STATE OF MICHIGAN

COURT OF APPEALS

THOMAS APSEY and CYNTHIA APSEY,

Plaintiffs-Appellants,

v

RICHARD STOVER, ROGER JAMIESON, CAROLE JOHNSTON, BETTY YOUNG, and HARRISVILLE TOWNSHIP,

Defendants-Appellees.

UNPUBLISHED
May 28, 2002

No. 228231
Alcona Circuit Court
LC No. 00-010365-CZ

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition for defendants pursuant to MCR 2.116(C)(6). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In July 1999, defendant township brought suit against plaintiffs (Case No. 99-10230-CE), alleging that they had dumped piles of dirt and debris along and over the parties' shared property line. The following December, while the trespass suit was pending, plaintiffs published a letter mentioning the suit in the local newspaper. Subsequently, two of the individual defendants in this case – all of whom are members of the township board, along with plaintiff Cynthia Apsey – informed the township's attorney that they thought a published statement of facts would be appropriate to "set the record straight." The attorney drafted a statement and received the approval of its contents in a series of telephone calls with the individual defendants. The local newspaper subsequently published a paid announcement captioned "To The Residents of Harrisville Township From Your Board," and signed "The Harrisville Township Board by Richard Stover, Roger Jamieson, Carole Johnston and Betty Young. (Statement paid for with personal funds)." The township was not charged for the attorney's services.

In January 2000, plaintiffs filed three lawsuits against defendants, including the present case, alleging that defendants violated the Open Meetings Act (OMA), MCL 15.261 *et seq*., by reaching, in a meeting not open to the public, an agreement about the content of the paid announcement and its publication. Defendants moved for summary disposition under MCR 2.116(C)(10) and argued that there was no meeting. Plaintiffs maintained that, as a matter of law, defendants engaged in a "round robin" system of deliberation in violation of the OMA. The

trial court opined that plaintiffs' action was an outgrowth of the trespass case and therefore granted summary disposition for defendants pursuant to MCR 2.116(C)(6).

On appeal, plaintiffs first contend that the trial court erred in dismissing their OMA action under MCR 2.116(C)(6), which provides for summary disposition when another action has been initiated between the same parties involving the same claim. We agree. This Court's review of a decision regarding a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

MCR 2.116(C)(6) is a codification of the former plea of abatement by prior action and is designed to stop parties from endlessly litigating matters involving the same questions and claims as those presented in pending litigation. *Fast Air, Inc v Knight*, 235 Mich App 541, 545-546; 599 NW2d 489 (1999). While the subrule does not require complete identity of the parties in both suits, the two suits must be based on the same or substantially the same cause of action. *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986). In deciding whether the two cases at issue are substantially the same cause of action, we consider whether resolution of either action would require examination of the same operative facts, *id.* at 601, and whether the cases involve common legal and factual issues, *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 667; 341 NW2d 783 (1983). Here, the operative facts of the trespass case are not the same as those in the OMA case. One involves whether plaintiffs disregarded the boundary between their property and that of the township, while the other involves whether defendants held a deliberative meeting contrary to statute. While the trial court may have accurately concluded that the OMA case was an outgrowth of the trespass case in the sense that the motive behind the alleged improper meeting was to litigate the trespass action in the newspaper, the cases do not arise from the same set of operative facts.

Nevertheless, the trial court reached the right result because summary disposition was appropriate under MCR 2.116(C)(10). "Where summary disposition is granted under the wrong rule, Michigan appellate courts, according to longstanding practice, will review the order under the correct rule." *Spiek, supra* at 338 n 9. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. In deciding a motion brought under this subrule, the trial court considers the documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

The OMA provides that a public body, when making a decision effectuating public policy, must make the decision at an open meeting unless there is an applicable exception. MCL 15.263(1), (2); *Schmiedicke v Clare School Bd*, 228 Mich App 259, 261; 577 NW2d 706 (1998). The act further provides that all deliberations of a public body constituting a quorum of its members must take place in an open meeting unless an exception applies. MCL 15.263(3). 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 made a decision, and if so, (4) whether any exceptions apply. *Schmiedicke, supra* at 261.

Plaintiffs argue that summary disposition was improper because the affidavits established a violation of the OMA, namely, that defendants improperly participated in a meeting not open to the public when they agreed to publish the paid announcement and approved its content. In

support, they rely on *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993). While the township attorney's sequential canvassing of the four board members individually by telephone regarding the paid announcement strongly resembles the "around-the-horn" telephone calls in *Booth*, we conclude that *Booth* is not dispositive because, unlike that case, any such consensus building in this case was not for the purpose of formulating public policy and thus fell outside the scope of the OMA.

To constitute a "meeting" of a public body as contemplated by the OMA, three elements must be present: (1) a quorum, (2) deliberation or rendering of a decision, (3) on a matter of public policy. *Ryant v Cleveland Twp*, 239 Mich App 430, 434; 608 NW2d 101 (2000); MCL 15.262(b), (d). Defendants in this case were not debating or deciding public policy when they concluded that they had to publicly respond to what they deemed misinformation circulating within the community about the trespass case. Similarly, they were not deciding public policy when they approved the contents of the statement prepared by the attorney. Accordingly, any deliberating they may have done was not required to be open to the public. In the absence of an OMA violation, summary disposition was appropriate.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff