

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH J. SPEICHER,

Plaintiff-Appellant,

v

COLUMBIA TOWNSHIP, COLUMBIA
TOWNSHIP SUPERVISOR, COLUMBIA
TOWNSHIP CLERK, COLUMBIA TOWNSHIP
TREASURER, COLUMBIA TOWNSHIP
FORMER TREASURER, and COLUMBIA
TOWNSHIP BOARD MEMBER,

Defendants-Appellees.

UNPUBLISHED
September 20, 2011

No. 298016
Van Buren Circuit Court
LC No. 09-058193-CZ

Before: GLEICHER, P.J., AND HOEKSTRA AND STEPHENS, JJ.

PER CURIAM.

In this Open Meetings Act (OMA) case, MCL 15.261 *et seq.*, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. This case arises out of plaintiff's request to be notified of any proceedings involving the appointment of township treasurer, and the defendants' failure to provide the requested notice and appointment of a treasurer at a special meeting. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendants on his claimed violation of MCL 15.266(1), which provides that "[u]pon the written request of an individual . . . and upon the requesting party's payment of a yearly fee of not more than the reasonable estimated cost for printing and postage of such notices, a public body shall send to the requesting party by first class mail a copy of any notice required to be posted pursuant to [MCL 15.265(2) to MCL 15.265(5)]." It is undisputed that plaintiff requested notice prior to the occurrence of the meeting in question. It is also undisputed that defendants did not establish a yearly fee and that plaintiff made no attempt to pay any such fee. The trial court found that because plaintiff did not pay a fee, he was not entitled to notice under MCL 15.266. Implicit in the court's holding was its conclusion that the statutory scheme placed the burden of paying a reasonable fee on plaintiff regardless of whether defendants had established any such fee. We disagree with the trial court's conclusion.

We review de novo a trial court's grant or denial of a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We "review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* The interpretation and application of a statute is a question of law that we review de novo. *Adair v State of Mich*, 486 Mich 468, 477; 785 NW2d 119 (2010).

The trial court's grant of summary disposition resulted from its interpretation of MCL 15.266(1).

The main goal of judicial construction of a statute is to "ascertain and give effect to the intent of the Legislature." *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). The first step in doing this is to review the language of the statute. *Id.* If the statutory language of the statute is unambiguous, then we assume that the Legislature intended its plain meaning, and the statute must be enforced as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id.*; see also *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007) (The judiciary may not speculate regarding the Legislature's intent beyond those words expressed in the statute.) A provision in a statute "is ambiguous only if it irreconcilably conflicts with another provision, or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation and punctuation omitted; emphasis in original). [*Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39-40; 761 NW2d 269 (2008).]

A review of the language in MCL 15.266(1) reveals that the statute is unambiguous. Therefore, we must assume that the Legislature intended its plain meaning, and the statute must be enforced as written. *Id.* at 39. MCL 15.266(1) sets out two conditions precedent to a requesting party's entitlement to notice: the requesting party must make a written demand for notice ("[u]pon the written request"), and the requesting party must pay a yearly fee ("upon the requesting party's payment of a yearly fee"). Although plaintiff made a written demand for notice, he did not pay a yearly fee. Consequently, the trial court determined that plaintiff failed to comply with the statutory requirements. However, it is clear that plaintiff was precluded from paying the fee in question only because defendants failed to establish it. Based on the plain language of the provision, we cannot conclude that the legislature intended to place a duty on a requesting party that was impossible to fulfill. The statute granted defendant the authority to set "a yearly fee of *not more than* the reasonable estimated cost for printing and postage of such notices." MCL 15.266(1) (emphasis added). The term "not more than" demonstrates that the legislature placed a ceiling on the amount of the fee. However, the legislature did not place a minimum limit on the amount of the fee. Consequently, defendants had the authority to set as low of a fee as they desired. Defendants, through their silence, set the fee at zero dollars. To conclude otherwise would permit governmental units to circumvent the Open Meetings Act at

their discretion. Consequently, plaintiff met each of the statutory duties that had been imposed on him and the trial court's grant of summary disposition was improper.

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendants on the basis that his claim that defendants conspired to intentionally violate the OMA was barred by the intracorporate conspiracy doctrine. We review de novo questions of law. *Megee v Carmine*, ___ Mich App ___; ___ NW2d ___ (2010) (Docket No. 292207, issued November 16, 2010), slip op at 5. The intracorporate conspiracy doctrine provides that “[g]enerally, a corporate entity cannot conspire with itself.” 15A CJS, Conspiracy, § 11, p 350. The intracorporate conspiracy doctrine is applicable to public, governmental entities. *Taylor v Alabama*, 95 F Supp 2d 1297, 1317-1318 (MD Ala, 2000), implied overruling on other grounds recognized by *Dorsey v Wallace*, 134 F Supp 2d 1364 (ND Ga, 2000). However, exceptions to the intracorporate conspiracy doctrine exist, such as when “corporate agents or employees act in a different capacity or for a personal purpose of their own, out of self-interest.” 15A CJS, Conspiracy, § 11, p 351. See also *Blair v Checker Cab Co*, 219 Mich App 667, 674-675; 558 NW2d 439 (1996) (exception where “the directors have an independent personal stake in a particular action and, therefore, are actually acting on their own behalf”). We believe that genuine issues of material fact exist regarding whether an exception to the intracorporate conspiracy doctrine is applicable in this case. Construing plaintiff's complaint in his favor, *Latham*, 480 Mich at 111, it alleges a deliberate attempt on the part of defendant board members to exclude plaintiff from the treasurer selection process. Factual questions exist regarding whether defendant board members were acting for a personal purpose of their own, out of self-interest, and whether they had an independent personal stake in who become treasurer, and were actually acting on their own behalf. While the board was ultimately free to select whomever it wanted for the position of treasurer, it was not free to purposefully exclude plaintiff from the process where “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.” *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002). Accordingly, the trial court erred in granting summary disposition in favor of defendants on this claim.

Plaintiff next argues that the trial court made impermissible factual findings when it concluded that the deposition testimony of the individual defendants overcame contrary circumstantial evidence of conspiracy. It is well settled that “a trial court may not make findings of fact in deciding a motion for summary disposition.” *Jackhill Oil Co v Powell Prod, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). “Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial.” *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Here, the trial court reviewed the record evidence, weighed the circumstantial evidence presented by plaintiff against the direct deposition testimony of defendants, and determined that a reasonable jury could not conclude that a conspiracy existed because defendants' testimony made sense. “This Court is liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Viewing the record in the light most favorable to plaintiff, reasonable minds could differ on the existence of a conspiracy. Simply because defendants' testimony was

plausible does not preclude the possibility that plaintiff's characterization of events was true, and the trial court's finding to the contrary was erroneous. The trial court erred when it made impermissible factual findings, and reversal is warranted.

Plaintiff also argues that the trial court made impermissible factual findings when it concluded that the deposition denial testimony of the individual defendants overcame contrary circumstantial evidence that the township decision to appoint the treasurer was not made at an open meeting. It is true that, as noted by the trial court, simply because the board decided to appoint a specific individual as treasurer at the special meeting does not equate with the board members meeting separately in contravention of MCL 15.263(2) (“[a]ll decisions of a public body shall be made at a meeting open to the public”) and MCL 15.263(3) (“[a]ll deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public”) to decide against other potential candidates for the position. However, “a genuine issue of material fact [exists] when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison*, 481 Mich at 425. Viewing the record in the light most favorable to plaintiff, reasonable minds could differ on where and when the decision to appoint the treasurer was made, specifically whether it was made before the meeting, particularly in light of the evidence that the now-appointed treasurer's family was in attendance, which signified that they knew something would happen, and in light of the fact that the meeting only lasted for five minutes. Simply because defendants' version of events was plausible does not preclude the possibility that plaintiff's characterization of events was true, and the trial court's finding to the contrary was erroneous.

Plaintiff next argues that the trial court erred in determining that defendants substantially complied with the notice provisions of the OMA. In this case, it is undisputed that the public notice did not state the telephone number or address of the township board, as required by MCL 15.264(a), or the location of the special meeting, as required by MCL 15.265(4). “The rationale of the substantial compliance rule is that while the notice provisions in statutes are mandatory, they are essentially procedural; that rigid adherence to such a procedural mandate will not be required if it is clear that a substantial compliance provides realistic fulfillment of the purpose for which the mandate was incorporated in the statute.” *Arnold Transit Co v Mackinac Island*, 99 Mich App 266, 275; 297 NW2d 904 (1980), quoting *Stelzer v Huddleston*, 526 SW2d 710, 713 (Tex App, 1975). Michigan courts have found substantial compliance with the notice requirements of the OMA in instances where there was no evidence that the public body was attempting to closet the meeting from the public. See, e.g., *id.* at 274-275; *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 532; 609 NW2d 574 (2000). Although the evidence does not show that the township board was deliberately attempting to close the meeting to the public in general, the fact that there was evidence that it deliberately kept the meeting from plaintiff and another individual who was interested in the treasurer position demonstrates that questions of fact exist. On this record, a finding of substantial compliance with the notice requirements of the OMA was not warranted, and the trial court erred in making that determination.

Related to plaintiff's claim that the trial court erred in determining that defendants substantially complied with the notice provisions of the OMA are the issues of whether to invalidate a decision made in violation of the OMA and whether to grant or deny injunctive relief. We review for an abuse of discretion a trial court's decisions whether to invalidate a decision made in violation of the OMA and whether to grant or deny injunctive relief. *Morrison*

v East Lansing, 255 Mich App 505, 520; 660 NW2d 395 (2003). It is unclear from the record whether the trial court considered and implicitly denied plaintiff's request to invalidate the treasurer's appointment and request for injunctive relief when it granted summary disposition in favor of defendants, or whether it did not consider the request at all in light of its determination that defendants substantially complied with the notice provisions of the OMA. Because it is unclear whether the trial court exercised its discretion in deciding these issues, remand is appropriate to afford the trial court an opportunity to employ its discretion and explicitly rule on these questions.

Finally, plaintiff argues that the decisions of individual defendants concerning who to hire as a temporary secretary and the preliminary litigation step of retaining a township attorney to represent defendants in this case became township decisions when the township board ratified and acted on them in contravention of the OMA. It appears that the "decisions" which plaintiff challenges were not "decisions" as defined in the OMA. Under a plain reading of MCL 15.262(d), a decision is "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required" *and* "by which a public body effectuates or formulates public policy." Neither of the "decisions" with which plaintiff takes issue were actions by which the township board effectuated or formulated public policy. Rather, they were akin to ministerial choices not subject to the requirements of the OMA. The trial court properly granted summary disposition in favor of defendants on these issues.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens