STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

ADELINE HAMBLEY,

Plaintiff,

-vs-

OTTAWA COUNTY, a Michigan County; JOE MOSS, SYLVIA RHODEA, LUCY EBEL, GRETCHEN COSBY, REBEKAH CURRAN, ROGER BELKNAP, and ALLISON MIEDEMA, Ottawa County Commissioners in their individual and official capacities,

Defendants.
/

DEFENDANTS' MOTION TO QUASH SUBPOENAS, BRIEF IN SUPPORT, AND PROOF OF SERVICE

FILE NO: 23-7180-CZ

HON. JENNY McNEILL
Sitting by SCAO Assignment

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DEFENDANTS' MOTION TO QUASH SUBPOENAS

NOW COME the above-named Defendants, by and through their legal counsel, and move this Honorable Court to Quash Plaintiff's Subpoenas of Joe Moss, Douglas Zylstra, Jacob Bonnema, and Roger Bergman pursuant to MCR 2.506(H) and MC 2.302(C), for all the reasons as stated in the attached Brief in Support which are incorporated herein in full.

WHEREFORE, Defendants respectfully request that this Honorable Court grant their Motion to Quash Subpoenas and grant all relief as requested in the attached brief.

Dated: November 27, 2023.

/s/ David A. Kallman_
David A. Kallman (P34200)
Attorney for Defendants

BRIEF IN SUPPORT

Pursuant to MCR 2.302(C) and MCR 2.506(H), Defendants move to quash or modify a subpoena issued by Plaintiff as privileged, unreasonable, oppressive, and in violation of state law. Specifically, Defendants request that this Honorable Court enter an order quashing Plaintiff's subpoenas of Joe Moss, Douglas Zylstra, Jacob Bonnema, and Roger Bergman and directing that they be excused from complying with the subpoenas. In addition, Defendants concur in County Clerk Justin Roebuck's Motion to Quash his subpoena and hereby incorporate his brief fully herein.

Plaintiff's subpoenas are fatally defective for numerous reasons:

I. Plaintiff's Subpoenas Are Untimely.

MCR 2.506(C)(1) states that a subpoena must be served at least "14 days before the appearance when documents are requested." In this case, every subpoena requests the production of documents, specifically, the closed session meeting minutes of the Ottawa County Board of Commissioners meeting on November 6, 2023. Needless to say, Plaintiff's issuance of the subpoenas on November 24, 2023 is not at least 14 days before the hearing set to occur on November 27, 2023 at 10:00 a.m. For this reason alone, Plaintiff's subpoenas must be quashed.

In addition, Plaintiff also failed to serve the subpoenas at least "2 days before the appearance" for testimony. MCR 2.506(C)(1). Plaintiff filed the subpoenas via MiFile on Friday, November 24, 2023, which is a day that the Court was closed. This means that Defendants will have approximately two business hours to respond to the subpoenas prior to the hearing. This also violates MCR 1.108.

II. Plaintiff's Subpoenas Demand an Illegal Act.

MCL 15.267(2) states three separate and distinct requirements of the closed session (emphasis added):

> 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 **[1]** shall be retained by the clerk of the public body, **[2]** are not available to the public, and **[3] 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.

The statute clearly provides that the closed session minutes "shall only be disclosed" if there is a civil action filed under sections 10, 11, and 13 of the Open Meetings Act (OMA). Notably, the third requirement does not limit such disclosure to "the public" and does not even mention "the public." Instead, it states that such disclosure "shall only" be allowed in a civil action commenced under the OMA.

Plaintiff attempts to avoid this obvious statutory limitation by only focusing on the second requirement of the statute and proceeds to cite various cases where courts have conducted an in-camera review of closed session minutes. Those cases actually disprove Plaintiff's point, however, because every single one of those cases involved a claim under the OMA, which is explicitly required under the third requirement of the statute. It should not be a surprise that a Court properly utilized the disclosure exemption of the third requirement. But in this case, there are no OMA claims. Thus, Plaintiff's cited cases offer her position no support.

Statutes "must be enforced as written." *Sanders v Delton Kellogg Schools*, 453 Mich 483, 556 NW2d 467 (1996). Courts must apply "clear and unambiguous statutes as written." *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003).

Finally, the Court of Appeals has specifically decided this issue and held that disclosure cannot be required in a case that does not include an OMA claim.

> Therefore, **plaintiff's proposed reading of the statute to require disclosure of the minutes <u>though no claim has been brought under the OMA cannot be supported by the language of the statute itself</u> and would require judicial construction to achieve**. But this Court is precluded from engaging in statutory construction because the very nature of its judicial role requires the Court to respect the constitutional role of the Legislature as the policy making branch of government and to refrain from encroaching on that branch's constitutional responsibility.

Local Area Watch v City of Grand Rapids, 262 Mich App 136, 146; 683 NW2d 745, 751 (2004) (emphasis added). The Court of Appeals further held that "defendants are **<u>strictly forbidden</u>** from releasing such minutes unless required by a judgment in a civil action filed under § 10, 11, or 13 of the OMA. Here, it is clear no such civil action was ever filed, and no order compelling disclosure was ever issued." *Id*. (emphasis added). Because this matter does not involve any OMA cause of action under sections 10, 11, or 13, no disclosure can be ordered. Again, Plaintiff has only cited cases that were brought under the OMA and are therefore inapplicable to this case. See, *Emsley v Charter Township of Lyon*, unpublished *per curiam* opinion of the Court of Appeals, issued December 2, 2021 (Docket No. 353097 and 354162) (Exhibit A).

Because no lawful disclosure can be ordered, any request for either testimony regarding the closed session minutes or production of the closed session minutes would amount to a request that those subpoenaed violate the law and potentially subject themselves to criminal or civil liability. MCL 15.272 specifically states that any public official who violates the OMA is "guilty of a misdemeanor." MCL 15.273 similarly provides for civil liability against a public official who violates the OMA. If this Court were to order any of those subpoenaed to reveal confidential information from closed session, this Court would essentially be ordering them to commit a crime. However, it is axiomatic that a "Court cannot use its judicial power to provide a remedy that would itself violate the law." *South Haven v Van Buren Cty Bd of Com'Rs*, 478 Mich 518, 534; 734 NW2d 533 (2007).

Finally, Plaintiff has already asserted in her Motion that the existing evidence is sufficient for this Honorable Court to rule on her Motion (Plaintiff's Brief in Support, pp 9, 10 -11). There is no need, nor any lawful mechanism, to order members of the Ottawa County Board of Commissioners to violate the law.

III. No Decisions Can Be Made In Closed Session.

The OMA clearly states that "[a]ll decisions of a public body must be made at a meeting open to the public." MCL 15.263(2). The OMA further defines a "decision" to mean a "determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure . . ."

The OMA also provides that a public body may conduct "deliberations" in closed session. MCL 15.263(3); MCL 15.267; MCL 15.268. The Court of Appeals has held:

> While these deliberations may take place in closed session, all actual votes and decisions must be made in an open meeting. Thus, the OMA makes a distinction between a public body's deliberations and its decisions.

Titus v Shelby Charter Tp, 226 Mich App 611, 616; 574 NW2d 391 (1997). Thus, it is legally impossible for the Board to "decide" to make any offers to settle a matter in closed session. Instead, the Board can only conduct "deliberations" or discussions regarding potential offers or possible resolutions. It has long been held in Michigan that the OMA prohibits public bodies "from taking final action on any matter during a closed meeting." OAG, 1979, No. 5445, p 2 (February 22, 1979) (Exhibit B).

Plaintiff originally admitted in her Motion to Enforce Settlement that she made the offer for $4 Million Dollars to settle the matter (Plaintiff's Brief in Support, p 4). Plaintiff then reversed her position in her Reply Brief and now claims that the Board made the offer for $4 Million Dollars (Plaintiff's Reply Brief, p 2-3). Plaintiff's new position is legally impossible because the Board could not make a decision in closed session to make any offer, and the Board never held any public

vote to decide to make any offer, including a settlement offer of $4 Million Dollars. Instead, all that can occur in closed session is the Board could have discussions about possible resolutions, review any offers from Plaintiff, and "deliberate" about those offers. *Titus*, *supra*. In short, this means that Plaintiff's claim that the Board was making offers throughout the day is legally impossible. Instead, there were continued discussions about different possibilities for resolution of the matter. This means that this Court's review of the closed session minutes would be meaningless because there are no "decisions" within the closed meeting minutes to review.

IV. Plaintiff's Subpoenas Violate Attorney-Client Privilege.

It is clear that Plaintiff is attempting to subpoena information protected by attorney-client privilege. The entire reason the Board went in to closed session was to discuss pending litigation and have discussions with corporate counsel pursuant to MCL 15.268(1). The Ottawa County Board of Commissioners is entitled to attorney-client privilege protection regarding its discussions with its counsel. *Reed Dairy Farm v Consumers Power Co,* 227 Mich App 614, 618-619; 576 NW2d 709 (1998). Our state "has accorded government officials and bodies this privilege and protection." *Detroit News, Inc v Indep Citizens Redistricting Comm'n*, 508 Mich 399, 409; 976 NW2d 612 (2021). The Board of Commissioners can only act through a vote of the majority of its members, and the Board has never voted to waive its privilege. MCL 46.3(2).

Defendants have never waived their privilege and no Board member has ever revealed their own discussions that occurred in closed session on November 6, 2023. Instead, all that has occurred is Chairman Moss executed an affidavit of what did **NOT** occur. At no point did Chairman Moss ever reveal what did occur in closed session or what the board actually discussed with its attorneys. Ironically, this is exactly what was done in the case cited by Plaintiff in her Reply Brief (Plaintiff's Reply Brief, p 10). In *Berryman v Madison Sch. Dist*, unpublished *per curiam* opinion of the Court

of Appeals, issued February 22, 2007 (Docket No. 265996) (Exhibit C), the Commissioners executed affidavits of what did **NOT** occur in closed session, confirming that no votes were taken, no decisions were made, and "no board member indicated in closed session how he or she would officially vote on the grievance in open session." *Id*. at 3.

Despite the issuance of those affidavits, the Court of Appeals never held that any waiver of attorney-client privilege existed. *Id*. at 4. The Court of Appeals held that '[o]nly a client can waive the attorney-client privilege and a waiver does not arise by accident. A true waiver must be intentional and voluntary. 'Absent a true waiver . . . a document retains its privileged status, regardless of whether it has been publicly disclosed.'" *Id*. at 4 (citing *Leibel v General Motors Corp*, 250 Mich App 229, 240-241; 646 NW2d 179 (2002). Consequently, the requested information is protected from discovery under MCR 2.302. See, e.g., *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 450, 528 NW2d 778 (1995); *Grubbs v K Mart Corp*, 161 Mich App 584, 589, 411 NW2d 477 (1987).

V. Parol Evidence Inadmissible.

A Board's vote cannot be changed or altered by parol testimony. *Tavener v Elk Rapids Rural Agr School Dist*, 341 Mich 244, 251; 67 NW2d 136 (1954). All that matters is what the BOC voted to do on November 6, 2023, as recorded in their vote to continue "litigation and settlement activities." Further, it would be futile and improper to even discuss or explore this issue, because this Honorable Court would be prohibited from hearing any parol testimony on this issue. Just like in *Berryman, supra*, Chairman Moss only stated what has not occurred, and he never revealed anything that did actually occur in closed session.

The Supreme Court further stated:

> When the law requires municipal bodies to keep records of their official action in the legislative business conducted at their meetings, the whole policy of the law

> would be defeated if they could rest partly in writing and partly in parol, and the true official history of their acts would perish with the living witnesses, or fluctuate with their conflicting memories. No authority was found, and we think none ought to be, which would permit official records to be received as either partial or uncertain memorials. **That which is not established by the written records, fairly construed, cannot be shown to vary them. They are intended to serve as perpetual evidence, and no unwritten proofs can have this permanence.**

Tavener, 341 Mich at 251-252 (emphasis added). Therefore, having testimony of individual Board members would not assist this Court in determining what, if any, decisions were made.

CONCLUSION

For all the above-stated reasons, Defendants respectfully request that their Motion to Quash Subpoenas be granted and the Court grant any other relief as the Court deems just and appropriate.

Respectfully Submitted:

Dated: November 27, 2023.

/s/ David A. Kallman
David A. Kallman (P34200)
Stephen P. Kallman (P75622)
Attorney for Defendants

PROOF OF SERVICE

David A. Kallman, hereby states and affirms that on the 27th day of November, 2023, he did serve a copy of Defendants' Motion to Quash Subpoenas with Brief in Support and Exhibits upon Attorney Sarah Riley Howard to her e-mail address as stated above and via MiFile.

Dated: November 27, 2023.

/s/ David A. Kallman
David A. Kallman (P34200)
Attorney for Defendants

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN EMSLEY,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF LYON BOARD OF TRUSTEES,

Defendant-Appellee.

UNPUBLISHED
December 2, 2021

No. 353097
Oakland Circuit Court
LC No. 2019-171617-CZ

MR. SUNSHINE and STEPHEN EMSLEY,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF LYON BOARD OF TRUSTEES, LISA BLADES, PATRICIA CARCONE, MICHELE CASH, JOHN DOLAN, SEAN O'NEIL, CAROL ROSATI, KRISTOFER ENLOW, and JOHN HICKS,

Defendants-Appellees.

No. 354162
Oakland Circuit Court
LC No. 2020-179219-CZ

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

In Docket No. 353097, plaintiff Stephen Emsley appeals as of right the trial court's order granting summary disposition to defendant, the Charter Township of Lyon Board of Trustees (the

Board), under MCR 2.116(C)(10). In Docket No. 354162, plaintiffs, Mr. Sunshine[1] and Emsley, appeal as of right the order of the trial court granting defendants, the Board and its individual members, summary disposition under MCR 2.116(C)(7) on the basis of res judicata, collateral estoppel, and governmental immunity, and dismissing plaintiffs' claims against the Board's attorney, Carol Rosati, under MCR 2.116(C)(8). We affirm the challenged orders of the trial court in both appeals.

