

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH J. SPEICHER,

Plaintiff-Appellant,

v

COLUMBIA TOWNSHIP BOARD OF
TRUSTEES,

Defendant-Appellee.

UNPUBLISHED
February 25, 2014

No. 313158
Van Buren Circuit Court
LC No. 11-600562-CZ

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right two trial court orders arising from his underlying claim that defendant, the Columbia Township Board of Trustees, violated the Open Meetings Act (OMA), MCL 15.261 *et seq.* First, plaintiff appeals the trial court's denial of his request that it invalidate the Board's hiring of the township fire chief. Second, he appeals the court's denial of his motion for costs and attorney fees. We affirm the trial court's denial of the invalidation of the hiring, but reverse and remand with respect to plaintiff's motion for cost and actual attorney fees.

I. FACTUAL BACKGROUND

In 2010, Columbia Township's fire chief vacated office. In October 2010, to facilitate the hiring of a new chief, the Board appointed a Fire Chief Review Committee, comprised of fire chiefs from other jurisdictions and two members of the Board. The Committee's purpose was to interview candidates for fire chief. Plaintiff was one of those candidates. The Committee interviewed candidates in a meeting closed to the public. After the closed interviews, the Board held three meetings, open to the public, regarding the hiring of the new chief. After those open meetings, the Board selected a person other than plaintiff as the new fire chief.

Plaintiff sued the Board, alleging that the hiring process violated the OMA, and moved for summary disposition. The trial court ruled that the Board violated the OMA and enjoined it from committing further violations. These rulings are not challenged on appeal. However, the court refused plaintiff's request to invalidate the Board's appointment of the new chief, and refused his request for court costs and actual attorney fees.

II. INVALIDATION OF THE HIRING

Plaintiff first argues that the trial court erred by refusing to invalidate the Board's appointment of the new chief. We review a trial court's decision whether to invalidate a decision made in violation of the OMA for an abuse of discretion. *Morrison v East Lansing*, 255 Mich App 505, 520; 660 NW2d 395 (2003). MCL 15.270(2) provides that:

[a] decision made by a public body may be invalidated if the public body has not complied with the requirements of [MCL 15.263(1), (2), and (3)] in making the decision or if failure to give notice in accordance with [MCL 15.265] has interfered with substantial compliance with [MCL 15.263(1), (2), and (3)] and the court finds that the noncompliance or failure has impaired the rights of the public under this act.

Therefore, “[a] court has discretion to invalidate a decision made in violation of the OMA if it finds that violation impaired the rights of the public under the OMA.” *Morrison*, 255 Mich App at 520.

The trial court ruled that the Board's noncompliance with the OMA had not “impaired the rights of the public.” Plaintiff asserts that this ruling was erroneous, relying on *Menominee Co Taxpayers Alliance, Inc v Menominee Co Clerk*, 139 Mich App 814; 362 NW2d 871 (1984). In that case,

[t]he Menominee County Treasurer resigned from that office effective as of November 7, 1983. Pursuant to [MCL 168.209,] defendants, the Menominee County Clerk, Prosecutor, and Probate Judge, came together to appoint a suitable person to replace the former Menominee County Treasurer. Defendants met on a single occasion to discuss the qualifications required for the Menominee County Treasurer. At this gathering, various individuals were discussed concerning their suitability for the treasurer position. In the context of discussion of various individuals' suitability, potential conflicts of interest were discussed with regard to various potential appointees. No notice of any public meeting was posted before defendants came together to discuss and make their appointment. The discussion was held in private and was not open to the public. As a result of that discussion, defendant Krause, County Clerk, was empowered by defendants Jurmu, Prosecutor, and Rolfs, Probate Judge, to contact Bernard Lang, an individual residing in the county. Defendants unanimously appointed Lang the Treasurer of Menominee County. [*Id.* at 816-817.]

The *Menominee* Court concluded that “[t]he denial of a public hearing in itself impaired the rights of the public. We find that, at the time the committee selected the treasurer, plaintiffs were denied their right to present their views.” *Id.* at 820.

