STATE OF MICHIGAN

COURT OF APPEALS

DICK BROWN and DUANE CAVERLY,

Plaintiffs-Appellants,

v

PLAINFIELD TOWNSHIP, PLAINFIELD TOWNSHIP TREASURER, PLAINFIELD TOWNSHIP CLERK, and PLAINFIELD TOWNSHIP SUPERVISOR,

Defendants-Appellees.

UNPUBLISHED
November 9, 2010

No. 291025
Iosco Circuit Court
LC No. 08-004441-CZ

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

In this action alleging violations of the Open Meetings Act (OMA), MCL 15.261 *et seq*., plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiffs were trustees on the five-member Plainfield Township Board of Trustees (the Board). The individual defendants were the other three members of the Board: Roma Bassi, Plainfield Township Treasurer (the Treasurer); Elaine Bielby, Plainfield Township Clerk (the Clerk); and Joe Pellens, Plainfield Township Supervisor (the Supervisor).[1] In 2008, the Supervisor determined that the position of Township Building Inspector and Zoning Administrator, which had been occupied by John Heilman since his hiring several years earlier by the former township supervisor, should be divided into two part-time positions. The Board voted to allow the Supervisor to advertise for a part-time Zoning Administrator. Heilman, Paul Olmstead, and one other candidate applied for the position. After interviewing the three candidates in June 2008, the Supervisor recommended to the Board that Olmstead be hired. At a special meeting held on June 26, 2008, the Board voted three to two to do so. Plaintiffs voted against Olmstead's hiring.

[1] Defendants advise that only the Clerk and the Treasurer remained on the Board after the 2008 election.

Plaintiffs then filed the instant action, alleging that the three individual defendants met before the June 2008 special meeting and conducted interviews for the Zoning Administrator position. Plaintiffs contended that this gathering of a quorum constituted a meeting of a "committee" that was subject to the provisions of the OMA, and that because the meeting was not noticed and was not conducted in a meeting open to the public, it constituted a violation of MCL 15.263(1), (2), and (3) and MCL 15.265(1). Plaintiffs sought injunctive relief under MCL 15.271 and, pursuant to MCL 15.270(2) and MCR 2.605, a declaratory judgment invalidating the Board's decision to hire Olmstead. Plaintiffs also alleged that the violation was intentional and that they were entitled to exemplary damages under MCL 15.273(1).

Defendants moved for summary disposition under MCR 2.116(C)(10), asserting that the Supervisor met with and interviewed the three candidates for the Zoning Administrator position of his own volition and without the presence or participation of the other two individual defendants. Thus, they claimed there was no meeting of a "public body" under the OMA. Defendants supported their motion with affidavits from the three individual defendants, who all stated that the June 2008 interviews were conducted solely by the Supervisor and that the Board did not instruct the Supervisor to interview applicants for this position or delegate any such authority to do so, for the reason that such authority was always perceived by all involved to be inherent to the Supervisor's office.[2] The Supervisor further stated in his affidavit that, although he had the sole authority to hire and fire for the position of Zoning Administrator, he nevertheless determined on his own to submit his recommendation that Olmstead be hired to a Board vote because plaintiffs wanted Heilman to receive the job. In addition, Olmstead stated in an affidavit that his only interview was conducted solely by the Supervisor and that he understood that his position was within the Supervisor's Department.

The trial court granted summary disposition to defendants. It held that there was no evidence that the Clerk or the Supervisor were involved in any way with the interview process or that there was a delegation of authority from the Board to the Supervisor.

On appeal, plaintiffs argue that the trial court erred in granting summary disposition to defendants on the basis that there was no delegation of authority from the Board to the Supervisor to interview candidates for the Zoning Administrator position. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim, *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004), and is properly granted when "there is no genuine issue as to any material fact, and the movie party is entitled to judgment . . . as a matter of law." "When a motion under [MCR 2.116(C)(10)] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by

[2] In addition, defendants submitted an excerpt from the Township's personnel manual that provided that the Supervisor, Clerk, and Treasurer had the authority to hire and direct the employees within their departments. Defendants also submitted Board minutes from 2004 indicating that a similar procedure was followed, without objection by plaintiffs, when Heilman was originally hired by then-Supervisor Chuck Parkinson.

affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

The OMA strictly limits "closed session" meetings of public bodies and generally requires that whenever a quorum of a public body meets to consider and discuss public business, such deliberations or decisions must take place in an open meeting, unless an exception applies. MCL 15.263; MCL 25.268; *Herald Co v Bay City*, 463 Mich 111, 129; 614 NW2d 873 (2000); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 531; 609 NW2d 574 (2000). To constitute a "meeting" under the OMA, three elements must be present: (1) a convening of a quorum of a "public body," (2) deliberation toward or rendering of a decision, and (3) a matter of public policy at issue. MCL 15.262(a), (b)[3]; *Schmiedicke v Clare Sch Bd*, 228 Mich App 259, 262; 577 NW2d 706 (1998).

Plaintiffs contend that the Supervisor appointed himself a "committee of one" and he therefore constituted a "public body" subject to the OMA.[4] However, "an individual acting in his official capacity is not a 'public body' for the purposes of the OMA." *Craig v Detroit Pub Sch Chief Executive Officer*, 265 Mich App 572, 579; 697 NW2d 529 (2005), citing *Herald Co*, 463 Mich at 131. In *Herald Co*, 463 Mich at 129-131, the Supreme Court held that an individual city manager was not subject to the terms of the OMA because a "public body" necessarily consists of more than one individual:

> As used in the OMA, the term "public *body*" connotes a collective entity. The statutory terms used illustratively to define "public body"—"legislative

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[3] MCL 15.262 provides in relevant part:

> As used in this act:
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> (a) "Public body" means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function . . . .
>
> (b) "Meeting" means the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy . . . .

[4] In the body of their brief, plaintiffs argue that, because the Clerk and the Treasurer admitted to reviewing the three candidates' applications, it stands to reason that they must have discussed the applications with the Supervisor. They claim that a genuine issue of material fact remains regarding whether the discussions of the Clerk and the Treasurer with the Supervisor constitute deliberations of a public body subject to the OMA. However, informal discussions among members of a public body regarding an issue before the body do not violate the OMA if no decision regarding the issue is made during the discussions and there is no intent to violate the OMA. See *St Aubin v Ishpeming City Council*, 197 Mich App 100, 102-103; 494 NW2d 803 (1992). In any event, plaintiffs have not met their burden under MCR 2.116(G)(4) to come forward with admissible evidence demonstrating that the Clerk and the Treasurer discussed the three candidates with the Supervisor.

> body" and "governing body"—do not encompass individuals. A single individual is not commonly understood to be akin to a "board," "commission," "committee," "subcommittee," "authority," or "council"—the bodies specifically listed in the act by the Legislature. We draw additional comfort in our construction of the OMA because the Legislature is certainly free to define, and has, in fact, defined elsewhere, the term "public body" in such a way as to encompass individuals. However, it would be awkward, to say the least, to apply the OMA to an individual. Perhaps the strongest common-sense basis for concluding that an individual was not contemplated by the Legislature as a "public body" is to consider how odd a concept it would be to require an individual to "deliberate" in an open meeting. MCL 15.263(3). Thus, we conclude that an individual executive acting in his executive capacity is not a public body for the purposes of the OMA. [Emphasis in original.][5]

As did the plaintiff in *Herald Co*, plaintiffs in this case cite *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993), for the proposition that the Supervisor individually constituted a public body. Although the Court in *Booth Newspapers*, 444 Mich at 225-226, rejected the defendant's assertion that a "one-man committee" could not be considered a "public body," the Court in *Herald Co*, 463 Mich at 134-135, held that the decision in that case was distinguishable because it "precluded an attempt by a public body to evade the OMA (and thus circumvent legislative intent)" by improperly delegating its authority to the committee chairman and to subquorum groups that had no independent authority to select a president.

As opposed to the circumstances of *Booth Newspapers* where "[t]he board effectively sought to delegate its authority as a body subject to the OMA to various bodies of its own creation that it believed were not subject to the OMA, for the express purpose of avoiding the requirements of the OMA," *Herald Co*, 463 Mich at 134, in the instant case, there was no delegation of authority or evasive effort by the Board. The evidence submitted by defendants

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[5] Although plaintiffs argue that *Herald Co* is inapplicable because the individual at issue in *Herald Co* was an appointed executive as opposed to a member of a township board, they do not explain how this is a distinction with a difference. Moreover, the Court in *Herald Co* addressed this issue, stating that it did not matter for purposes of its analysis that one member of the city manager's committee was also a city commissioner:

> In sharp contrast to the facts of *Booth* [*Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993)], in which a public body attempted to delegate authority to an individual member of that body in an effort to avoid compliance with the OMA, [the commissioner]—although a member of the public body that would ultimately determine who would be appointed fire chief—was not given any individual authority to make hiring decisions. Furthermore, the committee's duties—as specified by [the city manager], not the city commission—were of a purely advisory nature. Thus, *Booth* on this score is also inapposite. [*Herald Co*, 463 Mich at 136 n 19.]

establishes that the Supervisor, of his own volition and without assistance, interviewed the three candidates for the part-time Zoning Administrator position.

The affidavits of the three individual defendants, as well as the Township's personnel manual, demonstrate that the Supervisor acted pursuant to the apparently long-standing internal policy that the Building Inspector and Zoning Administrator positions were employees within the Supervisor's Department, and that he therefore had the authority to hire and direct such employees. Although plaintiffs argue that the Supervisor had no *actual* authority under statute or otherwise to hire a Zoning Administrator, this does not change the fact that there was simply no delegation of authority by the Board, whose members apparently *believed* that the Supervisor did have such authority. Moreover, regardless whether the Supervisor actually had authority to make a hiring decision or to convey a recommendation to the Board, the fact remains that the Board itself hired Olmstead. See *Herald Co*, 463 Mich at 132 (noting that "an individual executive making a recommendation to a deciding body [does not] constitute[] a *delegation* of authority" by that body) (emphasis in original). Accordingly, because there was no delegation of authority from the Board to the Supervisor, we affirm the trial court's order granting summary disposition to defendants.[6]

Defendants have requested that we determine "de novo" their entitlement to sanctions for plaintiffs' prosecution of a frivolous action. Because defendants did not cross-appeal from the trial court's denial of their motion for sanctions, the issue is not properly before this Court. *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005). Further, although defendants also request appellate sanctions, a request for such sanctions must be made in a motion filed pursuant to MCR 7.211(C)(8), and a request raised in a brief does not constitute a motion for purposes of that rule. *Id.*

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

[6] In light of our determination that the OMA is inapplicable to the circumstances of this case, we need not address defendants' alternative argument that plaintiffs lack standing to pursue their OMA claim.