a "**public official** who intentionally violates this act" and who "shall be personally liable" for the violation **as a member of a public body** who has the legal duty and capacity to comply with the regulations in the OMA applicable to public bodies. *Bitterman v Bolf*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2015 (Docket No 319663) (emphasis and text added.)

No contraction of the OMA is requested or required by defining "a public official" in MCL 15.273(1) as a member of a "public body," giving force to all of the substantive provisions of the OMA that expressly describe the legal standards and obligations of public bodies.

ARGUMENT

I. AN ABSTRACT DICTIONARY DEFINITION OF "PUBLIC OFFICIAL" INCORRECTLY DEFINES THE CLASS AND MEMBERS OF IT SUBJECT TO PERSONAL LIABILITY UNDER SECTION 15.273(1) OF THE OPEN MEETINGS ACT.

The way the issue was presented to the Supreme Court, the definition of "[a] public official who intentionally violates this act" and "shall be personally liable" for the violation really is a controversy over which "public official" has a legal duty stated in the OMA for which personal liability shall be imposed for violating it. MCL 15.273(1). Simply using a dictionary definition of "a public official" does not work, because "when considering the correct interpretation, the statute must be read as a whole." *Potter v McLeary,* 484 Mich 397, 441; 774 NW2d 1 (2009). "Individual words and phrases," like "public official," "while important, should be read in the context of the entire legislative scheme" of the OMA. *Potter v McLeary, id,* at 774. "In defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme," especially in MCL 15.273(1). *Potter v McLeary, id,* at 774. "Finally, the statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme" of the OMA, which establishes legal standards for the meetings and minutes of public bodies. *Potter v McLeary, id,* at 774.

"[T]he OMA's legislative purposes were to remedy the ineffectiveness of the 1968 statute and to promote a new era in governmental accountability." *Booth Newspapers v University of Michigan Board of Regents*, 444 Mich 211, 222; 507 NW2d 422 (1993). "To

further the OMA's legislative purposes, the Court of Appeals has historically interpreted the statute broadly, while strictly construing its exemptions and imposing on public bodies the burden of proving that an exemption exists." *Booth Newspapers, id,* at 223**.** The definition of "a public official who intentionally violates this act" in MCL 15.273(2) should further the promotion of the "new era in governmental accountability" by clarifying the legal basis for holding public officials accountable for legal duties and obligations imposed on public bodies by the legislature in the OMA.

There is no need for the Supreme Court to define the wide range of people within the class of "public official" who might intentionally violate the Open Meetings Act. The issue is how to define "[a] public official who intentionally violates this act" and who "shall be personally liable in a civil action" for the violation. This is an issue of legal duty, and it is the element of legal duty that the Court of Appeals supplied by requiring "a public official" to be a member of a public body, because the OMA established legal duties and obligations for public bodies, not public officials. MCL 15.261 *et seq, People v Whitney,* 228 Mich App 230; 578 NW2d 329 (1998). Holding public officials criminally and personally liable for intentional violations of the OMA must be predicated on a legal duty to comply with the OMA. That legal duty is imposed plainly on public bodies, and public officials who are members of the public bodies, rather than individuals who are public officials in some other capacity.

Defining "public official" broadly in MCL 15.273(1) would not advance the purpose of the OMA, because only those public officials with a legal duty imposed upon them by the OMA "shall be held personally liable in a civil action." Expanding the class of public officials exposed to personal liability beyond those public officials with the duty and capacity to comply with and effectuate the OMA would confound and frustrate citizens and public officials alike, and would contradict the plain language of the legislature's regulation of public bodies throughout the OMA.

While it is true that the OMA is construed broadly in favor of open meetings and narrowly in reviewing reasons for closed meetings, the "three-tiered enforcement scheme for private litigants" "and the distinct kinds of relief that they provide, stand alone." *Speicher v Columbia Township Board of Trustees*, 497 Mich 125, 135-136; 860 NW2d 51 (2014). When considering the definition of "public official" in MCL 15.273(1), "this is an important point because to determine whether a plaintiff may bring a cause of action for a specific remedy, this Court must determine whether the Legislature intended to create such a cause of action." *Speicher v Columbia Township*, *id*, at 136, internal quotations omitted. To the extent the definition of "public official" in MCL 15.273(1) determines which public official will be subject to personal liability for intentionally violating the act, the Supreme Court should remember that "[w]hen a statute, like the OMA, gives new rights and prescribes new remedies, such remedies must be strictly pursued, and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only." *Speicher v Columbia Township*, *id*, at 136.

A broad construction of "public official" based in whole or in part on descriptions of the duties and obligations of a village clerk in the General Law Village Act would be contrary to the principle of narrow construction of this "cause of action for a specific remedy" under the OMA. *Speicher v Columbia Township*, *id*, at 136.

There is the potential for enormous confusion over the scope and elements of personal liability of "a public official" for intentional violations of the OMA, if the term is defined broadly based on a dictionary definition or the common understanding, without some nexus to the regulatory focus of the OMA on public bodies. This nexus is provided by defining "a public official who intentionally violates this act" as "a public official who intentionally violates this act as a member of a public body." This is more than an exercise in choosing a definition. Without a nexus to a public body expressly regulated by the OMA, any public official who posts an inadequate notice of a public meeting, attends an illegally closed meeting, takes minutes at an illegally closed meeting, or removes a person from a meeting at the request of a mayor for not providing his address as a condition of addressing the public body, would be subject to personal liability under MCL 15.273(1).

In *Herald Co v City of Bay City*, 463 Mich 111, 130; 614 NW2d 873 (2000) the Supreme Court held that "an individual executive acting in his executive capacity is not a public body for the purposes of the OMA." The Court saw no merit in "plaintiff's contention that the city manager and city commission together constitute a public body." *Herald Co*

v Bay City, *id*, at 132. "The clear inference is that the Legislature deliberately chose not to use a definition encompassing individuals when it enacted the Open Meetings Act." *Davis v City of Detroit Financial Review Team*, 296 Mich App 568, 586-587; 821 NW2d 896 (2012). The focus of the OMA is on public bodies, not individual public officials working with or for public bodies. In *Muma v City of Flint Review Team*, unpublished Court of Appeals Case No. 309260 (May 21, 2012), companion case to *Davis v City of Detroit*, *id,* the Court of Appeals noted "[t]here was no factual basis to support the trial court's finding that any defendant intentionally violated the Open Meetings Act," and "ordered entry of judgment in favor of defendants in the trial court." The individual defendants undeniably were public officials, including the Governor and State Treasurer, and they were not public bodies or members of public bodies.

Can an individual public official who is outside the purview of the OMA by reason of not being a public body at the same time be subject to personal liability under MCL 15.273(1) for intentionally violating the OMA? The amici suggest that construing the OMA in its entirety necessarily involves aligning the scope of individual public official personal liability for intentional violations of the OMA with the underlying legal duties described and established in the OMA for public bodies. No other regulated class of public officials exists under the OMA.

The intended purview of MCL 15.273(1) should be determined by the legal duties imposed on public bodies in the OMA by the legislature, as opposed to a general legal

duty to follow the OMA. The distinction may be difficult to discern on fact patterns like the one out of which this case arises, but a few admittedly extreme examples may make the distinction more clear.

It is doubtful that the attorney general or a county prosecuting attorney commencing an OMA action for mandamus in a Circuit Court, rather than the Court of Appeals, would be personally liable for intentionally violating MCL 15.271(3): "An action for mandamus against a public body under this act shall be commenced in the Court of Appeals." Would a circuit court judge intentionally violate the OMA when he or she denies a request for court costs and actual attorney fees that are mandated to be awarded by MCL 15.271(4)? Of course not. Each of these individuals might be "a public official," but both of these individuals are not public bodies or members of a public body regulated by OMA, and each is not within the class of public officials who "shall be personally liable" for intentionally violating the OMA. Reading and construing the OMA in its entirety as establishing legal standards and obligations for public bodies, it is clear that the intentional violations of these legal standards and obligations for which criminal and civil liability can be found should be limited to those committed by people who are public officials and members of public bodies regulated by the OMA.

A person who is not a "public official" is not a member of the class of people subject to criminal or civil liability for intentional violations of the OMA, even though a person generally is obligated to follow the OMA as the state law on how public bodies

shall conduct business at open meetings. A person other than "a public official" [and a member of a public body] is not in a position to control or affect the operation of public bodies. A person who is "a public official" in any capacity other than as a member of a "public body" defined and regulated by the OMA **is not** "[a] public official who intentionally violates this act" according to MCL 15.273(1), because that "public official" has no specific legal duty or obligation to comply with the OMA as a member of a "public body." It is only "[a] public official" with the requisite capacity, authority, and specific legal duty to comply with the legal standards and obligations imposed on "public bodies" by the OMA who should, and therefore "shall, be personally liable" for intentionally violating the act.

When the legislature used the phrase "a public official" in MCL 15.273(1) there was no attempt to define the class of public officials subject to personal liability for intentionally violating the OMA, because the duties imposed by the OMA on public bodies provide the standard for making that determination. To the extent it is unclear, the definition of "a public official" subject to personal liability should give effect to the legislature's extensive regulation of public bodies in the OMA.

II. THE OPEN MEETINGS ACT ESTABLISHES LEGAL STANDARDS AND OBLIGATIONS FOR PUBLIC BODIES, WHICH ARE THE SAME LEGAL STANDARDS AND OBLIGATIONS FOR WHICH "A PUBLIC OFFICIAL" CAN BE PERSONALLY LIABLE.

The OMA supersedes local charters, ordinances and resolutions relating to "requirements for meetings of local **public bodies** to be open to the public." MCL 15.261(2) (emphasis added).

"**Public body**" is defined in MCL 15.262 (emphasis added) along with "meeting" of a public body, "closed session" of a public body, and "decision" of a public body. "**Public body** means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function…" MCL 15.262(1) (emphasis added).

Substantive provisions of the OMA establish legal standards for public bodies as illustrated by these excerpts, with no mention of "a public official."

> "All meetings of a **public body** shall be open to the public and shall be held in a place available to the general public." MCL 15.263(1) (emphasis added).
>
> "All decisions of a **public body** shall be made at a meeting open to the public." MCL 15.263(2) (emphasis added).
>
> "All deliberations of a **public body** constituting a quorum of its members shall take place at a meeting open to the public except as

provided in this section and sections 7 and 8." MCL 15.263(3) (emphasis added).

"A public notice for a **public body** shall always be posted at its principal office and any other locations considered appropriate by the public body." MCL 15.264(b) (emphasis added).

"A meeting of a **public body** shall not be held unless public notice is given as provided in this section by a person designated by the **public body**." MCL 15.265(a) (emphasis added).

"A **public body** may meet in a closed session only for the following purposes…" MCL 15.268 (emphasis added).

"Each **public body** shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held." MCL 15.269(1) (emphasis added).

"The **public body** shall make any corrections in the minutes at the next meeting after the meeting to which the minutes refer." MCL 15.269(1) (emphasis added).

"The **public body** shall make corrected minutes available at or before the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction." MCL 15.269(1) (emphasis added).

"A **public body** shall not include in or with its minutes any personally identifiable information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the general education provisions act, 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974." MCL 15.269(4) (emphasis added).

"Decisions of a **public body** shall be presumed to have been adopted in compliance with the requirements of this act." MCL 15.270(1) (emphasis added).

"[A]ny person may commence a civil action… to challenge the validity of a decision of a **public body** made in violation of this act." MCL 15.270(1) (emphasis added).

> "A decision made by a **public body** may be invalidated if the public body has not complied with the requirements of section 3(1), (2), and (3) in making the decision." MCL 15.270(2) (emphasis added).
>
> "The circuit court shall not have jurisdiction to invalidate a decision of a **public body** for a violation of this act unless an action is commenced… [w]ithin 60 days after the approved minutes are made available to the public by the **public body**… [or] [i]f the decision involves the approval of contracts… within 30 days after the approved minutes are made available to the public pursuant to that decision." MCL 15.270(3) (emphasis added).
>
> "If a **public body** is not complying with this act, the attorney general, prosecuting attorney of the county in which the **public body** serves, or a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act." MCL 15.271(1) (emphasis added).
>
> "An action for mandamus against a **public body** under this act shall be commenced in the court of appeals." MCL 15.271(3) (emphasis added).
>
> "If a **public body** is not complying with this act, and a person commences a civil action against the **public body** for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action." MCL 15.271(4) (emphasis added).

Immediately following the substantive provisions of the OMA is section 15.272, which provides that "[a] public official who intentionally violates this act is guilty of a misdemeanor punishable by a fine of not more than $1,000.00." Criminal liability is limited to intentional violations of the act committed by a member of a public body, because the legal standards established by the act apply specifically to public bodies, and the legal obligation to comply with the standards plainly is imposed on public bodies. The plain language of the OMA is conclusive on the legal duties imposed on public

bodies, which are the same legal duties imposed on "a public official" subject to personal liability for violating the duties enumerated in the OMA. While not articulated in those words, that is the effective result of the opinion in *People v Whitney*, *supra*. The identical conclusion was reached by the Court of Appeals below, in *Bitterman v Bolf*, *supra*. The conclusions reached were corrrect, and are consistant with the holding of the Supreme Court in *Herald Co v City of Bay City*, *supra*, and the Court of Appeals in *Davis v City of Detroit Financial Review Team, supra.*

III. A DICTIONARY DEFINITION OF "A PUBLIC OFFICIAL" WOULD SUBJECT THE VILLAGE CLERK TO VICARIOUS LIABILITY FOR ACTIONS AND INACTIONS OF THE VILLAGE PUBLIC BODY.

Plaintiff Appellant cited no specific provision of the OMA in her complaint that the village clerk allegedly violated.

> 22. Defendant BOLF's actions described here were willful, wrongful, and intentional.
>
> 23. By intentionally and wrongfully altering and/or changing the Approved Written Meeting Minutes of the November 8, 2012, meeting, Defendant BOLF has intentionally violated the requirements of the Open Meetings Act for the Village of Oakley to have and keep official and approved meeting minutes.
>
> 24. Such intentional violation makes Defendant BOLF personally liable in a civil action for actual and exemplary damages of not more than $500.00, plus costs and actual attorney fees to the person bringing the action.

(Plaintiff Appellant's Complaint, p 3, emphasis added.) The key provisions of the OMA on keeping and correcting minutes are found at MCL 15.269, and there is no stated

obligation of the clerk or any other public official (other than as members of the public body) to keep or correct minutes. The village clerk is not a public body or a member of the village council. The Plaintiff Appellant asks the court to hold the village clerk personally liable for intentionally violating the legal standards applicable to public bodies for keeping and correcting minutes under the OMA. This is an unwarranted extension of the personal liability provision of the OMA that cannot be authorized by a dictionary definition of "a public official". The village clerk lacks the authority and legal duty under the OMA to correct or approve the minutes of the public body of the Village of Oakley.

The facts of this case indicate the village clerk added language to the minutes without approval of the public body.[1] The clerk's action did not correct or approve the minutes, because it is only the public body that keeps, corrects, and approves its minutes according to MCL 15.269. Lawsuits against clerks of public bodies to keep, correct or approve minutes of the meetings of public bodies are not authorized by the OMA, except perhaps within the narrow terms of MCL 15.267(2).

> "A separate set of minutes shall be taken by the **clerk** or the designated secretary **of the public body** at the closed session. These minutes shall be retained by the **clerk of the public body**, are not available to the public, and shall only be disclosed if required by a civil action filed under section 10, 11, or 13. These minutes may be destroyed 1 year and 1 day after approval of the minutes of the regular meeting at which the closed session was approved."

[1] The amici erroneously stated in the brief filed December 29, 2015, that the village council properly corrected and approved its minutes, but it did not.

Plaintiff Appellant did not allege that the village clerk violated MCL 15.267(2), and did not argue on appeal that the village clerk violated MCL 15.267(2). This case is founded on an allegation that the village clerk altered (or corrected!) minutes without approval of the public body. Defining "**a public official** who intentionally violates this act" **as a member of a public body** would clarify the scope and application of MCL 15.273(1). This clarification would aid the bench, bar, general public, and governmental officials across the state in understanding the scope and application of MCL 15.273(1). Potential personal liability of a clerk of a public body for intentionally violating MCL 15.267(2) would be the only exception to the definition, based on the specific statutory language in MCL 15.267(2) that provides the nexus between the clerk and the OMA regulated public body.

There is the potential for creating immense confusion over the duties of public officials that might be bootstrapped to an OMA violation to obtain a court ruling of an intentional violation of the OMA. This case demonstrates how it can happen. The Plaintiff Appellant claims the duties of the office of the village clerk as described in the General Law Village Act, MCL 64.5(1), MCL 64.5(3), are reasons the village clerk should be a "public official" subject to personal liability under MCL 15.273(1). (Plaintiff Appellant's Application for Leave, p 11, and brief filed in the Court of Appeals, p 18.) But the Plaintiff Appellant ignores the lack of a personal liability connection between the General Law Village Act and the OMA. There is no personal civil liability clause in the General Law Village Act by which a village official and "a public official" might or "shall be held personally liable" for violating that act, the same way the OMA provides that "a

public official" "shall be personally liable" if he or she "intentionally violates this act." MCL 15.273(1).

This plain language of MCL 15.273(1) establishes personal liability for a public official who intentionally "violates this act," not the General Law Village Act or any other statute describing the functions and duties of public officials. Up to this point in the litigation, the Plaintiff Appellant has identified no specific provision of the OMA that the village clerk intentionally violated, even as an agent or public official of the public body. This is the missing element of the Plaintiff Appellant's case, and the dictionary definition of "a public official" who "intentionally violates this act" does not supply it.

The Plaintiff Appellant's contention that the village clerk is part of the village council is a strong argument for finding the clerk to be a member of the public body, but it falls short of meeting the legislative or governing function of public bodies described by the legislature in MCL 15.262(a). Without voting power on the village council, the clerk cannot be a member of the public body subject to personal liability for intentional violations of the OMA. The only exception to this rule is found in the text of MCL 15.267(2) where duties of the "clerk of the public body" are specified, and MCL 15.267(2) is not at issue in this case.

CONCLUSION

The Court of Appeals correctly defined "a public official who intentionally violates this act" as "a public official who intentionally violates this act as a member of a public body," and this is how the Supreme Court should define "a public official" in MCL 15.273(1).

Dated: December 29, 2015

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APPENDIX 1:

OPENING MEETINGS ACT

MCL 15.261 *et seq*

Open Meetings Act

15.261. Short title; effect on related local charter provisions, ordinances, resolutions

Sec. 1. (1) This act shall be known and may be cited as the "Open meetings act".

(2) This act shall supersede all local charter provisions, ordinances, or resolutions which relate to requirements for meetings of local public bodies to be open to the public.

(3) After the effective date of this act, nothing in this act shall prohibit a public body from adopting an ordinance, resolution, rule, or charter provision which would require a greater degree of openness relative to meetings of public bodies than the standards provided for in this act.

15.262. Definitions

Sec. 2. As used in this act:

(a) "Public body" means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o.

(b) "Meeting" means the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under section 4*o* of the home rule city act, 1909 PA 279, MCL 117.4*o*.

(c) "Closed session" means a meeting or part of a meeting of a public body that is closed to the public.

(d) "Decision" 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.

15.263. Meetings of public bodies; attendance, nonapplication

Sec. 3. (1) All meetings of a public body shall be open to the public and shall be held in a place available to the general public. All persons shall be permitted to attend any meeting except as otherwise provided in this act. The right of a person to attend a meeting of a public body includes the right to tape-record, to videotape, to broadcast live on radio, and to telecast live on television the proceedings of a public body at a public meeting. The exercise of this right shall not be dependent upon the prior approval of the public body. However, a public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting.

(2) All decisions of a public body shall be made at a meeting open to the public.

(3) All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public except as provided in this section and sections 7 and 8.

(4) A person shall not be required as a condition of attendance at a meeting of a public body to register or otherwise provide his or her name or other information or otherwise to fulfill a condition precedent to attendance.

(5) A person shall be permitted to address a meeting of a public body under rules established and recorded by the public body. The legislature or a house of the legislature may provide by rule that the right to address may be limited to prescribed times at hearings and committee meetings only.

(6) A person shall not be excluded from a meeting otherwise open to the public except for a breach of the peace actually committed at the meeting.

(7) This act does not apply to the following public bodies only when deliberating the merits of a case:

(a) The worker's compensation appeal board created under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws.

(b) The employment security board of review created under the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, as amended, being sections 421.1 to 421.73 of the Michigan Compiled Laws.

(c) The state tenure commission created under Act No. 4 of the Public Acts of the Extra Session of 1937, as amended, being sections 38.71 to 38.191 of the Michigan Compiled Laws, when acting as a board of review from the decision of a controlling board.

(d) An arbitrator or arbitration panel appointed by the employment relations commission under the authority given the commission by Act No. 176 of the Public Acts of 1939, as amended, being sections 423.1 to 423.30 of the Michigan Compiled Laws.

(e) An arbitration panel selected under chapter 50A of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being sections 600.5040 to 600.5065 of the Michigan Compiled Laws.

(f) The Michigan public service commission created under Act No. 3 of the Public Acts of 1939, being sections 460.1 to 460.8 of the Michigan Compiled Laws.

(8) This act does not apply to an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(9) This act does not apply to a committee of a public body which adopts a nonpolicy making resolution of tribute or memorial which resolution is not adopted at a meeting.

(10) This act does not apply to a meeting which is a social or chance gathering or conference not designed to avoid this act.

(11) This act shall not apply to the Michigan veterans' trust fund board of trustees or a county or district committee created under Act No. 9 of the Public Acts of the First Extra Session of 1946, being sections 35.601 to 35.610 of the Michigan Compiled Laws, when the board of trustees or county or district committee is deliberating the merits of an emergent need. A decision of the board of trustees or county or district committee made under this subsection shall be reconsidered by the board or committee at its next regular or special meeting consistent with the requirements of this act. “Emergent need” means a situation which the board of trustees, by rules promulgated under the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, determines requires immediate action.

15.264. Public notice; name of public body, posting locations

Sec. 4. The following provisions shall apply with respect to public notice of meetings:

(a) A public notice shall always contain the name of the public body to which the notice applies, its telephone number if one exists, and its address.

(b) A public notice for a public body shall always be posted at its principal office and any other locations considered appropriate by the public body. Cable television may also be utilized for purposes of posting public notice.

(c) If a public body is a part of a state department, part of the legislative or judicial branch of state government, part of an institution of higher education, or part of a political subdivision or school district, a public notice shall also be posted in the respective principal office of the state department, the institution of higher education, clerk of the house of representatives, secretary of the state senate, clerk of the supreme court, or political subdivision or school district.

(d) If a public body does not have a principal office, the required public notice for a local public body shall be posted in the office of the county clerk in which the public body serves and the required public notice for a state public body shall be posted in the office of the secretary of state.

15.265. Public notice of meetings; regular, rescheduled, special, or recessed meetings; meetings in residential dwellings; durational requirements

Sec. 5. (1) A meeting of a public body shall not be held unless public notice is given as provided in this section by a person designated by the public body.

(2) For regular meetings of a public body, there shall be posted within 10 days after the first meeting of the public body in each calendar or fiscal year a public notice stating the dates, times, and places of its regular meetings.

(3) If there is a change in the schedule of regular meetings of a public body, there shall be posted within 3 days after the meeting at which the change is made, a public notice stating the new dates, times, and places of its regular meetings.

(4) Except as provided in this subsection or in subsection (6), for a rescheduled regular or a special meeting of a public body, a public notice stating the date, time, and place of the meeting shall be posted at least 18 hours before the meeting in a prominent and conspicuous place at both the public body's principal office and, if the public body directly or indirectly maintains an official internet presence that includes monthly or

more frequent updates of public meeting agendas or minutes, on a portion of the website that is fully accessible to the public. The public notice on the website shall be included on either the homepage or on a separate webpage dedicated to public notices for nonregularly scheduled public meetings and accessible via a prominent and conspicuous link on the website's homepage that clearly describes its purpose for public notification of those nonregularly scheduled public meetings. The requirement of 18-hour notice does not apply to special meetings of subcommittees of a public body or conference committees of the state legislature. A conference committee shall give a 6-hour notice. A second conference committee shall give a 1-hour notice. Notice of a conference committee meeting shall include written notice to each member of the conference committee and the majority and minority leader of each house indicating time and place of the meeting.

(5) A meeting of a public body that is recessed for more than 36 hours shall be reconvened only after public notice that is equivalent to that required under subsection (4) has been posted. If either house of the state legislature is adjourned or recessed for less than 18 hours, the notice provisions of subsection (4) are not applicable. Nothing in this section bars a public body from meeting in emergency session in the event of a severe and imminent threat to the health, safety, or welfare of the public when ⅔ of the members serving on the body decide that delay would be detrimental to efforts to lessen or respond to the threat. However, if a public body holds an emergency public meeting that does not comply with the 18-hour posted notice requirement, it shall make paper copies of the public notice for the emergency meeting available to the public at that meeting. The notice shall include an explanation of the reasons that the public body cannot comply with the 18-hour posted notice requirement. The explanation shall be specific to the circumstances that necessitated the emergency public meeting, and the use of generalized explanations such as “an imminent threat to the health of the public” or “a danger to public welfare and safety” does not meet the explanation requirements of this subsection. If the public body directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, it shall post the public notice of the emergency meeting and its explanation on its website in the manner described for an internet posting in subsection (4). Within 48 hours after the emergency public meeting, the public body shall send official correspondence to the board of county commissioners of the county in which the public body is principally located, informing the commission that an emergency public meeting with less than 18 hours' public notice has taken place. The correspondence shall also include the public notice of the meeting with explanation and shall be sent by either the United States postal service or electronic mail. Compliance with the notice requirements for emergency meetings in this subsection does not create, and shall not be construed to create, a legal basis or defense for failure to comply with other provisions of this act and does not relieve the public body from the duty to comply with any provision of this act.

(6) A meeting of a public body may only take place in a residential dwelling if a nonresidential building within the boundary of the local governmental unit or school system is not available without cost to the public body. For a meeting of a public body that is held in a residential dwelling, notice of the meeting shall be published as a display advertisement in a newspaper of general circulation in the city or township in which the meeting is to be held. The notice shall be published not less than 2 days before the day on which the meeting is held, and shall state the date, time, and place of the meeting. The notice shall be at the bottom of the display advertisement, set off in a conspicuous manner, and include the following language: "This meeting is open to all members of the public under Michigan's open meetings act".

