STATE OF MICHIGAN

COURT OF APPEALS

BONNIE L. HOFF,

Plaintiff-Appellant/Cross-Appellee,

v

SANDRA SPOELSTRA, SUZANNE KENSINGTON, and CITY OF MARQUETTE,

Defendants-Appellees/Cross-Appellants,

and

GERALD R. PETERSON, JERRY IRBY, and STU BRADLEY,

Defendants-Appellees.

UNPUBLISHED
July 8, 2008

No. 272898
Marquette Circuit Court
LC No. 05-042405-CD

BONNIE L. HOFF,

Plaintiff-Appellee,

v

JACK LEADBETTER, TIMOTHY DEAN, and KARL A. WEBER,

Defendants,

and

SANDRA SPOELSTRA and GERALD PETERSON,

Defendants-Appellants.

No. 275979
Marquette Circuit Court
LC No. 05-042890-NO

BONNIE L. HOFF,

Plaintiff-Appellee,

v

JACK LEADBETTER, TIMOTHY DEAN, and KARL A. WEBER,

Defendants,

and

SANDRA SPOELSTRA and GERALD PETERSON,

Defendants-Appellants.

No. 276054
Marquette Circuit Court
LC No. 05-042890-NO

BONNIE L. HOFF,

Plaintiff-Appellant,

v

JACK LEADBETTER, SANDRA SPOELSTRA, and GERALD PETERSON,

Defendants,

and

TIMOTHY DEAN and KARL A. WEBER,

Defendants-Appellees.

No. 276257
Marquette Circuit Court
LC No. 05-042890-NO

Before: Whitbeck, P.J., Jansen and Davis, JJ.

PER CURIAM.

This case involves several consolidated cases, all arising out of the Marquette City Commission's termination of the City Attorney, plaintiff Bonnie Hoff. Hoff served as Marquette's City Attorney from February 1, 2001, through January 31, 2005, when a majority of Marquette's City Commission, consisting of defendants Sandra Spoelstra, Suzanne Kensington, Jerry Irby, and Stu Bradley, voted to terminate her.

In Docket No. 272898,[1] Hoff appeals as of right the trial court's August 2006 order granting defendants the City of Marquette (the City), Spoelstra, Kensington, Irby, Bradley, and City Manager Gerald Peterson summary disposition on Hoff's claims of interference with advantageous business relationship and conspiracy, intentional infliction of emotional distress, and violation of the Elliott-Larsen Civil Rights Act[2] (ELCRA). Hoff also appeals the trial court's grant of summary disposition in favor of Irby and Bradley on her claim of violation of the Open Meetings Act[3] (OMA). The City, Spoelstra, and Kensington cross-appeal the trial court's grant of summary disposition in Hoff's favor on her claim of violation of the Open Meetings Act against them.

In Docket No. 275979,[4] Spoelstra and Peterson appeal as of right the trial court's January 19, 2007 order denying them summary disposition on their claimed entitlement to governmental immunity. In Docket No. 276054, Spoelstra and Peterson appeal by leave granted from the portions of the same order denying them summary disposition on the merits of Hoff's claims of intrusion upon seclusion, public disclosure of private facts, civil extortion, and intentional infliction of emotional distress.

And in Docket No. 276257, Hoff appeals by delayed leave granted the portion of the trial court's January 11, 2007 order granting defendants attorney Timothy Dean and attorney Karl Weber summary disposition on her claims of intrusion upon seclusion, public disclosure of private facts, civil extortion, and intentional infliction of emotional distress.

We affirm in part and reverse in part.

I. Basic Facts And Procedural History

A. Factual History Of The Underlying Cases

In December 2000, Hoff was offered and accepted the position of City Attorney for the City. Hoff alleges that she thereafter suffered numerous instances of alleged discrimination during her employment with the City.

According to Hoff, throughout her years as City Attorney, City Manager Peterson allegedly expressed displeasure with her serving as City Attorney. Hoff alleged that Peterson's dislike of her "reached a point of blatant disrespect" in September 2003 when Peterson disagreed with Hoff over a legal question, and then-Mayor Irby chose to follow Peterson's advice. Hoff alleged that her relationship with both Peterson and Irby "deteriorated markedly" after that.

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[1] All claims in COA Docket No. 272898 arise of out *Hoff v Spoelstra*, Marquette Circuit Docket No. 05-042405-CD.

[2] MCL 37.2101 *et seq*.

[3] MCL 15.261 *et seq*.

[4] All claims in COA Docket Nos. 275979, 276054, and 276257 arise out of *Hoff v Leadbetter*, Marquette Circuit Docket No. 04-042890-NO.

In May 2004, a special meeting was called, and the agenda included an item regarding discussion of "'the confidentiality of City Attorney reports[.]" During the meeting, the City Commission went into closed session, presumably to discuss the confidentially issue. However, after the closed session, Bradley, seconded by Irby, moved to terminate Hoff's employment. The motion was unsuccessful, but the next day, Bradley allegedly made a "defamatory statement" to a news reporter, stating "that he and 'enough of us' (commissioners) had 'lost trust' in the City Attorney."

In September 2004, Peterson allegedly threatened Hoff with the elimination of her department, stating that "she 'did things very differently then her predecessor' and that there were 'consequences to her decisions.'" At a closed session of the City Commission in late-September 2004, Peterson "had a temper tantrum, shouted, labeled [Hoff] as an 'empire builder', said she was 'bad for the City,' repeatedly pointed his finger at her in a demeaning fashion and suggested that either 'she go or he would go.'" Shortly thereafter, Peterson allegedly informally submitted to Irby and Bradley a handwritten, purported resignation letter suggesting that either he or Hoff would "have to go."

On October 8, 2004, Hoff's counsel wrote a letter to Irby, stating that Hoff had been exposed to a hostile work environment and stated that "[m]ore than one citizen has noted the sexism inherent in that position." Hoff's counsel stated that this alleged behavior would no longer be tolerated. Hoff's counsel also forwarded the letter to the City Commission.

In January 10, 2005, Hoff received a letter from a Marquette Circuit judge, disclosing that the City had retained his son, attorney Karl Weber, "regarding various labor/employment issues relating to employees who serve at the pleasure of the commission." Hoff then sent a memorandum to the City Commission, questioning the propriety of the City hiring outside counsel. Later that month, Hoff's counsel received a letter from Weber informing Hoff's counsel that the City had retained Weber to provide legal representation relative to Hoff's allegations against the City.

On January 31, 2005, the date of the next regularly scheduled City Commission meeting, two commissioners allegedly contacted Hoff and informed her that she might be terminated at the meeting that day. According to Hoff, these two commissioners told her that Spoelstra and Kensington "had been 'making the rounds,' and bearing documents regarding work [Hoff] had done for the Commission—long before either new Commissioner began her tenure on the Commission." Spoelstra had allegedly told others that she "'lacked trust'" in Hoff. At the January 31 meeting, Bradley moved to add an agenda item regarding the contract with the City Attorney. Following Bradley's agenda motion, he moved to terminate the Hoff's contract, but he was ruled out of order. Bradley then slipped the "pre-written motion" to Kensington, who then read the motion, which Bradley then seconded. By a 4-3 vote, with Spoelstra, Kensington, Irby, and Bradley voting in favor of the motion, the City Commission terminated Hoff's contract. According to Hoff, the manner of her termination suggested "'political intrigue'" and resulted in an immediate recall drive against Spoelstra, Kensington, Irby, and Bradley.

B. Procedural History

(1) Docket No. 272898

In early March 2005, Hoff filed a seven-count complaint in Marquette Circuit Court (*Hoff v Spoelstra*), claiming, in pertinent part, that she was improperly dismissed from her position, and claiming violation of the OMA against Spoelstra, Kensington, Irby, and Bradley; interference with advantageous business relationship and conspiracy against Peterson, Irby, and Bradley; violation of the ELCRA against Spoelstra, Kensington, Irby, Bradley, and the City; and intentional infliction of emotional distress against Spoelstra, Kensington, Irby, Bradley, Peterson, and the City.

Hoff moved for partial summary disposition of her ELCRA claims against the City and Irby, arguing that there was no genuine issue of material fact that she was subjected to a hostile work environment because of "her status as a female" and that her termination was in direct retaliation to her engaging in the protected activity of complaining about her treatment. The trial court denied the motion on the ground that there were genuine issues of material fact, "particularly with respect to engagement in a protected activity, but also . . . other matters, as well."

Peterson, Spoelstra, Kensington, Irby, and Bradley then moved for summary disposition, arguing that, as the highest executive officials in Marquette acting within the scope of their authority, they were absolutely immune from Hoff's tort claims. They further argued that, regardless of their immunity, Hoff's intentional infliction of emotional distress claim was without merit. With respect to Hoff's OMA violation claim, Spoelstra, Kensington, Irby, and Bradley further argued that there was no allegation that they intentionally violated the act; that Hoff presented nothing more than an insufficient, conclusory statement that the rights of the public had been impaired; and that there was no evidence that the alleged meetings constituted "meetings," as defined by the act, which requires that a quorum be present and a decision rendered that concerns a matter of public policy.[5] Spoelstra, Kensington, Irby, and Bradley also argued that Hoff's ELCRA violation claim was wholly without merit. The City adopted Spoelstra, Kensington, Irby, and Bradley's arguments.

The trial court issued a detailed opinion and order denying summary disposition on the OMA violation claims, but granting summary disposition on the remainder of Hoff's claims. More specifically, with respect to Hoff's interference with advantageous business relationship and conspiracy claims against Peterson, Irby, and Bradley, the trial court held that, as the highest city officials, they were entitled to absolute immunity. Regarding Hoff's intentional infliction of emotional distress claims against Spoelstra, Kensington, Irby, Bradley, Peterson, and the City, the trial court agreed that the claim was without merit and barred by immunity.

With respect to Hoff's claim of violation of the ELCRA against Spoelstra, Kensington, Irby, Bradley, and the City, the trial court noted that Hoff's only known complaint regarding the

[5] See MCL 15.262(b).

alleged discrimination against her was the one-sentence comment contained in her counsel's October 8, 2004 letter to the commissioners, noting "sexism inherent in that position." The trial court then found that "nothing whatsoever" supported Hoff's cause of action under the ELCRA, explaining as follows:

> Without question, Ms. Hoff's work environment was not pleasant, and that environment might well be described by some as hostile. Without question, Ms. Hoff is a female. One cannot leap, however, from the fact that she is a female working in a less than pleasant environment, to a conclusion that that less than pleasant environment is due to the fact that she is a female.

Finally, turning to Hoff's claim of violation of the OMA against Spoelstra, Kensington, Irby, and Bradley, the trial court held as follows:

> [I]t is clear from the various exhibits submitted by the parties . . . , specifically including the Affidavits of Commissioners Spoelstra and Kensington, that the same type of Open Meetings Act violation found by the Court in *Booth Newspapers v University of Michigan Board of Regents*,[6] may well have occurred during the private "get togethers" between various subgroups of the Marquette City Commission that each involved, admittedly, less than a quorum of the Board. Such a conclusion . . . is supported by the fact that the Board terminated the contact of one of the two highest City employees, Ms. Hoff, the City Attorney, at the January 31, 2005, city commission meeting *without a whit of discussion and with no stated reason.* Even the most naïve and trusting observer would conclude that something more than an exchange of pleasantries, which involved the topic of Attorney Hoff's termination, took place at the non-public subgroup meetings. [Emphasis in original.]

The trial court later granted Hoff's motion to amend her complaint to add the City as a party to her OMA violation claim.

Hoff then moved for summary disposition of her OMA claim, arguing that there was no question of material fact that, with Irby and Bradley's knowledge, Spoelstra and Kensington engaged in individual meetings with the other three commissioners with the intent to circumvent the OMA, and that the meetings were intended to reach a decision on the public matter of Hoff's employment as a city official. More specifically, Hoff pointed to deposition testimony that evidenced that during the day before the City Commission meeting on January 31, 2005, Spoelstra and Kensington had three separate meetings with each of the three other commissioners to discuss Hoff. Hoff pointed out that Kensington testified that she knew the OMA prohibited the commissioners from meeting in groups consisting of more than three members. And Spoelstra confirmed that she was careful to make sure that she and Kensington

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[6] *Booth Newspapers* v *Univ of Mich Board of Regents*, 192 Mich App 574; 481 NW2d 778 (1992), aff'd in part and rev'd in part 444 Mich 211 (1993).

went to visit the other three commissioners one at a time because having four commissioners together discussing city business would be a violation of the OMA.

Spoelstra, Kensington, Irby, Bradley, and the City moved for summary disposition, arguing that there was no genuine issue of material fact that no decision regarding an issue of public policy was made during the allegedly improper meetings. They asserted that the decision to terminate Hoff was not made until the public meeting by a 4-3 vote. They also asserted that even though Spoelstra and Kensington admittedly went to visit the other commissioners, they did not do so with intent to make a decision regarding Hoff's termination. They also claimed that neither Spoelstra nor Kensington knew that Bradley was going to move to terminate Hoff at the meeting. They also pointed out that neither Spoelstra nor Kensington ever specifically attempted to secure the other commissioners' termination vote. They argued that because Hoff was an at-will employee who the City could terminate at any time, with or without cause, the fact that they failed to explain on the record the reasons behind their decision to terminate was not a violation of the OMA.

The trial court issued a detailed order granting Irby and Bradley summary disposition, but granting Hoff summary disposition as to Spoelstra, Kensington, and the City. More specifically, the trial court first stated its conclusions that the City Commission was a public body, a quorum of which is four members, and that a decision to terminate the City Attorney was a matter of public policy. The trial court then stated, "Obviously, a formal decision terminating City Attorney Hoff's employment was not rendered until the meeting of January 31, 2005, which no one has suggested was not conducted in compliance with the Open Meetings Act." However, the trial court found it significant that, through Spoelstra and Kensington's meetings with the three other commissioners, five commissioners had been directly involved in "deliberation" of the appropriateness of Hoff continuing as City Attorney. The trial court specifically concluded that "the several meetings constituted far more than '. . . an informal canvas by one member of a public body to find out where the votes would be on a particular issue, . . . [.]'"[7] The trial court further found that Spoelstra and Kensington conducted the meetings with the intent to avoid the OMA and that the meetings constituted a constructive quorum.

Turning to Irby and Bradley, the trial court found that their conduct did not violate the OMA. The trial court noted that both of them publicly made known their dissatisfaction with Hoff; but the trial court concluded that their mere awareness of Spoelstra and Kensington's "quest" "was far different than participation in the sub-quorum meeting plan." Ultimately, the trial court held that Spoelstra and Kensington's intentional violation of the OMA rendered invalid the City Commission's decision to terminate Hoff. The trial court awarded Hoff damages in the amount of $500 against Spoelstra and $400 against Kensington.

In Docket No. 272898, Hoff now appeals the trial court's grant of summary disposition in favor of Spoelstra, Kensington, Peterson, Irby, Bradley, and the City's on her claims of interference with advantageous business relationship and conspiracy, violation of the ELCRA, intentional infliction of emotional distress, and the trial court's grant of summary disposition in

[7] Quoting *St Aubin v Ishpeming City Council*, 197 Mich App 100, 103; 494 NW2d 803 (1992).

favor of Irby and Bradley on her claim of violation of the OMA. The City, Spoelstra, and Kensington cross-appeal the trial court's grant of summary disposition in Hoff's favor on her violation of OMA claim.

(2) Docket Nos. 275979, 276054, and 276257

In July 2006, Hoff filed her first amended, four-count complaint in Marquette Circuit Court (*Hoff v Leadbetter*),[8] claiming: intrusion upon seclusion and public disclosure of private facts against Spoelstra, Dean, and Weber; and civil extortion and intentional infliction of emotional distress against Spoelstra, Dean, Weber, and Peterson. Hoff based these claims on her allegation that during the prior action (*Hoff v Spoelstra*), these defendants "leaked" emails containing her private correspondence to the local press. Timothy Dean represented the City in *Hoff v Spoelstra*, and Karl Weber represented Bradley, Irby, Kensington, and Spoelstra in that action.

Dean and Weber moved for summary disposition, arguing that as attorneys, they had absolute immunity, or "litigation privilege," for the alleged acts that took place during the previous litigation. In the alternative, they argued that Hoff did not have cognizable claims for intrusion upon seclusion, public disclosure of private facts, civil extortion, or intentional infliction of emotional distress. With respect to Hoff's intrusion upon seclusion and public disclosure of private facts claims, Dean and Weber argued that the allegedly private emails were actually city property because they were stored on a city computer.

Spoelstra and Peterson also moved for summary disposition, arguing that, as government officials, they were immune from Hoff's claims. Indeed, they noted that the trial court already ruled in *Hoff v Spoelstra* that they were entitled to immunity on Hoff's prior claim of intentional infliction of emotional distress. In the alternative, they argued that Hoff failed to state cognizable claims for intrusion upon seclusion, public disclosure of private facts, civil extortion, or intentional infliction of emotional distress.

In a January 11, 2007 order, the trial court adopted the reasoning of Dean and Weber and granted their motion. Hoff now appeals that order by delayed leave granted in Docket No. 276257. However, in a January 19, 2007 order, the trial court stated that it was not persuaded by Spoelstra and Peterson's arguments and denied their motion for summary disposition. Therefore, they now appeal that order in Docket Nos. 275979 and 276054.

II. Governmental Immunity

A. Standard Of Review

MCR 2.116(C)(7) provides that a party may bring a motion for summary disposition on the ground that immunity granted by law bars a claim. To survive a (C)(7) motion on this ground, the plaintiff must allege facts warranting the application of an exception to governmental

[8] Leadbetter is not a party to this appeal; thus, there is no need to discuss the claims against him.

immunity.[9] Neither party is required to file supportive material; any documentation that a party provides to the court, however, must be admissible evidence.[10] The plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[11] We review de novo a trial court's ruling on a motion for summary disposition.[12] We also review de novo the legal question regarding the applicability of governmental immunity.[13]

B. Applicable Legal Principles

The governmental tort liability act[14] provides tort immunity for the highest executive officials of all levels of government who injure persons or damage property while acting within the scope of their authority.[15] The law further states:

> Except as otherwise provided in this section, . . . each officer and employee of a governmental agency, . . . and each member of a board, council, [or] commission, . . . is immune from tort liability for an injury to a person . . . caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:
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> (a) The officer, employee, [or] member, . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
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> (c) The officer's, employee's, [or] member's, . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.[16]

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[9] *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997) (1998).

[10] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[11] MCR 2.116(G)(5); *Maiden*, *supra* at 119-120; *Smith*, *supra* at 616.

[12] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[13] *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

[14] MCL 691.1401 *et seq*.

[15] MCL 691.1407(5) states as follows:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

[16] MCL 691.1407(2).

A "governmental function" is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."[17]

A highest executive official is *not* immune from tort liability for acts not within his or her executive authority. Whether the highest executive official of local government was acting within his authority depends on a number of factors, including the nature of the acts, the position held by the official, the local law defining his authority, and the structure and allocation of powers at that particular level of government.[18] The official's motive behind his or her actions is irrelevant.[19] An intentional tort can be within the scope of an executive's authority, but the intentional use or misuse of governmental authority for an unauthorized purpose might exceed that scope.[20] Ultra vires activity is not activity that a government official performs in an unauthorized manner; rather, it is activity that the government official lacks legal authority to perform in any manner.[21]

The governmental tort liability act also provides "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]"[22]

C. Analysis

Hoff does not dispute the trial court's finding that Spoelstra, Kensington, Irby, Bradley, and Peterson were among the highest executive officials for the City, nor that the City itself is not entitled to claim immunity.[23] Rather, she argues that their conduct was outside the scope of their authority. We disagree.

Section 4.6 of the Marquette City Charter provides, in pertinent part, as follows:

> The City Manager and Attorney shall be appointed by the Commission for an indefinite period, shall be responsible to and serve at the pleasure of the Commission and shall have their compensation fixed by the Commission.

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[17] MCL 691.1401(f).

[18] *American Transmissions, Inc v Attorney General*, 454 Mich 135, 141; 560 NW2d 50 (1997); *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988); *Baker v Couchman*, 271 Mich App 174, 180; 721 NW2d 251 (2006), rev'd 477 Mich 1097 (2007).

[19] *American Transmissions*, *supra* at 143-144; *Brown v Detroit Mayor*, 271 Mich App 692, 722; 723 NW2d 464 (2006), aff'd in part, vacated in part 478 Mich 589 (2007).

[20] *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 593; 640 NW2d 321 (2001).

[21] *Richardson v Jackson Co*, 159 Mich App 766, 771; NW2d 74 (1987), rev'd 432 Mich 377 (1989); see also *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 620; 363 NW2d 641 (1984).

[22] *Ross*, *supra* at 595; see MCL 691.1407(1).

[23] MCL 691.1401(d); MCL 691.1405.

* * *

> Except as may be otherwise required by statute or this charter, the Commission shall establish by ordinance such departments of the city as it deems necessary or advisable and shall prescribe therein the functions of each department and the duties, authorities and responsibilities of the officers of each department, but the Commission may not diminish the duties or responsibilities of the City Manager. The City Manager may prescribe such duties and responsibilities of the officers of those departments responsible to him which are not inconsistent with this charter or with any ordinance or resolution.

Further, § 4.8 of the Marquette City Charter provides, in pertinent part, as follows:

> The City Manager shall be the chief administrative officer of the city government. His functions and duties shall be:
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> (a) To be responsible to the Commission for the efficient administration of all administrative departments of the city government[.]

Moreover, § 4.11 of the Marquette City Charter, which governs the City Attorney's functions and duties, provides, in pertinent part, as follows:

> (a) The Attorney shall act as legal advisor to, and be attorney and counsel for, the Commission and shall be responsible solely to the Commission. . . .
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> * * *
>
> (f) He shall at all times co-operate with the City Manager and shall provide such information and reports and perform such duties as are requested by the City Manager so long as they are not inconsistent with the duties of his office as herein provided.
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> (g) Upon the recommendation of the Attorney, or upon its own initiative, the Commission may retain special legal counsel to handle any matter in which the city has an interest, or to assist and counsel with the Attorney therein.

Finally, pursuant to Michigan law, each city may in its charter provide:

> For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, *whether such powers be expressly enumerated or not*; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and

> ordinances relating to its municipal concerns subject to the constitution and general laws of this state.[24]

MCL 117.4j(3), taken together with the city charter, broadly empowered the City Commission to evaluate, supervise, and make decisions concerning the city attorney. Therefore, we conclude that the complained-of conduct against Spoelstra, Kensington, Irby, and Bradley was within the scope of their authority as commissioners, in that their conduct related to the administration of a government department and fell within their duties to supervise the city attorney.

The scope of Peterson's authority as city manager, however, is more difficult to discern. The city charter indicates that the city manager and the city attorney are essentially equal on the governmental hierarchy, both being appointed by and answerable only to the City Commission. Thus, Peterson did not have the same broad oversight powers as the commission members. However, the city manager is afforded the broad authority to ensure the "efficient administration of all administrative departments of the city government[,]" and the city attorney is expressly directed to cooperate with the city manager and provide information and reports and perform such duties as requested by the city manager. The latter provision logically carries with it the implicit, reciprocal provision that the city charter affords the city manager the authority to request from the city attorney information, reports, and the performance of certain duties. Therefore, we conclude that the complained-of conduct against Peterson was within the scope of his authority as city manager, in that his conduct related to the efficient administration of a government department and fell within his duties to work with the city attorney. Additionally, we note that, as city manager, Peterson had a right to comment on issues affecting city government, including a lawsuit filed by a governmental official against the government body.

Moreover, we conclude that Spoelstra and Peterson were authorized to discuss issues of public concern with members of the community, including by discussing and disseminating public documents. Here, those documents were Hoff's emails, in which she maintains she was entitled a reasonable expectation of privacy. However, the City's information systems policy stated that such emails were considered city property and could be subject to public disclosure under the Freedom of Information Act.[25] Most notably, the policy stated, "[T]he user should not expect any degree of privacy regarding e-mail messages. . . . Since your personal messages can be accessed by City management without your notice, you should not use e-mail to transmit any messages that you would not want read by a third party." Therefore, we conclude that there was no reasonable basis for Hoff to have any expectation of privacy in e-mails contained in the City's computer system.

The City is immune because tort claims are not covered by a specific exception to the governmental tort liability act.[26]

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[24] MCL 117.4j(3) (emphasis added).

[25] MCL 15.231 *et seq.*

[26] *Harrison v Director of Dep't of Corrections,* 194 Mich App 446, 450; 487 NW2d 799 (1992).

Accordingly, we conclude that Spoelstra, Kensington, Irby, Bradley, Peterson, and the City were all immune from Hoff's tort claims. Therefore, in Docket No. 272898, we affirm the trial court's August 2006 order granting summary disposition in favor of the City, Spoelstra, Kensington, Irby, Bradley, and Peterson, based on our conclusion that they were entitled to governmental immunity on Hoff's claims of interference with advantageous business relationship and conspiracy, and intentional infliction of emotional distress. And in Docket Nos. 275979 and 276054, we reverse the trial court's January 19, 2007 order denying Spoelstra and Peterson summary disposition based on our conclusion that they were entitled to governmental immunity on Hoff's claims of intrusion upon seclusion, public disclosure of private facts, civil extortion, and intentional infliction of emotional distress.

III. ELCRA

A. Standard Of Review

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law.[27] The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[28] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[29] We review de novo the trial court's ruling on a motion for summary disposition.[30]

B. Premature Grant Of Summary Disposition

Generally, "summary disposition is premature if it is granted before discovery on a disputed issue is complete."[31] However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. "The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position."[32] In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence.[33] The

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[27] MCR 2.116(C)(10).

[28] MCR 2.116(G)(3)(b); *Maiden, supra* at 120.

[29] MCR 2.116(G)(4); *Maiden, supra* at 120.

[30] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[31] *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989).

[32] *Id*.

[33] *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983).

Michigan Supreme Court has held that failure to comply with MCR 2.116(H)[34] precludes a claim that summary disposition was premature.[35] Here, Hoff did not comply with MCR 2.116(H); thus, she cannot complain that discovery was prematurely ended.[36] Moreover, as concluded below, further discovery did not uncover factual support for her position.

C. Alleged Discrimination

The ELCRA prohibits an employer from retaliating against an employee because the employee "has opposed a violation of this act, or because the [employee] has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act."[37]

> A prima facie case of retaliation can be established if a plaintiff proves: (1) that he was engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.[38]

This Court has indicated that a plaintiff's lodging of a complaint or "charge" with higher management about alleged discriminatory conduct constitutes protected activity.[39] "To establish causation, the plaintiff must show that his participation in activity protected by the [ELCRA] was

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[34] MCR 2.116(H) provides as follows:

> (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
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> (a) name these persons and state why their testimony cannot be procured, and
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> (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.

[35] *Coblentz v City of Novi*, 475 Mich 558, 570-571; 719 NW2d 73 (2006).

[36] *Id*.

[37] MCL 37.2701(a).

[38] *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310-311; 660 NW2d 351 (2003).

[39] *Rymal v Baergen*, 262 Mich App 274, 300-301; 686 NW2d 241 (2004), citing MCL 37.2701(a).

a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two."[40]

Hoff's only known complaint regarding the alleged discrimination against her was a one-sentence comment contained in her counsel's October 8, 2004 letter to the commissioners, noting "sexism inherent in that position." Arguably, this cryptic comment *could* be construed as the lodging of a complaint or "charge" with higher management about alleged discriminatory conduct, thereby constituting protected activity.[41] "Regardless of the vagueness of the charge or the lack of formal invocation of the protection of the act, if an employer's decision to terminate or otherwise adversely effect an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs."[42]

However, Hoff has failed to show that her alleged complaint of sex discrimination was a factor, let alone a "significant factor," in her termination. Hoff's allegations of adverse treatment by not only Peterson, but also Irby and Bradley, long pre-date her October 2004 letter, and Hoff does not allege that Irby and Bradley's treatment of her had anything to do with her being a female. Moreover, Hoff's own allegations suggest that Spoelstra and Kensington campaigned for her termination because of their distrust of her competence as an attorney. We agree with the trial court that "nothing whatsoever" supports Hoff's cause of action under the ELCRA.

Therefore, we affirm the trial court's dismissal of Hoff's claim of ELCRA retaliation against Spoelstra, Kensington, Irby, Bradley, and the City because their conduct did not satisfy the necessary elements of this claim.

IV. The Open Meetings Act

A. Standard Of Review

We review de novo the trial court's ruling on a motion for summary disposition.[43] We also review de novo the proper interpretation and application of a statute.[44]

B. Hoff's Allegations

With respect to her claimed violation of the OMA in *Hoff v Spoelstra*, Hoff alleged in her complaint that in the months and days leading up to her termination, Spoelstra, Kensington, Irby, Bradley, and Peterson plotted against her, "such that the goals and intent of Michigan's Open

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[40] *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001) (internal citation omitted).

[41] *Rymal*, *supra* at 300-301.

[42] *McLemore v Detroit Receiving Hosp & Univ Medical Ctr*, 196 Mich App 391, 396; 493 NW2d 441 (1992).

[43] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[44] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

Meetings Act were defeated, and the public's right to know how and why decisions are made in the City of Marquette was subverted." According to Hoff, "[t]he actions of the Defendants amounted to deliberating, in a round-robin meeting, toward a decision by a quorum of the Commissioner's members outside of public scrutiny, making the commission's action illegal, reprehensible and void."

C. Applicable Legal Principles

"The purpose of the OMA is to promote openness and accountability in government; it is therefore to be interpreted broadly to accomplish this goal."[45] Accordingly, the OMA provides that whenever a quorum of a public body deliberates or renders a decision on public policy, such deliberations or decisions must take place in an open meeting, unless an exception applies.[46] In other words, in deciding whether there was an OMA violation, the relevant inquiries are: (1) whether the board acted as a public body, (2) whether there was a meeting, (3) whether the members deliberated on or rendered a decision, and if so, (4) whether any exceptions apply.[47] To constitute a "meeting" of a "public body," as contemplated by the OMA, three elements must be present: (1) a quorum, (2) deliberation toward or rendering of a decision, (3) a matter of public policy at issue.[48] Because the OMA does not define the term "deliberation," this Court has turned to dictionary definitions and stated that "deliberation" includes "discussing," which, in turn, is defined as "the act of exchanging views on something[.]"[49]

A public official who acts with the specific intent to violate the OMA shall be personally liable for a violation of the act.[50] And this Court has repeatedly held that an OMA violation can be found when subquorum groups are intentionally created to deliberate on public policy and avoid the OMA, thereby constituting constructive quorums.[51]

For example, in *Booth Newspapers, Inc v Wyoming City Council*, two separate non-public meetings were held between various city council members, and although neither meeting alone had enough members in attendance to constitute a quorum, this Court held that the two-day total was sufficient to constitute a constructive quorum and a violation of the OMA.[52] This Court first acknowledged that "[a]dvisory committees of less than a quorum which do not

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[45] *Univ of Mich Board of Regents, supra* at 580.

[46] MCL 15.263(3).

[47] *Schmiedicke v Clare School Bd*, 228 Mich App 259, 261; 577 NW2d 706 (1998); *Univ of Mich Board of Regents, supra* at 581.

[48] *Ryant v Cleveland Twp*, 239 Mich App 430, 434; 608 NW2d 101 (2000); *Schmiedicke, supra* at 262; see MCL 15.262(b).

[49] *Ryant, supra* at 434, citing Black's Law Dictionary (7th ed).

[50] MCL 15.273(1); see *People v Whitney*, 228 Mich App 230, 254; 578 NW2d 329 (1998).

[51] *Univ of Mich Board of Regents, supra* at 581.

[52] *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 465, 472-473; 425 NW2d 695 (1988).

collectively deliberate toward resolution of public business are not within the purview of the act."[53] However, this Court concluded that the OMA's exception for "social or chance gathering[s] . . . not designed to avoid this act,"[54] evidenced an equal legislative intent that the OMA apply to any meetings intentionally designed *to* avoid the act.[55] According to this Court, "To accept the city council's suggestion that a public body can avoid the OMA by deliberately dividing itself into groups of less than a quorum and still deliberate on public policy would circumvent the legislative principles as well as the overall objective of the OMA to promote openness and accountability in government."[56]

Similarly, in *Booth Newspapers, Inc v Univ of Mich Board of Regents*, the defendant board established subquorum committees that engaged in telephone calls and small group meetings.[57] This Court found it significant that the acknowledged purpose of these subquorum committees was to engage in the same intercommunications that could only have been achieved in a full meeting of the board.[58] According to this Court, "The subquorum groups were utilized or designed to avoid the OMA, and therefore, they constituted a constructive quorum[.]"[59] Therefore, this Court held that, because the board "deliberately divided itself into subquorum groups to deliberate on public policy, in direct circumvention of the OMA's objective of promoting openness and accountability in government," the OMA applied.[60]

But conversely, in *St Aubin v Ishpeming City Council*, before a council meeting during which the plaintiff was terminated, the mayor held one-on-one discussions with each of the council members regarding whether the plaintiff should be retained as city manager.[61] As a result of these discussions, the mayor felt that there was a consensus among the council members to terminate the plaintiff. The plaintiff argued that this one-on-one canvassing contravened the OMA. However, this Court distinguished *St Aubin* from *Wyoming City Council* and *Univ of Mich Board of Regents*, on the ground that in those cases the subquorum meetings were designed to avoid the OMA, whereas the facts in *St Aubin* evidenced no such intent.[62]

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[53] *Id*. at 472, citing OAG, 1977-1978, No 5183 (Pt II, No 25), p 40 (March 8, 1977).

[54] MCL 15.263(10).

[55] *Wyoming City Council*, *supra* at 472.

[56] *Id*.

[57] *Univ of Mich Board of Regents*, *supra* at 577, 581.

[58] *Id*. at 577-578, 581.

[59] *Id*. at 581, citing *Wyoming City Council*, *supra*.

[60] *Id*.

[61] *St Aubin*, *supra* at 102.

[62] *Id*. at 103.

D. Spoelstra and Kensington

We first conclude that the trial court properly found that the City Commission is a public body,[63] a quorum of which is four of the seven members, and that a decision to terminate the City Attorney is a matter of public policy.[64]

We further conclude that the trial court also correctly found that Spoelstra and Kensington engaged in subquorum discussions with three other commissioners with the specific intent to circumvent the OMA, and that the purpose of the meetings was to deliberate on the public matter of Hoff's continuing employment.[65] Deposition testimony evidenced that during the day before the evening commission meeting on January 31, 2005, Spoelstra and Kensington had three separate meetings with each of the three other commissioners to discuss their concerns about Hoff. Kensington testified that she knew that the OMA prohibited the commissioners from meeting in groups larger than three. And Spoelstra confirmed that she was careful to make sure that she and Kensington went to visit the other three commissioners one at a time because having four commissioners together discussing city business was a violation of the OMA. As the trial court here concluded, "the several meetings constituted far more than '. . . an informal canvas by one member of a public body to find out where the votes would be on a particular issue, . . . [.]'"[66] Further, the meetings were clearly prearranged meetings to discuss Hoff, as opposed to merely a social or chance gathering.[67]

Spoelstra and Kensington argue that the private meetings did not violate the OMA because the City Commission made the actual decision to terminate Hoff at the public meeting by a 4-3 vote. However, it is not mandatory that an actual decision be made at the allegedly violative meeting. Deliberation, or discussion, on a matter of public policy, without the actual rendering of a decision, also satisfies the OMA's definition of "meeting."[68] Indeed, the fact that no public deliberations took place on the day the decision to terminate Hoff was rendered evidences that the deliberations had been already taken place privately. As this Court has recognized, "The primary purpose of the OMA is to ensure that public entities conduct all their decision-making activities in open meetings and not simply hold open meetings where they rubber-stamp decisions that were previously made behind closed doors."[69]

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[63] See *Whitney*, *supra* at 241-242, citing MCL 15.262(a) (finding that a city council is a public body).

[64] See *id*. at 242-243 (finding that city council deliberations regarding the hiring or retention of a city manager was among the most important exercises of governmental authority).

[65] See MCL 15.262(b); *Ryant*, *supra* at 434.

[66] Quoting *St Aubin*, *supra* at 103.

[67] See MCL 15.263(10).

[68] MCL 15.262(b); *Ryant*, *supra* at 434.

[69] *Schmiedicke*, *supra* at 264.

Additionally, we find it irrelevant that, in hindsight, the three other commissioners did not vote to terminate Hoff. The fact that Spoelstra and Kensington failed at their attempts to influence the other three commissioners does not negate the fact that they arranged the meetings with the intent to circumvent the OMA.

Accordingly, we conclude that the trial court did not err in holding that Spoelstra and Kensington intentionally violated the OMA. And in so holding, we affirm the trial court's determination that this violation of the OMA thereby invalidated the City Commission's termination of Hoff. However, we find it appropriate to note that MCL 15.270(5) 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.

E. Irby and Bradley

We further conclude, however, that Irby and Bradley's conduct did not violate the OMA. Both of them publicly made known their dissatisfaction with Hoff. But their mere awareness of Spoelstra and Kensington's meetings with the other commissioners simply did not amount to their participation in a subquorum meeting specifically intended to violate the act. Accordingly, we affirm the trial court's dismissal of Hoff's OMA violations claims against Irby and Bradley.

V. The Judicial/Litigation Privilege

A. Standard Of Review

We review de novo the trial court's ruling on a motion for summary disposition.[70] "We also review de novo as a question of law the applicability of a privilege."[71]

B. Legal Principles

"Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried."[72] The purpose of absolute immunity is to promote the public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their

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[70] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[71] *Oesterle v Wallace*, 272 Mich App 260, 263; 725 NW2d 470 (2006).

[72] *Oesterle*, *supra* at 264; *Couch v Schulz*, 193 Mich App 292, 295; 483 NW2d 684 (1992).

clients.[73] Alleged defamatory statements made in the contest of settlement negotiations is covered by the privilege, as long as they were made after the commencement of litigation.[74] This litigation privilege extends to every step in the proceedings and covers anything that may be said in relation to the matter at issue, including pleadings and affidavits.[75]

C. Analysis

Dean and Weber are attorneys, and the absolute litigation privilege applies to them.[76] They owed no duty to party opponents they did not represent. Accordingly, we affirm the trial court's dismissal of Hoff's claims against Dean and Weber because they were protected by the litigation privilege.

VI. Conclusion

In Docket No. 272898, we affirm the trial court's August 2006 order granting summary disposition in favor of the City, Spoelstra, Kensington, Irby, Bradley, and Peterson, based on our conclusion that they were entitled to governmental immunity on Hoff's claims of interference with advantageous business relationship and conspiracy, and intentional infliction of emotional distress. We also affirm the trial court's grant of summary disposition in favor of the City, Spoelstra, Kensington, Irby, Bradley, and Peterson, based on our conclusion that Hoff failed to satisfy the necessary elements of a violation of the ELCRA. We further affirm the trial court's grant of summary disposition in favor of Irby and Bradley based on our conclusion that they did not violate the OMA. And we affirm the trial court's grant of summary disposition in Hoff's favor based on our conclusion that Spoelstra and Kensington did intentionally violate the OMA.

In Docket No. 276257, we affirm the trial court's January 11, 2007 order granting Dean and Weber summary disposition based on our conclusion that they were entitled to absolute litigation privilege on Hoff's claims of intrusion upon seclusion, public disclosure of private facts, civil extortion, and intentional infliction of emotional distress.

And in Docket Nos. 275979 and 276054, we reverse the trial court's January 19, 2007 order denying Spoelstra and Peterson summary disposition based on our conclusion that they were entitled to governmental immunity on Hoff's claims of intrusion upon seclusion, public disclosure of private facts, civil extortion, and intentional infliction of emotional distress.

We affirm in part and reverse in part.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis

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[73] *Oesterle, supra* at 265.

[74] *Id*. at 268.

[75] *Couch, supra* at 295.

[76] *Oesterle, supra* at 264.