Plaintiff relies on the *Menominee* Court's statement that “[t]he denial of a public hearing in itself impaired the rights of the public” in arguing that the exclusion of the public from the Committee's interview meeting impaired the public's rights. However, plaintiff ignores the *Menominee* Court's rationale that the plaintiffs were “denied their right to present their views”

because the *only* meeting held by the public body was closed. Therefore, *Menominee* is distinguishable from this case because the Board held three open meetings after it held the closed interview meeting.

Moreover, we find the trial court's reliance on *Morrison* persuasive. In that case, we considered whether East Lansing's inclusion of a parking lot on the site of a community center should be invalidated under the OMA:

the [Hannah Building Committee (HBC)] failed to provide notice of the vast majority of its meetings and although the steering committee failed to provide notice of all its meetings, the public was not completely excluded from the process. The public was invited to speak at three HBC meetings, two planning-commission hearings, a work-session meeting of the city council, and the March 21, 2000, public hearing held by the city council. Plaintiffs and other members of the public expressed their concerns regarding the site plan on all those occasions, and each decision-making body heard their concerns. At the March 21, 2000, city-council meeting, which continued into the early morning hours, members of the public, including many of the plaintiffs, and council members discussed the proposed plan, including parking issues, at length before the council approved the plan. [225 Mich App at 521.]

The *Morrison* Court concluded that, “[u]nder these circumstances, plaintiffs had a reasonable opportunity to learn about the community-center site plans and to voice their concerns and opposition. Therefore, we cannot say that the trial court abused its discretion in refusing to invalidate the plan of development and in failing to grant injunctive relief.” *Id.*

Plaintiff argues that *Morrison* is distinguishable because “[t]he *Morrison* court made it clear that the public had plenty of input with respect to” the parking and traffic issues. However, in *Morrison*, the public was invited to three HBC meetings, two planning-commission hearings, a work-session meeting of the city council, and a public hearing held by the city council. *Id.* The public was excluded from at least 16 HBC meetings and 19 “steering committee” meetings. *Id.* at 508-511. Nonetheless, this Court ruled that, even though the public was excluded from a vast majority of the relevant meetings, the seven open meetings provided “a reasonable opportunity to learn about the community-center site plans and to voice their concerns and opposition.” *Id.* at 521. In this case, the public was excluded from only one meeting – the closed interview – but was invited to the three subsequent meetings regarding the hiring of the new chief. Thus, in this case, the public had even more opportunity to voice their concerns than did the public in *Morrison*, where this Court declined to reverse the trial court's denial of the plaintiffs' request to invalidate the public body's action.

Alternatively, plaintiff argues that he was entitled to a trial on the issue of whether the public's rights had been impaired. Specifically, plaintiff argues that the trial court “needed to examine the qualifications of all of the fire chief candidates and hear testimony of Township residents regarding the public interest in knowing the qualifications of the rejected candidates to reach a reasoned decision regarding impairment of the public rights.” However, a trial court's determination of whether the public's rights were impaired is not based on the relative merit of a public body's decision, but on the public's opportunity to participate in the public body's

decision-making process. *Id.* Testimony about the qualifications of the candidates and the importance of the position would not have furthered the purpose of the OMA, because that testimony would have been irrelevant to establish whether the public had access to and a means to obtain information about the qualifications of the candidates and the importance of the position. Moreover, the trial court possessed the discretion to determine, under the undisputed facts, whether the violation in this case impaired the rights of the public under the OMA. *Id.* at 520-521.

Accordingly, because the trial court properly found that the rights of the public were not impaired, it did not abuse its discretion by refusing to invalidate the Board's appointment of the new fire chief.

III. COURT COSTS AND ATTORNEY FEES

Plaintiff next argues that he was entitled to court costs and attorney fees under MCL 15.271(4). We review a trial court's denial of a motion for costs and attorney fees for an abuse of discretion. *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). MCL 15.271(4) provides:

[i]f 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.

In *Leemreis v Sherman Twp*, 273 Mich App 691, 704; 731 NW2d 787 (2007), we interpreted MCL 15.271(4).

Accordingly, there are three requirements for obtaining costs and attorney fees under this subsection: (1) a public body must not be complying with the act, (2) a person must commence a civil action against the public body "for injunctive relief to compel compliance or to enjoin further noncompliance with the act," and (3) the person must succeed in "obtaining relief in the action." [*Id.*]

The trial court ruled that the Board violated the OMA and enjoined the Board from further noncompliance. Thus, the first two elements were met. However, the court ruled that while plaintiff "technically prevailed and a violation did occur, the Plaintiff did not prevail in any substantive sense. The injunction required the Township in the future to follow the law, something already required by the Township." Accordingly, the trial court found that plaintiff had not succeeded in "obtaining relief in the action," and denied his motion for costs and attorney fees.

Contrary to the trial court's ruling, this Court has repeatedly held that a trial court's finding that a defendant violated the OMA, without more, is sufficient to find that a plaintiff succeeded in "obtaining relief" in an OMA action. See *Morrison*, 255 Mich App at 522 n 11 (holding that "[w]here a trial court declares that the defendants violated the OMA, but finds it unnecessary to grant injunctive relief, the plaintiffs are entitled to actual attorney fees and costs"); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 536; 609 NW2d 574 (2000) (holding that "a trial court's finding that a violation of the OMA has occurred constitutes

declaratory relief that is adequate to justify an award of attorney fees and costs”); *Schmiedicke v Clare Sch Bd*, 228 Mich App 259, 267; 577 NW2d 706 (1998) (holding that where a plaintiff has received declaratory relief in the form of a finding that a defendant has violated the OMA, attorney fees and costs should be awarded to the plaintiff).

The trial court granted plaintiff both declaratory and injunctive relief. Thus, all three elements of MCL 15.271(4) were met, *Leemreis*, 273 Mich App at 704, and the trial court abused its discretion by denying plaintiff’s motion for court costs and actual attorney fees. We remand this case to the trial court for the calculation of the award of costs and actual attorney fees.¹

The Board’s reliance on *Speicher v Columbia Twp Bd of Election Comm’rs*, 299 Mich App 86; 832 NW2d 392 (2012) is unpersuasive. In *Speicher*, the plaintiff successfully litigated a separate OMA action against the Columbia Township Board of Election Commissioners. *Id.* at 89. The trial court denied the plaintiff’s request for injunctive relief, but found that the defendant violated the OMA on two occasions. *Id.* Thereafter, the plaintiff moved to recover over \$32,000 in attorney fees and costs. *Id.* The trial court awarded only \$7,500 in attorney fees, finding that “a litigant is entitled to actual attorney fees pursuant to MCL 15.271(4) only if the litigant is successful and the claimed attorney fees are for the action commenced” and that “the requested attorney fees were clearly excessive in violation of the Michigan Rules of Professional Conduct.” *Id.* at 89-90.

On appeal, this Court found an insufficient factual basis for the trial court’s ruling that the fees were excessive. *Id.* at 96. However, the panel also held that, under MCL 15.271(4), a litigant cannot include within its list of “actual attorney fees” matters unrelated to the OMA action, and found that many of the hours the plaintiff’s attorney spent on the case related to researching an election law issue that was unnecessary to the resolution of the OMA claim. *Id.* at 97-99. Accordingly, the panel concluded that “the time billed by plaintiff’s attorney for election law research was not for the OMA action and, accordingly, cannot be included in the calculation of plaintiff’s actual attorney fees under MCL 15.271(4).” *Id.* at 100.

The Board argues that the instant litigation on whether the public’s rights were impaired by the hiring process was not “for the OMA action.” However, in *Speicher*, the plaintiff’s attorney spent time researching election law, an issue irrelevant to the OMA claim. *Id.* at 99-100. In this case, plaintiff’s attorney spent time litigating the issue of whether the public’s rights were impaired by the hiring process, a required element for the invalidation of a public body’s action under the OMA. MCL 15.270(2). Accordingly, *Speicher* is distinguishable from the present facts.

¹ Because we reverse and remand the trial court’s denial of plaintiff’s motion for costs and attorney fees, we need not address plaintiff’s argument that the trial court erred by denying his motion for reconsideration of the same issue.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Jane E. Markey

/s/ Cynthia Diane Stephens