(7) A durational requirement for posting a public notice of a meeting under this act is the time that the notice is required to be accessible to the public.

15.266. Public notice; requests for copies of notice

Sec. 6. (1) Upon the written request of an individual, organization, firm, or corporation, and upon the requesting party's payment of a yearly fee of not more than the reasonable estimated cost for printing and postage of such notices, a public body shall send to the requesting party by first class mail a copy of any notice required to be posted pursuant to section 5(2) to (5).

(2) Upon written request, a public body, at the same time a public notice of a meeting is posted pursuant to section 5, shall provide a copy of the public notice of that meeting to any newspaper published in the state and to any radio and television station located in the state, free of charge.

15.267. Closed sessions; vote, minutes

Sec. 7. (1) A 2/3 roll call vote of members elected or appointed and serving is required to call a closed session, except for the closed sessions permitted under section 8(a), (b), (c), (g), (i), and (j). The roll call vote and the purpose or purposes for calling the closed session shall be entered into the minutes of the meeting at which the vote is taken.

(2) A separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session. These minutes shall be retained by the clerk of the public body, are not available to the public, and shall only be disclosed if required by a civil action filed under section 10, 11, or 13. These minutes may be destroyed 1 year and 1 day after approval of the minutes of the regular meeting at which the closed session was approved.

15.268. Closed sessions; purposes

Sec. 8. A public body may meet in a closed session only for the following purposes:

(a) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer, employee, staff member, or individual agent, if the named person requests a closed hearing. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered after the rescission only in open sessions.

(b) To consider the dismissal, suspension, or disciplining of a student if the public body is part of the school district, intermediate school district, or institution of higher education that the student is attending, and if the student or the student's parent or guardian requests a closed hearing.

(c) For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing.

(d) To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.

(e) To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body.

(f) To review and consider the contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential. However, except as otherwise provided in this subdivision, all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this act. This subdivision does not apply to a public office described in subdivision (j).

(g) Partisan caucuses of members of the state legislature.

(h) To consider material exempt from discussion or disclosure by state or federal statute.

(i) For a compliance conference conducted by the department of commerce under section 16231 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.16231 of the Michigan Compiled Laws, before a complaint is issued.

(j) In the process of searching for and selecting a president of an institution of higher education established under section 4, 5, or 6 of article viii of the state constitution of 1963, to review the specific contents of an application, to conduct an interview with a candidate, or to discuss the specific qualifications of a candidate if the particular process of searching for and selecting a president of an institution of higher education meets all of the following requirements:

(*i*) The search committee in the process, appointed by the governing board, consists of at least 1 student of the institution, 1 faculty member of the institution, 1 administrator of the institution, 1 alumnus of the institution, and 1 representative of the general public. The search committee also may include 1 or more members of the governing board of the institution, but the number shall not constitute a quorum of the governing board. However, the search committee shall not be constituted in such a way that any 1 of the groups described in this subparagraph constitutes a majority of the search committee.

(*ii*) After the search committee recommends the 5 final candidates, the governing board does not take a vote on a final selection for the president until at least 30 days after the 5 final candidates have been publicly identified by the search committee.

(*iii*) The deliberations and vote of the governing board of the institution on selecting the president take place in an open session of the governing board.

15.269. Minutes; contents, corrections, availability for public inspection, inclusion of personally identifiable information covered by federal law

Sec. 9. (1) Each public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. The public body shall make any corrections in the minutes at the next meeting after the meeting to which the minutes refer. The public body shall make corrected minutes available at or before the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction.

(2) Minutes are public records open to public inspection, and a public body shall make the minutes available at the address designated on posted public notices pursuant to section 4. The public body shall make copies of the minutes available to the public at the reasonable estimated cost for printing and copying.

(3) A public body shall make proposed minutes available for public inspection within 8 business days after the meeting to which the minutes refer. The public body shall make approved minutes available for public inspection within 5 business days after the meeting at which the minutes are approved by the public body.

(4) A public body shall not include in or with its minutes any personally identifiable information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the general education provisions act, 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974.

15.270. Decisions; invalidation action, venue, reenactment

Sec. 10. (1) Decisions of a public body shall be presumed to have been adopted in compliance with the requirements of this act. The attorney general, the prosecuting attorney of the county in which the public body serves, or any person may commence a civil action in the circuit court to challenge the validity of a decision of a public body made in violation of this act.

(2) A decision made by a public body may be invalidated if the public body has not complied with the requirements of section 3(1), (2), and (3) in making the decision or if failure to give notice in accordance with section 5 has interfered with substantial compliance with section 3(1), (2), and (3) and the court finds that the noncompliance or failure has impaired the rights of the public under this act.

(3) The circuit court shall not have jurisdiction to invalidate a decision of a public body for a violation of this act unless an action is commenced pursuant to this section within the following specified period of time:

(a) Within 60 days after the approved minutes are made available to the public by the public body except as otherwise provided in subdivision (b).

(b) If the decision involves the approval of contracts, the receipt or acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal to the electors, within 30 days after the approved minutes are made a available to the public pursuant to that decision.

(4) Venue for an action under this section shall be any county in which a local public body serves or, if the decision of a state public body is at issue, in Ingham county.

(5) In any case where an action has been initiated to invalidate a decision of a public body on the ground that it was not taken in conformity with the requirements of this

act, the public body may, without being deemed to make any admission contrary to its interest, reenact the disputed decision in conformity with this act. A decision reenacted in this manner shall be effective from the date of reenactment and shall not be declared invalid by reason of a deficiency in the procedure used for its initial enactment.

15.271. Noncompliance; actions for injunctive relief and mandamus

Sec. 11. (1) If a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, or a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act.

(2) An action for injunctive relief against a local public body shall be commenced in the circuit court, and venue is proper in any county in which the public body serves. An action for an injunction against a state public body shall be commenced in the circuit court and venue is proper in any county in which the public body has its principal office, or in Ingham county. If a person commences an action for injunctive relief, that person shall not be required to post security as a condition for obtaining a preliminary injunction or a temporary restraining order.

(3) An action for mandamus against a public body under this act shall be commenced in the court of appeals.

(4) If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

15.272. Intentional violations; penalties

Sec. 12. (1) A public official who intentionally violates this act is guilty of a misdemeanor punishable by a fine of not more than $1,000.00.

(2) A public official who is convicted of intentionally violating a provision of this act for a second time within the same term shall be guilty of a misdemeanor and shall be fined not more than $2,000.00, or imprisoned for not more than 1 year, or both.

15.273. Intentional violations; civil actions for damages

Sec. 13. (1) A public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action.

(2) Not more than 1 action under this section shall be brought against a public official for a single meeting. An action under this section shall be commenced within 180 days after the date of the violation which gives rise to the cause of action.

(3) An action for damages under this section may be joined with an action for injunctive or exemplary relief under section 11.

15.273a. Selection of institution's president; violations by governing board; civil fine

Sec. 13a. If the governing board of an institution of higher education established under section 4, 5, or 6 of article viii of the state constitution of 1963 violates this act with respect to the process of selecting a president of the institution at any time after the recommendation of final candidates to the governing board, as described in section 8(j), the institution is responsible for the payment of a civil fine of not more than $500,000.00. This civil fine is in addition to any other remedy or penalty under this act. To the extent possible, any payment of fines imposed under this section shall be paid from funds allocated by the institution of higher education to pay for the travel and expenses of the members of the governing board.

15.274. Repealer

Sec. 14. Act No. 261 of the Public Acts of 1968, being sections 15.251 to 15.253 of the Compiled Laws of 1970, is repealed.

15.275. Effective date

Sec. 15. This act shall take effect January 1, 1977.

APPENDIX 2:

Bitterman v Bolf

UNPUBLISHED OPINION

UNPUBLISHED
Court of **Appeals** of Michigan.

Shannon **BITTERMAN**, Plaintiff–Appellant,
v.
Cheryl D. **BOLF**, Defendant–Appellee.

Docket No. **319663**.
April 14, **2015**.

Saginaw Circuit Court; LC No. 13–019397–CZ.

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

Opinion

PER CURIAM.

Plaintiff, Shannon Bitterman, appeals as of right the trial court's order granting summary disposition to defendant, Cheryl D. Bolf, under MCR 2.116(C)(10). The trial court concluded that Bolf was not a public official for the purposes of the Open Meetings Act (the Act). We affirm.

I. FACTUAL BACKGROUND

Bolf is a clerk for the Village of Oakley. Bitterman filed a complaint against Bolf, alleging that Bolf falsified minutes from a village council meeting on November 8, 2012. Bolf admitted that she added a paragraph to the public meeting minutes after the council reviewed and approved the minutes in December 2012, but she maintained that she did so in good faith to correct an error.

During a deposition in June 2013, counsel for Bitterman sought to question Bolf about a closed session of the meeting that took place on November 8, 2012. Counsel for Bolf objected on the grounds that discussions in closed council sessions are privileged. Counsel for Bitterman contended that any discussions outside the purpose of the closed meeting were not privileged. Counsel for Bolf instructed Bolf not to answer the questions.

On July 12, 2013, Bitterman filed a motion to compel Bolf to answer the questions, asserting that the answers were not privileged and that counsel for Bolf should not have

instructed Bolf not to answer. Bolf responded that her answers were subject to a privilege and that answering them also would have violated the trial court's order in a different lawsuit. On July 22, 2013, the trial court denied Bitterman's motion. It determined that Bolf's answers were subject to a privilege and that permitting Bitterman to depose Bolf on the issue would violate its protective order in another case.

In August 2013, Bitterman moved for summary disposition under MCR 2.116(C)(10). Bitterman alleged that there was no question of fact regarding whether Bolf violated the Act because she admitted that she altered the minutes. In response, Bolf moved for summary disposition under MCR 2.116(C)(10), asserting that a village clerk is not a public official under the Act.

The trial court granted summary disposition to Bolf on the basis that she was not a public official. Relying on this Court's decision in *People v. Whitney*, 228 Mich.App 230; 578 NW2d 329 (1998), the trial court reasoned that Bolf was not a public official because she was not a member of a public body. It also noted that Bolf did not exercise legislative authority.

II. STANDARDS OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition and issues of statutory interpretation. *Herald Co. v. Bay City*, 463 Mich. 111, 117; 614 NW2d 873 (2000). When interpreting a statute, this Court's role is to examine the statute's language to determine the intent of the legislature. *Id.* "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id.* at 117–118.

We review for an abuse of discretion the trial court's decision on a discovery motion. *Reed Dairy Farm v. Consumers Power Co.*,227 Mich.App 614, 616; 576 NW2d 709 (1998). The trial court abuses its discretion when its outcome falls outside the range of principled outcomes. *Maldonado v. Ford Motor Co.*, 476 Mich. 372, 388; 719 NW2d 809 (2006). We review de novo issues of privilege. *In re Costs & Attorney Fees*, 250 Mich.App 89, 98; 645 NW2d 697 (2002).

III. CLOSED MEETING PRIVILEGE

Bitterman contends that the trial court erred by refusing to compel Bolf to answer her questions about the closed session. According to Bitterman, the privilege should not attach because the council discussed topics outside the stated purpose of the meeting. Bolf contends that her attorney properly instructed her not to answer any questions because her answers were subject to a statutory privilege. We conclude that the

trial court did not abuse its discretion by denying Bitterman's motion to compel because Bitterman did not follow the proper discovery procedures in light of Bolf's assertion of privilege.

While the Act generally provides that any meeting of a public body should be held in a public place and open to the general public, MCL 15.263(1), it also provides exceptions under which a public body may meet in a closed session. MCL 15.268. Minutes taken at a closed session "are not available to the public, and shall only be disclosed if required by a civil action" filed under the Act. MCL 15.267(2). However, this Court does not allow public bodies to evade the Act's requirements by discussing topics in closed meetings outside of those topics for which the Act provides an exception. *Whitney,* 228 Mich.App at 247.

Michigan follows a policy of open and broad discovery. *Reed Dairy Farm,* 227 Mich.App at 616. Generally, any matter that is relevant to the subject matter of the controversy is subject to discovery. *Id.* Parties may make objections during depositions, and "evidence objected to on grounds *other than privilege,* shall be taken subject to the objections. MCR 2.306(C)(4) (emphasis added). An attorney may instruct a party not to answer a question "when necessary to preserve a privilege or other legal protection...." MCR 2.306(C)(5)(a). "An in camera proceeding is the appropriate vehicle to determine whether information requested in discovery proceedings is protected by a statutory privilege." *LeGendre v. Monroe Co.,* 234 Mich.App 708, 742; 600 NW2d 78 (1999).

In this case, counsel for Bolf asserted that the answer to Bitterman's question was subject to a statutory privilege. At the time Bitterman asked the question, there was no indication that the closed session minutes were required in this action. MCR 2.306(D)(1)allowed Bolf's counsel to instruct her not to answer the question because Bolf was asserting a statutory privilege. The proper method to challenge Bolf's assertion of statutory privilege would have been to seek an in-camera review of the allegedly privileged documents. Instead, Bitterman sought to compel an answer on the basis that counsel for Bolf improperly instructed Bolf not to answer. The trial court properly determined that Bolf's counsel was entitled to instruct her not to answer the question because Bolf was asserting a statutory privilege.

We conclude that the trial court's outcome did not fall outside the range of principled outcomes. We do not consider the trial court's alternative ground for denying Bitterman's motion—that allowing Bitterman access to the closed meeting minutes would violate a protective order in another case—because it is not necessary to our resolution of this issue.

IV. PUBLIC OFFICIAL

Bitterman contends that the trial court improperly granted summary disposition under MCR 2.116(C)(10) because Bolf was a "public official" under the Act. We disagree.

The Act requires that "[e]ach public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose for which a closed session is held." MCL 15.269(1). A public body is "any state or local legislative authority or governing body, including a ... council...." MCL 15.262. The Act provides a remedy against public bodies who do not comply with its provisions:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action. [MCL 15.271(4).]

The Act also provides a remedy against public officials who intentionally violate the Act's provisions:

> A public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action. [MCL 15.273(1).]

The Act does not define the term "public official." *Wilkins v. Gagliardi,* 219 Mich.App 260, 271; 556 NW2d 171 (1996). When an act does not define a term, this Court may consider a dictionary definition to assist our interpretation. *People v. Morey,* 461 Mich. 325, 330; 603 NW2d 250 (1999). But this Court also must read statutes as a whole and may not read statutory provisions in isolation. *Robinson v. City of Lansing,* 486 Mich. 1, 15; 782 NW2d 171 (2010). We must read cohesive statutory provisions together. *McCahan v. Brennan,* 492 Mich. 730, 739; 822 NW2d 747 (2012).

We conclude that consulting a dictionary is not necessary to assist in determining the meaning of the phrase "public official" because we have already interpreted this phrase in a different section of the statute. In *People v. Whitney,* this Court interpreted the language in MCL 15.272(1), which provides that "[a] public official who intentionally violates this act is guilty of a misdemeanor...." *Whitney,* 228 Mich.App at 253. In interpreting this provision, we determined that the prosecution must show that the

defendant was a member of a public body. *Id.* at 253. We also recognized a possible distinction between public officials and nonpublic officials. See *Id.* at 253 n 14.

Though Bitterman contends that our interpretation in *Whitney* was dicta, we disagree. Dictum is a judicial comment that is not necessary to the decision in the case. *Carr v. Lansing,* 259 Mich.App 376, 383–384; 674 NW2d 168 (2003). In *Whitney,* the language of MCL 15.272(1) was at issue as an element of the crimes on appeal. This Court's resolution of what is required for a person to be a "public official who intentionally violates this act" was directly germane to the controversy in that case. We conclude *Whitney's* interpretation is not dicta.

We also conclude that *Whitney's* interpretation of this language is instructive in this case. Both statutory sections are part of the same Act, so we must construe these provisions together. The operative language of MCL 15.272(1) and MCL 15.273(1) are almost identical—both sections refer to "[a] public official who intentionally violates this act[.]" This Court in *Whitney* held that a person is not a public official unless they are a member of a public body. Construing these provisions together, we conclude that a person is only a public official for the purposes of MCL 15.273(1) if they are a member of a public body.

In this case, the public body in question is the village council. "The president and trustees constitute the council." MCL 62.1. There is no indication that a village clerk is part of the counsel. Further, it is clear from the meeting minutes that Bolf did not vote at the meeting. Because Bolf was not a member of the council, she was not a member of a public body and was not a public official under MCL 15.273(1). We conclude that the trial court properly granted summary disposition.

We affirm. As the prevailing party, Bolf may tax costs. MCR 7.219.

All Citations

Not Reported in N.W.2d, 2015 WL 1650937

APPENDIX 3:

Muma v City of Flint Review Team
UNPUBLISHED OPINION

Court of **Appeals** of Michigan.

Samuel **MUMA**, Plaintiff–Appellee,

v.

CITY OF **FLINT** FINANCIAL **REVIEW TEAM**, **City** of **Flint** Emergency Manager, Governor, and State Treasurer, Defendants–Appellants.

Docket No. 309260.
May 21, 2012.

Ingham Circuit Court; LC No. 12–000265–CZ.

Before: WHITBECK, P.J., and O'CONNELL and M.J. KELLY, JJ.

Opinion

PER CURIAM.

Defendants appeal by right from the trial court's order granting declaratory judgment and permanent injunctive relief to plaintiff Samuel Muma. On appeal, the dispositive question is whether the trial court correctly determined that the Open Meetings Act applies to the City of Flint Financial Review Team (Flint Financial Review Team). Because we conclude that the Open Meetings Act does not apply to the Flint Financial Review Team, we reverse and remand for entry of judgment in favor of defendants.

I. BASIC FACTS

On September 12, 2011, the State Treasurer provided the Governor with a preliminary review of the City of Flint's financial condition, as permitted by the Local Government and School District Fiscal Accountability Act. (This Act is commonly referred to as the Emergency Financial Manager Act or "Act 4" based on its public act number, which is 2011 PA 4. We discuss provisions of this Act related to a review team created under that act in more detail in our opinion also issued today in *Davis v. City of Detroit Financial Review Team,* ––– Mich.App ––––; ––– NW2d –––– (2012).) The State Treasurer concluded in his report that the City of Flint was in a state of probable financial stress. As a result of the State Treasurer's finding, on September 30, 2011, the Governor appointed the Flint Financial Review Team. The Flint Financial Review Team held five meetings in October and November 2011 that were not open to the public. It is undisputed that enough members of the team were present at each of the five meetings to constitute a quorum.

The Flint Financial Review Team filed a report with the Governor on November 7, 2011. In the report, the Flint Financial Review Team concluded that a local government financial emergency existed within Flint and that no satisfactory plan existed to resolve the emergency. The Flint Financial Review Team further recommended the appointment of an emergency financial manager to resolve the emergency.

In a November 8, 2011 letter, the Governor advised Flint's mayor and city council that he had determined that Flint had a local government financial emergency and that no satisfactory plan existed to resolve the emergency. Neither the mayor nor city council requested a hearing regarding the Governor's determination of a financial emergency in Flint. The Governor appointed Defendant City of Flint Emergency Manager Michael K. Brown to serve as Flint's emergency manager, and he began his service on December 1, 2011.

In March 2012, Muma sued defendants in the Ingham Circuit Court. Muma alleged that the Flint Financial Review Team was a public body subject to the Open Meetings Act and that it had held meetings and taken actions in violation of the Open Meetings Act. Specifically, Muma asked the trial court to invalidate all decisions made in violation of the Open Meetings Act and to enjoin future noncompliance. Muma moved for a temporary restraining order and preliminary injunctive relief on March 15, 2012. The trial court granted the motion and, on the same day, it entered a temporary restraining order prohibiting Emergency Manager Brown "from taking any action in regard" to Flint "or action on behalf" of Flint "in any manner."

The trial court held a hearing on Muma's motion for a preliminary injunction on March 20, 2012. At that hearing, the trial court stated that it believed the Flint Financial Review Team to be "a body that should comply with the Open Meetings Act." The trial court also noted that "not one word" of the Emergency Financial Manager Act deals with the Open Meetings Act and the trial court stated that it had "to presume that the legislature wanted everyone to comply with the Open Meetings Act." The trial court indicated that it would invalidate the relevant decisions of the Governor and Emergency Manager Brown and would reinstate the powers of Flint's mayor and city council. In addition, the trial court awarded Muma attorney fees and costs. The trial court also decided that it would impose a fine of $1,000, although it did not expressly address the issue of whether any defendant had intentionally violated the Open Meetings Act. The trial court additionally denied defendants' request for a stay of its decision.

Although the March 20, 2012 hearing was to consider Muma's request for a preliminary injunction, the trial court nevertheless proceeded to enter a declaratory judgment and permanent injunction on March 23, 2012. In that judgment and permanent injunction, the

trial court declared that (1) the October and November 2011 meetings of the Flint Financial Review Team violated the Open Meetings Act; (2) defendants' noncompliance with the Act impaired the rights of the public under the act; (3) all actions, determinations, or decisions of the Flint Financial Review Team were invalid under the Open Meetings Act, and that the Governor's actions and decisions, along with those of Emergency Manager Brown, which were made with respect to Flint after October 5, 2011, were also invalidated; and (4) Flint's mayor and city council were "reinstated."

The trial court further permanently enjoined defendants, any person appointed by them, and any other person acting on their behalf from taking any action reserved to the mayor and city council to govern and administer Flint under its charter and ordinances and permanently enjoined further noncompliance with the Open Meetings Act. The trial court also assessed defendants $1,000 in exemplary damages, jointly and severally, for intentional violation of the Open Meetings Act and awarded Muma $15,612.60 in attorney fees and $525 in costs. Defendants appealed to this Court on the same day.
On March 26, 2012, this Court issued an order setting an expedited briefing schedule and granting defendants' motion for stay pending appeal. Accordingly, this Court authorized Emergency Manager Brown to exercise his powers during the pendency of the present appeal. This Court retained jurisdiction of the appeal and gave the order immediate effect.

II. APPLICABILITY OF THE OPEN MEETINGS ACT

A. STANDARD OF REVIEW

Defendants argue that the trial court erred when it determined that they were "public bodies" subject to the Open Meetings Act. This Court reviews de novo issues of statutory construction.

B. DISCUSSION

A central issue in this case is whether the Open Meetings Act applies to the Flint Financial Review Team. For the reasons set forth in our opinion also issued today in *Davis v. City of Detroit Financial Review Team,* ---Mich.App ----; --- NW2d ---- (2012), we hold that the Flint Financial Review Team, as a review team for a municipal government created under the Emergency Financial Manager Act, is not a "public body" subject to the Open Meetings Act. Thus, the trial court erred when it determined otherwise and erred when it concluded that the Flint Financial Review Team had violated the Open Meetings Act.

The trial court also granted permanent injunctive relief barring all defendants, including the Governor, State Treasurer, and Emergency Manager Brown, from further noncompliance with the Open Meetings Act. However, as we also discuss in detail in our opinion in *Davis*, the Governor and the State Treasurer in their individual executive capacities are not public bodies under the Open Meetings Act and, thus, are also not subject to the Open Meetings Act in the context of this case.

Emergency Manager Brown is also not subject to the Open Meetings Act. Muma argues that, in assuming what had been duties of the Flint City Council—which is clearly a public body under the Open Meetings Act—Emergency Manager Brown must also be subject to the Open Meetings Act in carrying out those duties. We reject that position on the basis of this Court's holding in *Craig v. Detroit Public Schools Chief Executive Officer*. In that case, this Court held that the Chief Executive Officer of the Detroit Public Schools was not required to comply with the Open Meetings Act. Like Emergency Manager Brown acting in place of the Flint City Council in the present case, the Chief Executive Officer in *Craig* operated under a statutory scheme in which he "essentially [stood] in the shoes of the former school board."

But this Court, nevertheless, rejected the argument in *Craig* that the Chief Executive Officer had to comply with the Open Meetings Act because he stepped into the shoes of the school board. Rather, this Court held that, in light of the Michigan Supreme Court opinion in *Herald Co v. Bay City*, the Chief Executive Officer was not a "public body" under the Open Meetings Act because he was an individual acting in his official capacity. Reading the Open Meetings Act and the other relevant statute in *Craig* together, this Court concluded that the Chief Executive Officer was required "to perform all the duties and obligations of the former school board, but because [the Chief Executive Officer] is an individual and not a 'public body' within the meaning of the[Open Meetings Act], he is simply not able or required to carry out these functions at open meetings."

Accordingly, we reject Muma's effort to distinguish *Craig* on the ground that the Chief Executive Officer was carrying out his executive duties, not the duties of the school board. Instead, *Craig* makes clear that, when a single executive, such as the Chief Executive Officer in *Craig* or Emergency Manager Brown in this case, assumes the duties of a public body pursuant to a statute that sets out that executive's duties, that single executive is not a public body subject to the Open Meetings Act.

It necessarily follows that defendants are not public bodies subject to the Open Meetings Act and, accordingly, that the trial court erred in granting declaratory and injunctive relief in favor of Muma as well as in awarding Muma attorney fees and costs. However, we further underscore that, even had the Open Meetings Act applied, there was no basis

for the trial court to grant a permanent injunction against defendants rather than limiting its judgment to declaratory relief. As set forth by the Michigan Supreme Court in *Straus v. Governor:*

> [D]eclaratory relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, § 1, to conform their actions to constitutional requirements or confine them within constitutional limits. *Durant v. Michigan,* 456 Mich. 175, 205; 566 NW2d 272 (1997). Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations. *Id.* at 206.

There was also no factual basis to support the trial court's finding that any defendant *intentionally* violated the Open Meetings Act. Obviously, it is possible for a party to violate the Open Meetings Act without intentionally doing so. A violation of the Open Meetings Act only rises to the level of being intentional if the party violating the Open Meetings Act had a subjective desire to violate that act or knowledge that he or she was doing so. There is no record evidence in this case to support a conclusion that any defendant acted with the requisite desire or knowledge. In light of our holdings that defendants did not violate the Open Meetings Act in this case, it is unnecessary to reach defendants' arguments regarding the Open Meetings Act's limitations period or the doctrine of laches.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction. We further order this judgment to be given immediate effect and, given the important public questions involved, order that none of the parties may tax their costs.

All Citations

Not Reported in N.W.2d, 2012 WL 1838554