I. FACTS

These consolidated cases involve challenges under the Open Meetings Act (OMA), MCL 15.261 *et seq*., to certain closed sessions conducted by the Board. In Docket No. 353097, Emsley initiated a lawsuit against the Board alleging that it repeatedly violated the requirements of the OMA when it went into closed session during public board meetings on April 5, 2010, August 7, 2017, November 6, 2017, December 4, 2017, January 2, 2018, February 5, 2018, June 4, 2018, September 4, 2018, and November 7, 2018. In each instance, the Board went into a closed session for the stated purpose of considering attorney-client privileged communications. In his amended complaint, Emsley alleged that on the specified meeting dates the Board failed to comply with the procedures for going into a closed session under the OMA and also used the closed sessions to consider public policy matters with the Board's attorney that should have been deliberated publicly.

The Board moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that it fully complied with the OMA when it entered the closed sessions to discuss privileged communications with its counsel. The Board asserted that in compliance with § 8(h) of the OMA, MCL 15.268(h), on each date the Board announced that it was entering into a closed session to consider a written legal communication from its attorney, that contrary to Emsley's allegations it was not required to identify the privileged documents to be discussed before entering the closed sessions, and that there was no evidence that the Board exceeded the proper scope of any closed session. The Board supported its motion under MCR 2.116(C)(10) with the affidavit of Gary August, the township's special counsel, detailing the subjects covered during the closed sessions.

In response to the motion for summary disposition, Emsley argued in part that the Board again violated the OMA on August 5, 2019, a date not included in Emsley's complaint, by improperly entering into a closed session to discuss written communications from its attorney. Following a hearing, the trial court granted the Board's motion for summary disposition under MCR 2.116(C)(10), finding no genuine issue of material fact regarding the alleged violations of the OMA. The trial court determined that the Board had complied with the requirements of the OMA when going into the closed sessions, rejecting Emsley's arguments that the Board failed to satisfy the requirements of the OMA.

Emsley moved for reconsideration of the trial court's order granting the Board summary disposition under MCR 2.116(C)(10), and in response the Board submitted affidavits from Carol Rosati and Lisa Anderson, attorneys who participated in the closed sessions. After reviewing *in*

[1] Plaintiffs' complaint describes Mr. Sunshine as "a citizens group organized to promote open meetings of Michigan Public Bodies."

camera the Board's meeting minutes, closed session minutes, and attorney-client communications for the relevant meetings including the August 5, 2019 meeting, the trial court denied the motion for reconsideration.

While Emsley's motion for reconsideration was pending before the trial court in Docket No. 353097, plaintiffs initiated a second lawsuit against the Board, the individual Board members, and the Board's attorney, Carol Rosati (Docket No. 354162). Plaintiffs alleged that the Board violated the OMA by meeting in closed session during a public meeting on August 5, 2019, to discuss a written communication from the Board's attorney. Plaintiffs alleged that the written attorney communication was used as a subterfuge to call a closed session to improperly discuss a potential lawsuit that was not yet pending. Plaintiffs alleged that the individual board members acted in concert to evade the requirements of the OMA, engaging in a civil conspiracy to violate the OMA. Plaintiffs also alleged that Rosati, as the township's attorney, violated the OMA as a public official and aided and abetted the conspiracy to violate the OMA.

The Board and its members moved for summary disposition in part under MCR 2.116(C)(7). The Board contended that plaintiffs' claims were barred by res judicata and collateral estoppel because the trial court previously decided the merits of any claims related to the August 5, 2019 meeting in Emsley's first lawsuit, and that the civil conspiracy claim was barred by governmental immunity because all defendants associated with the Board were acting within the scope of their legislative authority. Rosati moved for summary disposition under MCR 2.116(C)(6), (7), (8), and (10), asserting that she was not a public official, that there was no civil conspiracy because any underlying tort alleged against defendants was barred by governmental immunity, and that plaintiffs' claims were also barred by res judicata and collateral estoppel.

The trial court granted defendants' motions and dismissed plaintiffs' claims against the Board and the individual board members under MCR 2.116(C)(7), finding that plaintiffs' claims were precluded by res judicata and collateral estoppel. The trial court stated, in relevant part:

> The Court has already decided, in a final judgment, that the Board did not violate the OMA when it met in closed session on August 5, 2019 to discuss a memorandum from its attorney. Although the August 5 meeting was not part of Emsley's first amended complaint in the second lawsuit, his subsequent briefs repeatedly referred to the August 5 meeting, that meeting was discussed at oral argument on the motion for reconsideration, and the Court expressly included that meeting in its opinion and order denying the motion for reconsideration.
>
> The addition of Mr. Sunshine as a plaintiff does not change the outcome. The complaint alleges Mr. Sunshine is a "citizens group organized to promote meetings of Michigan Public Bodies," but there is no record of Mr. Sunshine being a registered corporate entity or assumed name. In any event, Mr. Sunshine would be in privity with Emsley, because they represent the same legal right and have a "substantial identity of interests." *Baraga Co v State Tax Comm*, 466 Mich 264, 269-270; 645 NW2d 13 (2002).

The trial court also dismissed the civil conspiracy claim against the Board members, holding that plaintiffs had not pleaded facts in avoidance of governmental immunity. The trial court also

granted Rosati's motion for summary disposition under MCR 2.116(C)(8), finding that Rosati was neither a public official nor a member of the Board. The trial court further found that absent an underlying actionable tort, the claim against Rosati for civil conspiracy was subject to dismissal. Plaintiffs now appeal.

II. DISCUSSION

A. STANDARD OF REVIEW

Plaintiffs raise a series of challenges to the trial court's orders[2] granting defendants summary disposition in both consolidated cases. We review de novo a trial court's decision to grant or deny a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). We also review de novo questions of statutory interpretation, *Vermilya v Delta College Bd of Trustees*, 325 Mich App 416, 418; 925 NW2d 897 (2018), and the application of a legal doctrine, such as res judicata. See *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

MCR 2.116(C)(7) provides for summary disposition on the basis of release, payment, prior judgment, or immunity granted by law. *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015). When reviewing a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7), we consider all documentary evidence in the light most favorable to the non-moving party, *id*., accepting the complaint as factually accurate unless specifically contradicted by affidavit or other documentation. *Frank v Linkner*, 500 Mich 133, 140; 894 NW2d 574 (2017). If the facts are undisputed, and if reasonable minds could not differ regarding the legal effect of the facts, whether summary disposition is proper is a question of law for the Court. *Estate of Miller v Angels' Place, Inc*, 334 Mich App 325, 330; 964 NW2d 839 (2020).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim. *El-Khalil*, 504 Mich at 159. When reviewing a grant or denial of summary disposition under MCR 2.116(C)(8), we consider the motion based upon the pleadings alone and accept all factual allegations as true. *Id*. at 160. Summary disposition under MCR 2.116(C)(8) is warranted when the claim is so unenforceable that no factual development could justify recovery. *Id*.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil*, 504 Mich at 160. Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When reviewing a motion for summary disposition under MCR

[2] In Docket No. 353097, the Board asserts that because the trial court's final order of October 15, 2020 is identified in Emsley's claim of appeal as the order appealed, the proper scope of this Court's review does not extend to Emsley's challenges related to the trial court's March 2, 2020 order denying reconsideration of the court's October 15, 2020 order. When a party properly claims an appeal from a final order, however, the party is permitted to raise on appeal issues related to other orders in the case. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). The scope of this Court's review therefore extends to issues raised regarding the trial court's March 2, 2020 order.

2.116(C)(10) we consider the documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. We will find that a genuine issue of material fact exists when the record leaves open a genuine issue upon which reasonable minds might disagree. *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018).

B. SCOPE OF CLOSED SESSION

Plaintiffs contend that the trial court erred by granting defendants summary disposition in the respective cases because the Board violated the OMA when going into closed session on the specified dates. Plaintiffs argue that a public body only may consult with its attorney in a closed session under MCL 15.268(e), and only regarding trial or settlement strategy in specific pending litigation when discussion in an open meeting would have a detrimental financial effect on the public body's position. Plaintiffs contend that the Board improperly relied upon MCL 15.268(h) to meet in closed session with their attorney to discuss matters other than pending litigation. We disagree that the trial court erred in granting defendants summary disposition.

The purpose of the OMA 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." *Vermilya*, 325 Mich App at 419 (quotation marks and citation omitted). "Under the OMA, public bodies must conduct their meetings, make all of their decisions, and conduct their deliberations (when a quorum is present) at meetings open to the public." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 134-135; 860 NW2d 51 (2014). Specifically, the OMA provides that "[a]ll meetings of a public body must be open to the public and must be held in a place available to the general public," MCL 15.263(1), that "[a]ll decisions of a public body must be made at a meeting open to the public," MCL 15.263(2), and that except as otherwise provided, "[a]ll deliberations of a public body constituting a quorum of its members must take place at a meeting open to the public." MCL 15.263(3). See *Citizens for a Better Algonac Comm Sch v Algonac Comm Sch*, 317 Mich App 171, 177; 894 NW2d 645 (2016).

The OMA, however, also provides exceptions to the general rule that all meetings of a public body must be open, thereby permitting a public body to meet in a closed session[3] for certain purposes. MCL 15.268 provides, in pertinent part:

> A public body may meet in a closed session only for the following purposes:
>
> * * *
>
> (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.

[3] " 'Closed session' means a meeting or part of a meeting of a public body that is closed to the public." MCL 15.262(c).

* * *

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

The parties do not dispute that on the dates in question, the Board went into closed sessions during public meetings for the announced purpose of considering material subject to attorney-client privilege exempt from disclosure under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Section 13 of the FOIA, MCL 15.243(1)(g), permits a public body to exempt from disclosure "[i]nformation or records subject to the attorney-client privilege." Plaintiffs argue, however, that although the OMA permits the Board to meet in a closed session to "consider" a written legal opinion under MCL 15.268(h), only MCL 15.268(e) permits a public body to enter into a closed session to "consult" with its attorney, and then only regarding specific pending litigation.[4]

This Court has construed MCL 15.268(h) to encompass an attorney-client exemption under the OMA. Although a public body may not "evade the open meeting requirement of the OMA merely by involving a written opinion from an attorney in the substantive discussion of a matter of public policy for which no other exemption in the OMA would allow a closed meeting," MCL 15.268(h) permits discussion with counsel during a closed session, "limited to the meaning of any strictly legal advice presented in the written opinion."[5] *People v Whitney*, 228 Mich App 230, 247; 578 NW2d 329 (1998).

In *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 467; 425 NW2d 695 (1988), this Court explained the scope of the exception in MCL 15.268(h), holding that under the clear language of that section, "[t]he only material which can be considered in closed sessions under this provision is that exempt from discussion or disclosure by a state or federal statute." The Court further explained that when the statute being relied upon for exemption is Michigan's FOIA, a public body is permitted to go into closed session under MCL 15.268(h) to consider written privileged communications from an attorney, though not oral opinions because the FOIA only protects public records. *Booth Newspapers*, 168 Mich App at 467-470. This Court explained:

> We conclude that the attorney-client privilege which may be asserted regarding the consideration and discussion of a written legal opinion under § 8(h) is no broader or narrower than this common-law privilege. We, therefore, hold that

[4] At oral argument, however, plaintiff retreated from this position, acknowledging that a public body may go into closed session under MCL 15.268(h) to discuss with its attorney legal advice in a written privileged attorney-client communication.

[5] Plaintiffs, no doubt, are familiar with this Court's opinion in *Emsley v Lyon Charter Twp Bd of Trustees*, unpublished per curiam opinion of the Court of Appeals, issued March 27, 2018 (Docket No. 337123), p 4, in which this Court explained that MCL 15.268(h) "has been construed to encompass an attorney-client exemption under the OMA, allowing discussion of a written legal opinion in a closed session limited to the meaning of any strictly legal advice presented in the written opinion."

> § 8(h) of the OMA authorizes closed sessions to discuss matters which are exempt from disclosure or discussion by a statute (such as the FOIA), or which are reasonably related thereto. To effectuate the clear legislative intent in the OMA to promote openness and accountability, the scope of the discussion in closed session must legitimately relate to legal matters, and not bargaining, economics, or other tangential nonlegal matters. [*Booth Newspapers*, 168 Mich App at 468.]

In Docket No. 353097, Emsley argues that the Board exceeded the permissible scope of a closed session under MCL 15.268(h) by considering oral opinions from its attorneys. In Docket No. 354162, plaintiffs contend that even if the Board were permitted to go into a closed session to consider a privileged written document, during the closed session on August 5, 2019, the Board consulted its attorney regarding nonprivileged matters in violation of the OMA. The record, however, does not support plaintiffs' arguments. There is no evidence that the Board exceeded the scope of the exception in MCL 15.268(h) by considering or discussing matters beyond the legal matters addressed in the privileged written material that was the basis for the closed sessions. After reviewing the minutes of the closed sessions and the written communications, the trial court found that the Board did not exceed the scope of a closed session under MCL 15.268(h), that the minutes of the closed sessions confirmed that the sessions were limited to attorney-client privileged written communications, and plaintiffs did not provide documentation to the contrary. Similarly, our review of the record indicates that the trial court did not err by rejecting plaintiffs' contention that the Board violated the OMA by exceeding the permissible scope of the closed sessions under MCL 15.268(h).

C. ADDITIONAL EXEMPTION REQUIREMENTS

In Docket No. 353097, Emsley also contends that the trial court erred by granting the Board summary disposition because the Board entered into closed session on the dates in question under MCL 15.268(h) without fulfilling the procedural requirements of identifying the statutory provision under which it was acting and the materials to be considered in the closed session. The trial court rejected Emsley's argument, stating:

> As Defendant points out, the meeting minutes for every meeting in the First Amended Complaint (with one exception - April 5, 2010), demonstrate that the Board complied with the OMA. The Board entered closed sessions for the permitted purpose of discussing a written communication protected by the attorney-client privilege. This is affirmed by the affidavit of Gary August, special counsel to the Township. As for the April 5, 2010 meeting, there is no proof that the Board entered closed session in violation of the OMA.
>
> Plaintiff argues that the minutes must describe the privileged document, state the exemption justifying the closed session, and state the general nature or topic of the documents. But Plaintiff cites no authority for these requirements. The cases cited by Plaintiff are distinguishable.
>
> * * *

> [T]he FOIA exemption does not impose such a description requirement. Defendant was authorized to enter the closed sessions at issue for the purpose of discussing written attorney-client privileged communications, and the minutes reflect proper notification to the public of the actions that would be taken by the board in closed session.

Under the OMA "the purpose . . . for calling [a] closed session shall be entered into the minutes of the meeting" when a public body votes to go into closed session. MCL 15.267(1). Here, when calling for the closed sessions, the meeting minutes reflect that the Board announced that the purpose was "to discuss Attorney Client Privileged Communication in accordance with the Open Meetings Act, MCL 15.268(h)," thereby informing the public of the specific exemption in the OMA under which the Board was proceeding. Although the Board did not identify the relevant FOIA provision, it described the material to be considered as attorney-client privileged communications, which was sufficient to inform the public that the Board was relying on the FOIA exemption permitting nondisclosure of "[i]nformation or records subject to the attorney-client privilege." MCL 15.243(1)(g).

As support for the assertion that a public body also must describe the privileged documents and the general topic of the documents, Emsley relies upon *Vermilya*, 325 Mich App 416, and *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 86-87; 669 NW2d 862 (2003), abrogated on other grounds by *Speicher*, 497 Mich at 125. Those cases are distinct from this case and do not support Emsley's assertion. In *Vermilya*, the public body entered into a closed session relying upon MCL 15.268(e) regarding the exemption for specific pending litigation, and not MCL 15.268(h) for attorney client privileged documents. In *Herald Co*, the public body entered into a closed session to consider documents purportedly exempt from disclosure under the FOIA as trade secrets or commercial or financial information, and not as attorney client privileged documents. In sum, contrary to Emsley's assertions, nothing in the OMA or the FOIA obligated the Board to provide a more detailed explanation of the documents to be considered during the closed sessions. Accordingly, the trial court did not err by rejecting Emsley's arguments[6] that the Board failed to adequately state its reasons for calling for closed sessions under MCL 15.268(h).

We also reject Emsley's contention in Docket No. 353097 that the trial court erred by granting the Board summary disposition because the Board failed to demonstrate that the written communications considered by the Board at the closed sessions were the product of an attorney-client relationship. The trial court rejected Emsley's argument, finding that there was no genuine issue of fact regarding the existence of the attorney-client relationship. In support of its motion

[6] Emsley also contends in Docket No. 353097 that the trial court ignored his challenge to the closed session held on December 4, 2017. The public minutes of that meeting indicate that a motion was made to go into closed session to "discuss the pending lawsuit of Ten Milford vs. Lyon Township in accordance with the Open Meetings Act, MCL 15.268[(e)] because discussion in an open meeting would have a detrimental financial effect on the Township," and "to discuss two Attorney-Client Privileged Communications in accordance with the Open Meetings Act, MCL 15.268(h)." The Board's statement of its purpose for the closed session was sufficient to inform the public of the purposes of the closed session, consistent with the requirements of the OMA.

for summary disposition, the Board submitted the affidavit of Attorney August, who averred that his law firm had been retained by the township to provide legal advice and services on an "as needed basis" as requested by the Township. The Board also submitted copies of the meeting minutes, which reflected that the Board went into closed session to consider attorney-client privileged communications. In further response to Emsley's challenge to the existence of an attorney-client relationship, the Board submitted the affidavit of Attorney Rosati, who averred that she was appointed to the position of lead township attorney on September 18, 2017, and thereafter provided legal services for the township. She further stated that she and August both provided legal opinions to the Board, and both attended meetings at which the Board considered those opinions. Thus, the Board submitted evidence supporting the existence of attorney-client relationships; conversely, Emsley did not present support for his belief that an attorney-client relationship did not exist. Accordingly, the trial court did not err by rejecting Emsley's contention that communications considered during the closed sessions were not the product of an attorney-client relationship.

D. REQUEST TO AMEND (DOCKET NO. 353097)

Emsley contends that while Docket No. 353097 was pending before the trial court, the Board again violated the OMA on August 5, 2019. Emsley asserts that at a public meeting held that day, the Board met in closed session to consult with its attorney regarding a potential lawsuit not yet filed involving its former lawyer, again violating the OMA. Emsley contends that the trial court abused its discretion by denying his request to amend his complaint to add allegations regarding this incident. We disagree.

We review the trial court's decision whether to allow a party to amend a complaint for an abuse of discretion. *Kostadinovski v Harrington*, 321 Mich App 736, 742-743; 909 NW2d 907 (2017). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Jawad A. Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 208; 920 NW2d 148 (2018). Leave to amend ordinarily should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility. *Kostadinovski*, 321 Mich App at 742-743; see also MCR 2.118(A)(2). Although a trial court's discretion in granting or denying a motion to amend a pleading is not boundless, *PT Today, Inc v Comm'r of Fin & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006), we defer to the trial court's judgment. *Kostadinovski*, 321 Mich App at 743.

In response to the Board's second motion for summary disposition in Docket No. 353097, Emsley stated that he wanted to amend his complaint to add the allegation that the Board violated the OMA by going into closed session at a meeting on August 5, 2019, to settle a matter "pre-suit" with its former legal counsel. Emsley argued that MCL 15.268(e) did not permit a closed session for this purpose because that subsection applies only to pending litigation, and that the Board used the stated purpose of considering an attorney-client privileged communication as a pretext to close the session under MCL 15.268(h).

The public minutes for the August 5, 2019 meeting reveal that the Board voted to enter into a closed session for two reasons. The first was "to discuss attorney client privilege [sic] communication in accordance with the Open Meetings Act, MCL 15.268(h)." The second was "to

discuss pending litigation, Cambridge of Lyon LLC v Charter Township of Lyon, Oakland County Circuit Court Case No. 2018-168390-CZ in accordance with the Open Meeting Act, MCL 15.268(e), as an open meeting would have a detrimental financial effect on the litigation or settlement position of the Township." Following the closed session, the Board reconvened in an open meeting and approved a motion to authorize "a settlement agreement to settle a matter 'pre-suit' with former legal counsel."

The trial court denied Emsley's motion for reconsideration, holding in part that the August 5, 2019 closed session was properly closed pursuant to MCL 15.268(h), in compliance with the OMA. The trial court observed that the minutes of the August 5, 2019 closed session revealed that the Board discussed a written attorney-client communication during the closed session, which was exempt from disclosure under the FOIA. The trial court further observed that an affidavit from Attorney Rosati confirmed that the session was closed on that date for the Board to consider written attorney-client privileged communications, and thus the amendment requested by Emsley to add allegations related to the August 5, 2019 meeting would be futile. See *Weymers v Khera*, 454 Mich App 639, 658; 563 NW2d 647 (1997). Because the record supports the trial court's decision, the trial court did not abuse its discretion by declining to permit Emsley to amend his complaint to add allegations related to the August 5, 2019 meeting.

E. MCR 2.116(G)(4)

In Docket No. 353097, Emsley contends that the Board's second motion for summary disposition under MCR 2.116(C)(10) was deficient because the Board failed to identify sufficiently the matters it believed presented no genuine issue of material fact, contrary to MCR 2.116(G)(4), and that as a result, Emsley was not able to respond properly to the motion. We disagree.

When moving for summary disposition under MCR 2.116(C)(10), the moving party must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). "The level of specificity required under MCR 2.116(G)(4) is that which would place the nonmoving party on notice of the need to respond to the motion made under MCR 2.116(C)(10)." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

In this case, in its motion for summary disposition the Board asserted that there was no genuine issue of material fact that the closed sessions were properly held pursuant to MCL 15.268(h). The Board asserted that contrary to Emsley's contentions, at each public meeting specified it announced in sufficient detail that the purpose for entering the closed session was to consider written attorney-client privileged information. The Board's motion further asserted that there was no evidence that it exceeded the scope of its authority in any closed session or that the attorney-client relationship was used as subterfuge for going into any closed sessions. The Board argued that its motion was supported by the minutes of the challenged meetings, as well as August's affidavit and other submitted evidence, and that it was entitled to summary disposition under MCR 2.116(C)(10). The Board's motion thus adequately apprised Emsley that the Board did not believe there were genuine issues of material fact regarding whether the challenged closed sessions were proper under MCL 15.268(h). Indeed, Emsley focused on these issues in his response to the motion, as did the trial court when reviewing the claims to determine if there were

genuine issues of material fact. Accordingly, Emsley's contention that the Board's motion was procedurally deficient because it did not comply with MCR 2.116(G)(4) is without merit.

F. MCR 2.116(H)

In Docket No. 353097, Emsley contends that summary disposition was premature under MCR 2.116(H) because he was unable to obtain through discovery the facts necessary to support his arguments. Emsley argues that because the Board refused to answer his discovery requests, the trial court should have denied the Board's second motion for summary disposition under MCR 2.116(H)(2)(a) and ordered the Board to provide discovery under MCR 2.116(H)(2)(b). We disagree.

MCR 2.116(H) provides:

> (1) A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. The affidavit must
>
> (a) name these persons and state why their testimony cannot be procured, and
>
> (b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.
>
> (2) When this kind of affidavit is filed, the court may enter an appropriate order, including an order
>
> (a) denying the motion, or
>
> (b) allowing additional time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories, or other discovery.

In support of his response to the Board's second motion for summary disposition, Emsley submitted an affidavit from his attorney under MCR 2.116(H) asserting that it was not possible to obtain the allegedly privileged attorney-client records. In denying Emsley's motion for reconsideration, the trial court explained:

> Finally, Plaintiff argues there are outstanding fact issues and he has been unable to conduct discovery about them because the facts are known only to people he cannot get affidavits from. For instance, whether the material discussed in the closed sessions is exempt from disclosure under FOIA where only one of the eleven sessions mentions the exemption in Section 13(l)(g); whether the Board requested attorney-client communications from the attorney; the subject matter of the five closed sessions not addressed in Gary August's affidavit; and the topic of the August 5, 2019 closed session where the Board came out of closed session and voted to "settle a matter pre-suit".

> The Court finds that none of these are genuine issues of material fact that would preclude summary disposition. As noted above, all of the closed sessions were proper under the OMA, including the five sessions not addressed in Gary August's affidavit and the August 5, 2019 session, and the Board had an attorney-client relationship with the attorneys. Plaintiff has not shown the Court erred or that correction of the error requires a different result.

As the trial court explained, the information to which Emsley indicated he did not have access was not relevant to Emsley's legal arguments regarding whether the Board properly entered into closed sessions under MCL 15.268(h) on the specified dates. Moreover, to the extent that Emsley argued that the Board may have exceeded the scope of any discussions permitted in a closed session, the trial court remedied Emsley's lack of access by reviewing *in camera* the minutes of the closed sessions available and the privileged communications and found that these materials confirmed that the closed sessions were limited to considering written attorney-client communications. Accordingly, the trial court was not obligated to deny the Board's second motion for summary disposition under MCR 2.116(H)(2)(a) and permit further discovery.

G. CONSPIRACY

In Docket No. 354162, plaintiffs contend that the trial court erred by dismissing plaintiffs' conspiracy claim against the Board members and attorney Rosati. Plaintiffs alleged that defendants conspired to violate the OMA at the August 5, 2019 meeting, and that Rosati acted in concert with the individual board members to violate the OMA. The trial court held that governmental immunity shielded the Board members from liability for the alleged conspiracy claim, and held that Rosati was not liable because she was not a public official who could violate the OMA and also because there could be no conspiracy where there was no underlying violation of the OMA.

A civil conspiracy is not actionable by itself, but instead requires a separate, actionable tort as the basis of the conspiracy. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003). To establish a conspiracy, a plaintiff must demonstrate "a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Swain v Morse*, 332 Mich App 510, 530; 957 NW2d 396 (2020). If the plaintiff fails to establish an underlying tort, the claim for conspiracy fails. See *Advocacy Org*, 257 Mich App at 384. As discussed, the trial court did not err when it determined that the record demonstrated that the Board and its members followed proper procedures before going into closed session for permissible purposes under the OMA at the August 5, 2019 meeting. Because there was no underlying violation of the OMA, plaintiffs cannot prevail on their conspiracy claim against Rosati or the individual Board members. Accordingly, the trial court did not err by dismissing the conspiracy claims.

H. RES JUDICATA

In Docket No. 354162, plaintiffs contend that the trial court erred by dismissing their allegations that defendants violated the OMA by going into a closed session on August 5, 2019, on the basis that the claims are barred by res judicata.[7] We disagree.

Res judicata precludes relitigation of a claim predicated on the same underlying transaction litigated in a prior case. *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013). The purpose of the doctrine of res judicata is to prevent multiple lawsuits litigating the same cause of action, *King v Munro*, 329 Mich App 594, 600; 944 NW2d 198 (2019), "by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate the claims." *William Beaumont Hosp v Wass*, 315 Mich App 392, 398; 889 NW2d 745 (2016) (quotation marks and citations omitted). Res judicata bars a subsequent action if "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). For purposes of res judicata, parties are in privity if they are "so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Id*. at 122.

Here, the trial court decided in Docket No. 353097 that the Board did not violate the OMA by going into a closed session at the August 5, 2019 public meeting. Although Emsley's complaint in Docket No 353097 did not identify the August 5, 2019 meeting as one of the sessions challenged, in the course of that litigation he argued before the trial court that the Board had violated the OMA by going in to a closed session on that date, and requested to amend his complaint to allege a violation of the OMA at that meeting. The trial court thereafter addressed and decided the merits of Emsley's arguments regarding the August 5, 2019 closed session, holding that the evidence demonstrated that the Board did not violate the OMA by entering a closed session on that date. Emsley was a plaintiff in both actions, and Mr. Sunshine was in privity with Emsley in light of its substantial identity of interests with Emsley. See *id*. Accordingly, because the trial court decided in Docket No. 353097 that the Board did not violate the OMA by entering into closed session on August 5, 2019, the trial court properly determined that the same claim raised by plaintiffs in Docket 354162 was barred by res judicata.

I. REQUEST TO AMEND (DOCKET NO. 354162)

Plaintiffs also contend that the trial court abused its discretion by denying their motion to amend their complaint in Docket No. 354162. We disagree. In their response to Rosati's motion for summary disposition, plaintiffs requested that the trial court permit them to amend their complaint, but did not specify the proposed amendment. When a party seeks to amend a complaint, the party must offer the proposed amendment in writing; when a plaintiff fails to so do, the trial court does not abuse its discretion by denying the request to amend. *Twp of Grayling v Berry*, 329

[7] The trial court also dismissed the claims as barred by collateral estoppel and governmental immunity, and because Rosati was not a public official. Because we conclude that the trial court properly determined that the claims were barred by res judicata, we decline to reach the challenges to these additional bases for summary disposition.

Mich App 133, 151-152; 942 NW2d 63 (2019). Accordingly, the trial court did not abuse its discretion by declining to allow plaintiffs to amend their complaint.

Affirmed.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola

EXHIBIT B

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5445

February 22, 1979

TOWNSHIPS:

Township board meetings

OPEN MEETINGS ACT:

Township board meetings fixing compensation of township officers

OFFICERS AND EMPLOYEES:

Township board meetings fixing compensation of township officers

A public body may not take final action on any matter during a closed meeting.

A township board at an open meeting may raise the salary of the township supervisor if the action is not taken within 60 days before an election; such action is subject to the possibility of alteration by a subsequent meeting by the township electors.

In lieu of these procedures for determining salaries for elected officials, the township board may, by ordinance, establish a local official's compensation commission to determine the salary of each township elected official.

The Honorable Edgar A. Geerlings

State Representative

The Capitol

Lansing, Michigan 48909

You have asked the following questions concerning the authority of a township board to act in executive sessions which are closed to the public:

1. Can a township board take final action on any matter at a closed meeting?

2. Can the township board set the salary for a township supervisor in excess of the amount established by the electors at the annual township meeting?

RS 1846, Ch 16, Sec. 72b as last amended by 1977 PA 159; MCLA 41.72b; MSA 5.64(2) provides:

> 'The business which the township board may perform shall be conducted at a public meeting of the board held in compliance with Act No. 267 of the Public Acts of 1976. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976.'

The Open Meetings Act, 1976 PA 267; MCLA 15.261 et seq; MSA 4.1800(11) et seq, precludes public bodies from taking final action at closed sessions. Section 3 of the Open Meetings Act states, in part:

> '(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 otherwise provided in sections 7 and 8.' (Emphasis added)

The term 'decision' is defined in Sec. 2 of the Open Meetings Act to mean '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.' Thus, 1976 PA 267, Sec. 3(2) mandates that all decisions be made at an open meeting. In contrast, 1976 PA 267, Sec. 3(3) permits deliberations to be made at a closed session pursuant to sections 7 and 8.

Therefore, in answer to question 1, it is my opinion that the Open Meetings Act prohibits township boards from taking final action on any matter during a closed meeting.

Addressing your second question, elected township officials, such as the supervisor, are entitled to the salary set by the township electors at the annual township meeting or, if the electors fail or neglect to set a salary, to the salary that was paid for the office in the previous year. RS 1846, Ch 16, Sec. 95, as amended, MCLA 41.95; MSA 5.82. In addition, RS 1846, Ch 16, Sec. 95(3), supra, provides that a township board may determine the salaries of its members subject to review by the township electors as follows:

> 'The salary of township officials who are paid a salary may be determined by resolution adopted by the township board. The electors at a subsequent township meeting may alter the amount of salary fixed by the resolution. A salary shall not be raised within 60 days before an election.'

Thus, it is my opinion that a township board at an open meeting may raise the salary of the township supervisor if the action is not taken within 60 days before an election and subject to the possibility of alteration by a subsequent meeting of the township electors. Such action concerning the determination of the salary for the township supervisor could not, however, be taken at an executive or closed session of the township board.

It will be noted that, pursuant to RS 1846, Ch 16, Sec. 95(4), supra, a township board may, be ordinance, establish a local official compensation commission which shall determine the salary of each township elected official. This is an alternate procedure for establishing such salaries and may be used in place of that described in RS 1846, Ch 16, Sec. 95(1) and (2).

Frank J. Kelley

Attorney General

EXHIBIT C

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JAMES BERRYMAN and CONNIE HAYES, Plaintiffs-Appellants, v MADISON SCHOOL DISTRICT, MADISON SCHOOL DISTRICT BOARD OF EDUCATION, WALTER HILL, DEBORAH GRIFFITH, JULIE RAMOS, M. KYLE EHINGER, DAWN BALES, DAVID HALSEY, and MARK SWINEHART, Defendants-Appellees.	UNPUBLISHED February 22, 2007 No. 265996 Lenawee Circuit Court LC No. 05-001803-CZ

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arose when plaintiff Hayes, a teacher for defendant Madison School District, told her superintendent that she was going to adopt a child from Guatemala and intended to take leave under the Family Medical Leave Act (FMLA), 29 USC 2601 *et seq*. She also suggested that she would take the leave as a paid absence, because she had accumulated paid leave time under the collective bargaining agreement. The administration decided that Hayes should only receive unpaid leave, so she filed a grievance that eventually worked its way before defendant school board. Plaintiff Berryman was the union representative who represented plaintiff Hayes throughout the grievance process, and the remaining defendants are the individual members of the school board.

Before addressing Hayes' in an open meeting, the members of the board held a closed meeting. They assert that the only purpose of the closed meeting was to review a letter drafted by the district's legal counsel and make sure that the board members did not have any revisions that they thought were necessary. However, plaintiffs allege that the board members were visibly and actively engaged in conversation in the closed, but windowed, room. Plaintiffs further assert that another district employee was handed documents to photocopy before the issue was put to a vote, but the originals already had the signature of the board's secretary on them. When the board reopened the meeting, defendant Swinehart immediately began editorializing about the anticipated course of the proceedings, indicating that the board was denying the

grievance. After prompting by the superintendent, Swinehart restated his position as a motion, and the motion passed. Plaintiffs then filed this suit, alleging that the action was invalid because the board's closed meeting violated the Open Meetings Act (OMA), MCL 15.261 *et seq*. Our review of this case is limited solely to the OMA issues, and does not address the validity of defendants' decision to deny Hayes' grievance.

Plaintiffs first contend that the trial court erred by granting summary disposition to defendants. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Pursuant to MCL 15.263 of the OMA, a public body, such as a school board, must meet publicly and its members must conduct their deliberations and reach their decisions in the public meetings. However, the requirement of open deliberations does not apply to a closed meeting conducted "to consider material exempt from discussion or disclosure by state or federal statute." MCL 15.268(h). Therefore, the school board members did not run afoul of the OMA if they closed the meeting "for consideration of a written legal opinion within the attorney-client privilege." *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 467; 425 NW2d 695 (1988). Additionally, the Michigan Freedom of Information Act provides that a public body may exempt from disclosure any "[i]nformation or records subject to the attorney-client privilege." MCL 15.243(1)(g).

The term "consider" in MCL 15.268(h) is not so limited that it required each board member to silently read the attorney's opinion letter and withhold all comment until the open meeting resumed. Instead, the statute allows the public body, or entity, to "consider" the legal opinion, indicating that the Legislature intended discussion and deliberation among the individual parts of the whole entity. MCL 15.268. In fact, "deliberating" is a defining component of a "meeting" convened under the OMA, whether open or closed. MCL 15.262(b); see also *Moore v Fennville Public Schools Board of Education*, 223 Mich App 196, 202; 566 NW2d 31 (1997). Plaintiffs argue that the duration of the closed session – 27 minutes – is substantial and suggests that the board did more than merely review the written materials of its legal counsel. They also point to plaintiff Berryman's allegation that he could see the board members carrying on a conversation. However, the board members were not prohibited from discussing the legal documents, and 27 minutes does not seem unreasonably long for the board members to read and discuss the 11-page draft disposition and accompanying attorney letter. Under the circumstances, neither the length of the board meeting nor the board's deliberations raise an inference that board members used the meeting to deliberate specifically about denying Hayes' grievance without reference to the legal opinion. According to the affidavits of all eight of the board members present at the closed session, "any discussion or deliberation in closed session was consistent with [MCL 15.263(3)], was brief, and was limited to legal counsel's letter and draft grievance disposition." Therefore, plaintiffs failed to substantiate their allegations that the school board's deliberations ran afoul of the OMA.

Regarding plaintiffs' assertion that a decision had already been made in closed session, contrary to MCL 15.263(2), the OMA defines a decision as a "determination, action, vote or disposition upon a motion . . . 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). Plaintiffs argue that the lack of deliberation by the board members after they returned to open session implies that the deliberation and decision actually occurred during the closed session. They argue that

the decision in this case, like the decision in *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 229; 507 NW2d 422 (1993), was a fait accompli before the open meeting began. We disagree. Given the contents of the legal opinion and the legal advice considered in the closed meeting, it is not surprising that the members' general agreement with the opinion would translate into the action they eventually took. Nevertheless, this natural understanding and common perception among the board members does not amount to a "decision" under the act. See *Moore*, *supra* at 203.

Here, the board members' affidavits confirm that no decision was made regarding Hayes' grievance, no vote was taken, and no board member indicated in closed session how he or she would officially vote on the grievance in open session. Defendants submitted the minutes of the closed session to the lower court for in camera review, as well as affidavits from all board members confirming that the discussion in the closed session was limited to legal counsel's written material, with no discussion of how each member would vote. Under the circumstances, the lack of deliberation in the open meeting does not suggest that the board secretly and definitively decided the matter. To hold otherwise would leave every closed meeting open to judicial intervention and disclosure as long as the public body's preferred course after the meeting was so obvious that further discourse was unnecessary and the final decision was unanimous. Because plaintiffs fail to proffer any evidence of abuse or circumvention of the OMA, this case does not remotely rise to the level of back-room decision-making that was condemned in *Booth Newspapers, Inc v Univ of Michigan Bd of Regents, supra.*

Plaintiffs' next argue that the trial court erred in denying plaintiffs' motion to compel on the basis that the material sought was protected by the attorney-client and attorney work-product privileges. We disagree. Whether the attorney-client privilege applies to a communication is a question of law that this Court reviews de novo. *Leibel v General Motors Corp*, 250 Mich App 229, 236; 646 NW2d 179 (2002). Similarly, whether the work product privilege applies is a question of law that we review de novo. *Koster v June's Trucking Inc*, 244 Mich App 162, 168; 625 NW2d 82 (2000). A trial court's decision to grant or deny a discovery request is reviewed for an abuse of discretion. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 593; 657 NW2d 804 (2002). "Opinions, conclusions, and recommendations based on facts are protected by the attorney-client privilege when the facts are confidentially disclosed to an attorney for the purpose of legal advice." *Leibel*, *supra* at 239. "The purpose of the attorney-client privilege is to permit a client to confide in the client's counselor, knowing that the communications are safe from disclosure." *Co-Jo, Inc v Strand*, 226 Mich App 108, 112; 572 NW2d 251 (1997).

In this case, the documents sought by plaintiffs consist of (1) a draft of Hayes' grievance disposition, which contained facts disclosed by district officials, the attorney's legal analysis, and his legal opinions; (2) another draft of Hayes' grievance disposition with minor revisions on district letterhead; and (3) a letter from legal counsel to defendants providing his recommendations concerning the draft. The two versions of the draft disposition contained essentially the same language except for a few minor revisions. The documents sought after in the instant case are protected by both the attorney-client privilege and the work-product doctrine. The drafts of Hayes' grievance disposition, as well as the accompanying letter, contained confidential facts disclosed to the attorney for the purpose of securing the attorney's legal advice concerning how to proceed with Hayes' grievance. The attorney's advice was sought to ensure

that the board's decision comported with the collective bargaining agreement and the FMLA, both of which allow paid leave in limited circumstances.

Plaintiffs acknowledge that the documents contain some information that is normally privileged, but argue that the purpose of the documents means that defendants waived their privilege to withhold them. Only a client can waive the attorney-client privilege and a waiver does not arise by accident. *Leibel*, *supra* at 240. A true waiver must be intentional and voluntary. *Leibel*, *supra* at 241. "Absent a true waiver . . . a document retains its privileged status, regardless of whether it has been publicly disclosed." *Id*. Contrary to plaintiffs' assertions, the privilege is not waived merely because a final version of the drafts would eventually be made available to Hayes and her union. There is no indication that waiving the privilege to the final document waives the privilege to its rough drafts. Absent an affirmative indication that defendants intended to waive the privilege, the requested documents are not subject to discovery. *Id*.

Moreover, the work product doctrine protects from discovery the notes, working documents, and memoranda that an attorney prepares in anticipation of litigation. *Id*. at 244. "[A] document may be prepared in anticipation of litigation if the attorney rendered legal advice in order to protect the client from future litigation concerning a particular transaction or issue." *Id*. at 246. Here, legal counsel composed the two draft dispositions in an effort to avoid binding arbitration. Similarly, the attorney letter accompanying the drafts contained legal opinions and was prepared in an effort to avoid further litigation. Arbitration proceedings were imminent at the time the documents were drafted. The attorney who drafted the documents represented the district in arbitration. The documents contained mental impressions, conclusions, opinions, and legal theories concerning the arbitration, and plaintiffs never demonstrated a pressing need and a lack of alternative sources for any facts contained in the documents. Accordingly, the trial court did not err when it determined that the documents were protected as the attorney's work product.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot