

STATE OF MICHIGAN
COURT OF APPEALS

TOM ROTTA,

Plaintiff-Appellant,

v

BRANDY MILLER, DAVID BOURGETTE,
CHERI ROZELLE, and CITY OF LUDINGTON,

Defendants-Appellees.

UNPUBLISHED
October 28, 2021

No. 356343
Mason Circuit Court
LC No. 20-000068-CZ

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

In this action brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, and the Open Meetings Act (OMA), MCL 15.261 *et seq.*, plaintiff appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendants. This matter arises out of underlying litigation that had been brought by plaintiff and a co-plaintiff against the City of Ludington (the City). That litigation was ultimately settled. Plaintiff challenges the procedural manner in which the Ludington City Council (the Council) and the individual defendants (who were members of the Council) went about approving that settlement. We affirm.

I. FACTUAL BACKGROUND

Very little information about the underlying litigation has been provided, beyond the bare fact that plaintiff and a co-plaintiff, Dianne Steelhoff, pursued a lawsuit against the City. At its November 25, 2019, meeting of the Council, pursuant to its planned agenda, the members present unanimously voted to go into a closed session to discuss a proposed settlement to the lawsuit. Following the closed session, those members unanimously voted to approve the settlement. Plaintiff, Steelhoff, and appropriate representatives from the City signed that settlement at that time. However, only four out of the seven total Council members had been present, which was fewer than the two-thirds of members necessary to enter a closed session under MCL 15.267(1). It is therefore undisputed that the vote to enter a closed session violated the OMA at that time. Plaintiff does not challenge any other aspect of the public portion of the November 25, 2019,

meeting; in fact, he alleges that the settlement agreement signed at that time was proper and binding.

Nevertheless, shortly thereafter, plaintiff advised the City and the public that the decision to go into closed session had been improper. At its December 9, 2019, meeting, pursuant to its planned agenda, the Council, now with six members present,¹ unanimously voted to go into closed session to “re-enact a potentially violated decision.” Following that closed session, the Council again unanimously voted to agree to the settlement. Plaintiff generally argues that the December 9, 2019, closed session could not “cure” the impropriety of the November 25, 2019, closed session. He also argues that, because the settlement had allegedly already been validly executed, there was no possible “detrimental financial effect on the litigating or settlement position of the public body” to justify a closed session under MCL 15.268(e). Plaintiff helpfully summarizes his position as, “a legitimate purpose existed for the first closed session but not a proper quorum, whereas a legitimate quorum existed for the second closed session, but not a proper purpose.”

Plaintiff is entitled to bring an action to compel compliance with the OMA and to enjoin further noncompliance with the OMA. MCL 15.271(1). However, we find no evidence that plaintiff suffered any kind of practical harm from the procedural irregularities, which we note only to emphasize that plaintiff is not seeking to invalidate any action of the Council. The trial court in the underlying litigation entered an order of dismissal, along with the parties’ stipulation to dismissal, on December 18, 2019; i.e., more than a week after the December 9, 2019, Council meeting. Nevertheless, on December 13, 2019, plaintiff submitted a FOIA request for the separate minutes taken at the closed portions of the November 25 and December 9, 2019, meetings. Pursuant to MCL 15.267(2), separate minutes must be taken at closed sessions, and those minutes are, with certain litigation-related exceptions, generally not available to the public. Defendants denied plaintiff’s FOIA request pursuant to MCL 15.243(1)(d), which provides that “A public body may exempt from disclosure . . . Records or information specifically described and exempted from disclosure by statute.” Thus, beyond plaintiff’s right to bring an action under the OMA, it is clear that the legality of the closed portions of the two Council meetings is also critical to plaintiff’s FOIA request.²

The trial court held a hearing and concluded that defendants could reasonably have concluded that the procedural error at the November 25, 2019, meeting posed a risk that the settlement might be challenged and voided at some point in the future. Therefore, it was proper for the Council to re-enact its closed discussion and adoption of the settlement to remedy any error. The trial court concluded that, as a consequence, the OMA was not violated by the City, so defendants had properly denied plaintiff’s FOIA request. Plaintiff conceded that his claims against the individual defendants for intentionally violating the OMA was premised solely on the December 9, 2019, meeting. The trial court therefore held that the individual defendants had not

¹ The three individual defendants are the Council members who were present at both meetings.

² See *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 143; 683 NW2d 74 (2004) (“where relief is sought only under the FOIA, judicial review is not available to determine whether a public body had the authority under the OMA to go into closed session and thereby exempt minutes of that meeting from disclosure under the FOIA”).

intentionally violated the OMA. Plaintiff moved for reconsideration, which the trial court denied, and this appeal followed.

II. STANDARD OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). The trial court denied the motion under MCR 2.116(C)(8), and defendants have neither cross-appealed from that denial nor, insofar as we can glean, argued that the trial court erred as an alternative ground for affirmance. We therefore review this matter solely under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint. *Id.* at 120. This Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Lockwood v Ellington Twp*, 323 Mich App 392, 401; 917 NW2d 413 (2018) (quotation omitted). This Court also reviews de novo any underlying questions of statutory interpretation, with the goal of giving effect to the Legislature’s intent. *Spalding v Swiacki*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 354598), slip op at p 3.

Appellate consideration is not precluded merely because a party makes a more sophisticated or more fully-developed argument on appeal than was made in the trial court. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). However, a party generally may not seek relief on appeal by taking a position contrary to a position taken in the trial court. *Local Emergency Financial Assistance Loan Bd v Blackwell*, 299 Mich App 727, 737; 822 NW2d 401 (2013). Finally, we note that parties appearing *in propria persona* are entitled to more generosity and lenity in construing their pleadings than would be afforded to lawyers; however, they remain subject to the same substantive standards as lawyers, including the same obligations to provide support for their claims. *Estelle v Gamble*, 429 US 97, 106-108; 97 S Ct 285; 50 L Ed 2d 251 (1976); *Totman v School Dist of Royal Oak*, 135 Mich App 121, 126; 352 NW2d 364 (1984).

III. GENERAL PRINCIPLES OF LAW

In general, public records must be disclosed upon request pursuant to the FOIA, unless, in relevant part, those records are specifically exempt from disclosure by statute. *Traverse City Record-Eagle v Traverse City Area Pub Schs Bd of Ed*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 354586), slip op at p 3. “One such exemption described by statute applies to minutes of a closed meeting conducted under the OMA.” *Id.*, slip op at pp 3-4. “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 v Delta College Bd of Trustees*, 325 Mich App 416, 419; 925 NW2d 897 (2018) (quotation omitted). To further that goal, public bodies are generally required to conduct their meetings in public, although they may enter closed sessions under limited circumstances and upon complying with certain procedural requirements. *Id.* at 419-

420. Failure to comply with those procedural requirements constitutes a violation of the OMA. *Id.* at 420-424.

Three distinct remedies are available for a violation of the OMA: “A plaintiff may: (1) seek to compel compliance with OMA or enjoin further noncompliance; (2) seek actual and exemplary damages against a public official for intentional violations of OMA; or (3) seek to have the decision of a public body invalidated on the grounds that it was not made in conformity with OMA.” *Lockwood*, 323 Mich App at 402 (citations omitted). As discussed, plaintiff does not appear to have suffered any practical harm from the alleged OMA violations, and he appears not to be seeking to invalidate the settlement. Consequently, “substantial compliance” with the OMA is irrelevant: civil liability may be imposed for a mere technical violation, but only if the violation was intentional. *Spalding*, ___ Mich App at ___, slip op at pp 5-6. Furthermore, the minutes of a closed session held in violation of the OMA are subject to disclosure under FOIA. *Manning v City of East Tawas*, 234 Mich App 244, 253; 593 NW2d 649 (1999), abrogated in part on other grounds in *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125; 860 NW2d 51 (2014).

IV. ANALYSIS

At the outset, to avoid confusion, we take note of what is (and is not) at issue. Plaintiff’s position is that the closed session held on November 25, 2019, would have been appropriate but for the lack of a sufficient quorum under MCL 15.267(1). Plaintiff expressly agreed in the trial court, and asserted in his complaint, that he was alleging an intentional violation of the OMA by the individual defendants only as to the December 9, 2019, closed session. Although plaintiff discusses on appeal an alleged pattern of noncompliance with the OMA by the City and the Council, that is wholly outside the scope of this matter. Furthermore, to the extent this discussion alleges that the November 25, 2019, violation of the OMA was intentional, it is contrary to plaintiff’s position in the trial court. *Local Emergency Financial Assistance Loan Bd*, 299 Mich App at 737. It is undisputed that the vote to enter the closed session on November 25, 2019, was improper at the time; however, it is necessarily, if tacitly, also undisputed that the improper vote was not intentional.

Plaintiff argues that the procedural defect in the November 25, 2019 vote to enter closed session cannot be cured after the fact. That is not what the law holds. MCL 15.270(5) provides a reenactment procedure, which public bodies may use to cure procedural deficiencies that may otherwise form the basis of OMA actions. It provides as follows:

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. [MCL 15.270(5).]

In other words, “a deficiency in the procedure may not render a decision made during a session invalid if the public body duly reenacts and corrects the procedural omission,” and the reenacted

decision is effective from the date of the reenactment. *Lockwood*, 323 Mich App at 404 (quotation marks and citation omitted). The *Lockwood* Court also explained that:

there is nothing in OMA that suggests a board must be sued before correcting any procedural violations on its own. To conclude otherwise ignores the ratification provision included in OMA by the Legislature, and further, it would result in a waste of city resources and taxpayer dollars. [*Id.* at 405.]

A vote to enter a closed session is itself a “decision” subject to validation through reenactment. *Manning*, 234 Mich App at 251-252. In *Manning*, this Court explained:

The city council was certainly acting in furtherance of public policy by meeting with its attorney to deliberate over how best to defend its and East Tawas’ interests in the pending litigation, and by deciding to preserve the value of strategy decisions by voting to close the session. Thus, the vote to close the session was a “decision” subject to validation through reenactment under subsection 10(5).

Because the city council properly reenacted its decision, that decision now stands untainted by procedural deficiency. Furthermore, deficiencies in the keeping of minutes of meetings are, in any event, not grounds for invalidating the actions taken. [*Id.* at 252-253.]

Presuming the vote on December 9, 2019, was not otherwise improper, the trial court therefore correctly held that defendants cured the procedural defect of November 25, 2019. The November 25, 2019 closed session was, therefore, not *ultimately* a violation of the OMA, or at least it was no longer a violation of the OMA when plaintiff made his FOIA request. Therefore, the minutes from that session are not disclosable under the FOIA.

Plaintiff contends that the vote on December 9, 2019, was also a violation of the OMA, and indeed an intentional violation, because it was not made for any proper purpose. Plaintiff points out that there are a limited number of statutorily permitted reasons to meet in a closed session, and the only potentially applicable reason is found in MCL 15.268(e), which states:

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

Plaintiff argues that the settlement *itself* was final and valid notwithstanding the procedural error in entering a closed session, so as of December 9, 2019, there was no longer any possible “detrimental financial effect.” Therefore, he argues, the vote to enter closed session on December 9, 2019, was also invalid.

We find it somewhat self-contradictory for plaintiff to contend that an error occurred while simultaneously contending that correction of that error was unnecessary. As discussed, re-enactment of a vote to enter closed session for the purpose of curing a procedural deficiency is specifically permitted. It should be obvious that there is nothing sinister about seeking to correct a prior procedural error where the public body is specifically authorized to do so. Furthermore,

this Court has held that “if an action taken at a meeting held in violation of OMA is not reenacted, it is not valid, and it has no force or effect.” *Lockwood*, 323 Mich App at 405. We therefore agree with the trial court that defendants would reasonably have worried that the finality and validity of the settlement was questionable in light of the improper vote to enter closed session. The possibility of invalidating the settlement could certainly have a “detrimental financial effect on the litigating or settlement position of the public body.” Even if the settlement was inviolate at that time, MCL 15.268 refers to holding closed sessions for particular “purposes.” Although the exemptions in MCL 15.268 must be construed narrowly and strictly, they should not be strained to the point of defeating the Legislature’s intent. See *Manning*, 234 Mich App at 251. If a public body was required to be correct about the financial effect of a discussion before even holding the discussion, the exemption would be eviscerated.

We conclude that the trial court correctly held that OMA violation of the procedurally-erroneous vote to enter closed session on November 25, 2019, was cured by defendants’ vote on December 9, 2019, to re-enact the decision. We further conclude that the trial court correctly held that the December 9, 2019 vote to enter closed session was not a violation of the OMA, because it was proper for defendants to cure the prior violation and because it was proper for defendants to be concerned about the financial effect of the settlement being potentially voidable. Because no violation of the OMA ultimately occurred, the trial court correctly granted summary disposition in favor of defendants as to all claims. We need not consider the remainder of plaintiff’s arguments.

Affirmed. We direct that the parties shall bear their own costs on appeal, a matter of public importance being involved. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick