

STATE OF MICHIGAN
COURT OF APPEALS

HAMID R. KHORRAMI,

Plaintiff/Counter-Defendant-
Appellant,

v

BOSTON TOWNSHIP,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

September 16, 2004

No. 250426

Ionia Circuit Court

LC No. 02-022524-AZ

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendant on defendant's counterclaim seeking enforcement of its junkyard ordinance and on plaintiff's claim for an alleged violation of the Michigan Open Meetings Act (OMA), MCL 15.261 *et seq.* We affirm, and award costs and attorney fees on appeal to defendant as a sanction for the filing of a vexatious appeal by plaintiff, the amount to be determined by the trial court on remand.

Plaintiff argues first that the trial court lacked jurisdiction to grant declaratory relief in this case, noting that the authority to give declaratory relief depends on the authority to try actions on the same claim as that on which it is providing declaratory relief. Plaintiff contends that only a district court may hear a case involving a municipal civil infraction, so that a circuit court has no jurisdiction in such a case. We disagree.

Plaintiff states the rule correctly: A court's jurisdiction over a declaratory action depends on its having jurisdiction of the same action in a non-declaratory case. MCR 2.605(A)(2). However, this rule does not bar the circuit court's jurisdiction in this case because the court would have jurisdiction in an underlying action.

The township junkyard licensing ordinance states that any violation of it is a nuisance *per se*. MCL 252.202, consistent with that approach, declares junkyards not conforming to state statutory requirements to be public nuisances. MCL 600.2940(1) authorizes circuit courts to hear claims for abatement of nuisances and to enjoin nuisances. MCL 600.8302(4)(a) specifically states that, although district courts have jurisdiction to hear municipal civil infraction cases, this does not deprive the circuit courts of jurisdiction to hear claims to abate nuisances, to

determine the validity of municipal ordinances creating civil infractions, or to determine the applicability of such ordinances to particular defendants. Therefore, the circuit court has jurisdiction both of underlying claims involving nuisances resulting from violation of the junkyard licensing ordinance and of declaratory judgment claims regarding the same subject.

Plaintiff next argues that the trial court was wrong to grant summary disposition without allowing discovery. We disagree.

This Court reviews a trial court's entry of summary disposition de novo. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The standard is whether, when the evidence is considered in the light most favorable to plaintiff, there is a genuine issue of material fact. MCR 2.116(C)(10); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The nonmovant receives the benefit of all reasonable inferences. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999), remanded on other grounds 465 Mich 919; 638 NW2d 748 (2001). The benefit of the doubt is given to the existence of a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998). If the record, when viewed in this way, leaves open an issue on which reasonable minds could differ, summary disposition is inappropriate. *Allstate Ins Co v Dep't of Mgmt & Budget*, 259 Mich App 705; 675 NW2d 857 (2003). Summary disposition is rarely proper in cases where credibility, intent or state of mind is crucial. *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). Findings of fact may not be made or credibility weighed by a court deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

Under this standard, entry of summary disposition was appropriate. As to plaintiff's OMA claim, defendant presented unrefuted, corroborated evidence, through affidavits from its clerk and supervisor, that the board went into closed session to meet with its attorney to discuss enforcement procedures. Plaintiff presented nothing to counter it. Plaintiff asserts that, had he been permitted to depose and cross-examine these persons, he might have been able to show their statements to have been untrue. This is pure speculation and conjecture. Summary disposition cannot be withheld on this basis. *Detroit v General Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998). It was also uncontroverted that plaintiff had no license for his junkyards, that operation of unlicensed junkyards is per se a public nuisance, and that a circuit court has authority to abate such nuisances by enjoining them. Therefore, entry of summary disposition in favor of defendant on its counterclaim for declaratory and injunctive relief was also appropriate.

Plaintiff argues that the board's unanimous vote to go into closed session as reflected in the minutes was not taken by roll call as required by MCL 15.267 and therefore violated the OMA. Plaintiff asserts that because the closed session involved a discussion between defendant's board and its attorney about legal enforcement strategies against plaintiff, the enforcement action presumably was a result of the closed session, and because the closed session was illegal, the enforcement action is barred. We disagree.

We review de novo a trial court's determination of whether, under a given set of facts, the OMA has been violated. *Morrison v East Lansing*, 255 Mich App 505, 517; 660 NW2d 395 (2003); *In re Jude*, 228 Mich App 667, 670; 578 NW2d 704 (1998).

The vote to go into closed session was unanimous. Therefore, the positions of the respective members were recorded as clearly as if a roll call vote had been taken. Any OMA violation by not taking a roll call vote, then, had no practical effect, and so there is no basis for granting relief to plaintiff because of it. *Willis v Deerfield Twp*, 257 Mich App, 541, 556-557; 669 NW2d 279 (2003).

Plaintiff next raises two arguments connected with the township board's minutes, arguing that the original minutes should have stated the reason for going into closed session, pursuant to MCL 15.267 and MCL 15.269, and that the minutes were not corrected on this point in a timely fashion, pursuant to MCL 15.269(1), as the correction was not made until six months later. Plaintiff is correct that the initial minutes were deficient and that the correction was late. However, there is nothing in the record to indicate, and plaintiff has presented no argument to show, that any harm was caused by either violation. Therefore, there is no ground for affording relief. *Willis, supra*, 257 Mich App 556-557. Moreover, given that the minutes have now been corrected, the issue would appear to be moot. *Morales v Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003).

Plaintiff also argues that the trial court erred in finding that the board went into closed session for a proper purpose, i.e., the discussion of confidential matters with its attorney. There is no question that this is a proper basis for a closed session of a public body, both pursuant to statute, MCL 15.268(h) and MCL 15.243(1)(g), and case law, *Booth Newspapers, Inc v Regents of Univ of Mich*, 93 Mich App 100, 106-107; 286 NW2d 55 (1979). However, plaintiff argues that the attorney-client privilege may not be used as a pretext for discussing matters outside the privilege in closed session simply because an attorney submits a document referring to the matters. He then asserts that the board, in closed session, did exactly that by discussing the merits of plaintiff's junkyard applications and the pros and cons of taking enforcement action against him.

Plaintiff is correct that the attorney-client privilege cannot be used as a pretext for discussing non-privileged matters outside the privilege simply because an attorney is used as a conduit for information. *People v Whitney*, 228 Mich App 230, 247-249; 578 NW2d 329 (1998). However, he submitted no evidence to support his contention that the non-privileged matters were discussed in the closed session, and the uncontroverted evidence is to the contrary. The trial court, therefore, properly disregarded this contention under MCR 2.116(H), and properly entered summary disposition in favor of defendant.

Plaintiff argues that the trial court erred by not holding that the township board failed to approve the minutes of its closed session, as required by MCL 15.267. He makes two arguments on this point. The first is that, although there were two affidavits from township officials stating that in approving the minutes for the August 14, 2002, meeting the board approved both the open session minutes and the closed session minutes, this did not happen. However, as with the previous issue, plaintiff offered no evidence to support this contention, and so it was properly disregarded by the trial court. Second, plaintiff argues that MCL 15.267 does not allow open and closed session minutes to be approved at the same time, but requires that their approval be

separate. The short answer is that MCL 15.267 has no such requirement, and indeed is silent as to the means by which minutes may be approved. The trial court did not err on this issue.

Plaintiff next argues that the trial court abused its discretion by not invalidating, because of OMA violations, actions that defendant's board took at the August 14, 2002, meeting, in denying his junkyard license applications, and in authorizing the township supervisor to issue infraction citations to him. We disagree.

If a public body takes action in proceedings violating the OMA, and the violation impairs the rights of the public, a trial court has discretion to invalidate the public body's action. MCL 15.270(2); *Morrison, supra*, 255 Mich App 520-521. A trial court's decision whether to invalidate the public body's action is reviewed for an abuse of discretion. *Morrison, supra*. This Court "will invalidate a decision made in contravention of the OMA if noncompliance with the OMA has impaired the rights of the public." *Jude, supra*, 228 Mich App at 672. The standard of review of the trial court's decision whether a violation gives rise to the right to injunctive relief is also an abuse of discretion. *Morrison, supra*, 255 Mich App at 520.

As our previous discussion makes clear, we do not believe that plaintiff has shown a substantial violation of the OMA, and on that ground alone, we would not reverse the trial court's decision not to invalidate the township board actions. *Willis, supra*, 257 Mich App 556-557. However, we note two additional points. First, the threshold requirement is that harm to the public be shown, and plaintiff has shown none. Instead, there is unrefuted evidence that plaintiff was committing public nuisances with his junkyards and that defendant's board, after confidential conversation with its attorney on how to do so, proceeded with enforcement action against plaintiff and did so openly. This is the precise opposite of harm to the public, and the action was done openly, in a way that did not violate the openness of government that the OMA protects. We find no abuse of discretion by the trial court in denying relief to plaintiff on this claim.¹

Next, plaintiff argues that the trial court erred in not granting injunctive relief to enjoin any future OMA violations by defendant. We disagree.

This Court reviews a trial court's decision whether a violation gives rise to the right to injunctive relief for an abuse of discretion. *Morrison, supra*, 255 Mich App 520. The usual rule that injunctive relief is an extraordinary remedy to be granted only when justice requires it, there is no adequate remedy at law, and there is a real and imminent danger of irreparable injury applies in OMA cases. *Nicholas v Meridian Twp*, 239 Mich App 525, 533-534; 609 NW2d 574 (2000). Plaintiff has shown none. The worst that the record establishes, with respect to defendant's actions, is that its minutes originally failed to state clearly how and why the board went into closed session and that it corrected this deficiency belatedly, though it has now done

¹ Because we reject plaintiff's argument on this basis, we find it unnecessary to address defendant's contentions that plaintiff's claim for invalidation of the actions was untimely, that he lacked standing to bring the claim, and that the issue is now moot.

so. This is hardly the type of conduct that provides a basis for injunctive relief. The trial court, therefore, did not abuse its discretion in declining to order it.

Lastly, plaintiff argues that the trial court erred by not awarding him attorney fees. We disagree.

Entitlement to an award of attorney fees is a question of construction of a statute, MCL 15.271(4), so this Court reviews the trial court's ruling on it de novo. See *Manning v East Tawas*, 234 Mich App 244, 253-254; 593 NW2d 649 (1999).

Attorney fees are available only when a party "succeeds in obtaining relief in the action." MCL 15.271(4). Plaintiff has obtained no relief in this action. Therefore, he is not entitled to attorney fees.

Defendant asks this Court to award it costs and attorney fees on appeal for the reason that plaintiff's appeal is wholly frivolous. This Court may award costs and attorney fees, on its own motion or that of a party, as a sanction for a vexatious appeal. MCR 7.216(C)(1), *DeWald v Isola (After Remand)*, 188 Mich App 697, 700; 470 NW2d 505 (1991). The rule is designed to prevent clear abuse of the appellate process. *Haliw v Sterling Heights*, 257 Mich App 689, 704; 669 NW2d 563 (2003), lv gtd 470 Mich 869; 682 NW2d 84 (2004). If an appeal is taken for purposes of hindrance and delay, or in the absence of a reasonable basis for believing that the party has a meritorious issue to raise, or if the party grossly disregards the requirement that issues be fairly presented to the court, it is vexatious. *Id.* at 702-703; MCR 7.216(C)(1)(a).

We believe that under that standard, this appeal is vexatious, and costs and attorney fees should be awarded as a sanction. Plaintiff's arguments in this appeal are without merit. Plaintiff surely had no reasonable basis to believe that it had meritorious issues to raise with respect to, for example, the existence of jurisdiction in the circuit court, its entitlement to injunctive relief, or there being a basis for this Court to rule that matters outside the attorney-client privilege were discussed in the closed session. Moreover, plaintiff's statements to this Court on this and other factual issues with no support in the record and with uncontroverted evidence to the contrary, breached the duty of fair representation of matters to the tribunal.

Affirmed, with costs and attorney fees on appeal awarded to defendant. The trial court shall, on remand, determine the appropriate amount to be awarded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Henry William Saad