STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

MICHAEL ZORAN, KYLE SUNDAY,
and AUSTIN ADAMS
Plaintiffs,

-vs-

Case No. W-13-001841-CZ
HON. MICHAEL L. WEST

TOWNSHIP OF COTTRELLVILLE,
and KELLY AN LISCO aka KELLY ANN
FISCELLI-LISCO aka KELLY ANN
FISCELLI
Defendants.

Opinion and Order Regarding Writ of Quo Warranto and Open Meetings Act Violation

The Quo Warranto Claim

Count V of Plaintiff, Michael Zoran's Complaint seeks a writ of Quo Warranto ousting former township supervisor, Defendant, Kelly Fiscelli from her elected office. Specifically, Plaintiff Zoran claims Fiscelli, F/K/A Kelly Lisco vacated the office of supervisor when she moved from Cottrellville Township to the City of Marine City in February 2013, thereby ceasing to be an inhabitant of the Township. The question to be decided by the Court is whether a justiciable controversy presently exists, and if so, what relief, if any, should be ordered.

Fiscelli no longer holds the office of township supervisor as she was removed from that position pursuant to a recall election held in November 2015. Reluctantly, Plaintiff recognizes that this Court cannot remove Fiscelli from an office she does not currently hold. For that reason, Defendants contend the issue of Fisceli's removal from office is

moot and Plaintiff's quo warranto claim must be dismissed. Plaintiff contends his quo warranto claim is not moot because a quo warranto claim provides for additional remedies or sanctions beyond ouster, such as a fine and the assessment of costs. Zoran contends the Court must find Fiscelli vacated her office when she first moved from the Township in February 2013, which would have resulted in her ouster had she not been recalled, and then proceed to order a fine and the assessment of costs as proved in the relevant statute. A review of some of the factual background is necessary.

Factual and Procedural Background

Fiscelli was elected to the office of supervisor in November 2012. At that time Fiscelli lived at an address on Nautical Lane in Cottrellville Township. In late December 2012 or early January 2013 the home was sold and Fiscelli moved to an address within the city of Marine City in mid-February 2013. She remained at the Marine City address until July 22, 2013, at which time she moved back into the Township at an address on River Road. She resided at the River Road address for the remainder of 2013, all of 2014 and until April 3, 2015 when she moved back into the city of Marine City. Fiscelli has resided in Marine City ever since.

The issue of quo warranto first came before the Court on December 17, 2013 pursuant to Plaintiff's motion to amend his complaint and add a quo warranto claim. At that time, Fiscelli was residing in the Township, not in Marine City. Plaintiff's motion to amend the complaint was denied because it appeared to the Court no material facts suggested Fiscelli intended to permanently reside outside the Township. At that time, she was back in the Township and her move to Marine City appeared to be based on personal or financial hardship. Plaintiff appealed this Court's decision. On August 23, 2015 the

Court of Appeals reversed finding that sufficient factual merit existed to justify further inquiry into the quo warranto proceedings. The Court of Appeals was unaware that a recall effort against Fiscelli was under way or that a recall election had been scheduled for November 2015.

On October 19, 2015 Plaintiff filed his renewed motion to amend the complaint and add a quo warranto claim. An order granting leave to amend the complaint adding a quo warranto claim was entered on November 2, 2015, the day before the recall election. The next day Fiscelli was overwhelmingly defeated, thereby removing her from the office of supervisor.

In December 2015, both parties moved for summary disposition regarding the quo warranto claim. Defendant's motion was brought pursuant to MCR 2.116(C)(4)&(5) asserting the quo warranto claim was now moot because Fiscelli's removal from office has already occurred, and that Plaintiff lacks standing because he can no longer claim to be an aggrieved party and seek the affirmative relief of ouster. Plaintiff insists the quo warranto claim is not moot and that the Court must find Fiscelli vacated her office in February 2013 when she moved from the Township to Marine City and that she wrongfully held and usurped the office of supervisor until she was recalled on November 3, 2015. Plaintiff also contends the Court may also impose a fine and must assess costs, even though ouster from office has already occurred.

Analysis

Plaintiff relies on three provisions of the Michigan Compiled laws, MCL 201.3(4), MCL 600.4515, and MCL 600.4511.

MCL 201.3 provides:

> Section 3. Every office shall become vacant, on the beginning of any of the following events before the expiration of the term of such office:
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> ***
>
> 4. His ceasing to be an inhabitant of this state; or, if the office be local, if the district, county, township, city, or village for which he shall have been appointed...

In most cases, when an office holder moves out of the relevant jurisdiction the official resigns from the public office and the vacancy created is filled according to law. If the office holder fails to resign and wrongfully holds over the official can be removed from office in a quo warranto proceeding.

MCL 600.4115 provides:

> Whatever any defendant in a quo warranto proceeding is found or adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise, or privilege, judgment shall be rendered that the defendant be ousted and all together excluded from that office, franchise, or privilege. In addition to awarding costs against the defendant, the court may, in its discretion, impose a fine upon the defendant found guilty not exceeding $2,000.00.

MCL 600.4511 provides:

> When an action is brought against a person for usurping an office and the person rightfully entitled to the office is a party and avers his right to it, and judgment is rendered in his favor, he is entitled to any damages sustained because of the usurpation by the defendant of the office from which the defendant has been evicted. The claim for damages may be joined with the claim for quo warranto, or brought separately within 1 year after the judgment in the action for the quo warranto.

The parties do not dispute the primary remedy available to a successful plaintiff in a quo warranto proceeding is ouster of the official from office. Defendants contend the penalty of a possible fine and the award of costs are supplemental remedies and only available to a Plaintiff who first obtains a judgment of ouster. Plaintiff agrees the action of ouster is a moot point, but contends other relief should still exist. In other words, the

primary remedy of a "judgment...that the defendant be ousted and all together excluded from that office..." cannot be rendered because it is moot. While Plaintiff recognizes he cannot obtain the primary remedy of ouster under MCL 600.4515 he still claims the "addition[al]" remedy of costs and the penalty of a fine can and should be ordered against Fiscelli. Plaintiff's argument lacks sufficient legal support.

MCL 600.4515 does not specify the type of costs to be awarded against a defendant. Plaintiff suggests the "costs" referred to in MCL 600.4515 should include an outright award of attorney fees or an award of attorney fees akin to consequential damages in a Uniform Commercial Code (UCC) case. Plaintiff's argument is without merit. Generally, attorney fees as an element of costs is not available in the absence of a statute, court rule or other authority that specifically provides for it. *Dessart v Burak*, 470 Mich 37, 42 (2004). No such authority exists here. The UCC case relied upon by Plaintiff, *Keelynark v Yomaka Motor Corp*, 52 Mich App 105 (1986) is unique to the situation presented in that case. It does not support an award of attorney fees based upon a generalized theory or argument of consequential damages as litigation expenses.

Because no special or specific costs are set forth in the statute it can be *presumed* that only those costs available to a prevailing party as set forth by statute and court rule can be assessed. MCR 2.625. A prevailing party is one who obtains a judgment that is favorable to him on a disputed issue. An award of costs to a prevailing party is *supplemental* to a favorable outcome of the underlying question. Here, the parties dispute the underlying facts upon which any judgment must be based. Plaintiff believes Fiscelli has usurped and unlawfully held the office of supervisor from February 2013 to November 3, 2015. If the facts support Plaintiff's claim, MCL 600.4515 provides Plaintiff is

entitled to a judgment of ouster, not a declaratory judgment that Fiscelli has usurped the office of supervisor for some period of time and should have been ousted. The latter is an advisory finding that cannot provide the relief specified in the statute. The purpose of Plaintiff's quo warranto action was to remove Fiscelli from office. That purpose is now moot. A quo warranto judgment that provides Fiscelli wrongfully held office for the period in question and for which she should have been ousted has no practical legal effect. In *People v Richmond*, 486 Mich 29, 34-35 (2010) the Supreme Court explained the doctrine of Mootness.

> It is the 'principal duty of this Court...to decide actual cases and controversies.' (citation omitted). That is, '[t]he judicial power...is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.' (citation omitted.) As a result, 'this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before' it. (citation omitted). Although an issue is moot, however, it is nevertheless justiciable if 'the issue is one of public significance that is likely to recur, yet evade judicial review.' (citation omitted). It is 'universally understood...that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, ...or a judgment upon such matter which, when rendered, for any reason, cannot have an practical legal effect upon a then existing controversy.' (citation omitted). Accordingly, a case is moot when it presents 'nothing but abstract questions of law which do not rest upon existing facts or rights.' (citation omitted).

There is no presently existing right to demand Fiscelli's removal from office. Consequently, Plaintiff's quo warranto claim involves nothing but an abstract question of law.

The Michigan Supreme Court recently addressed the issue of mootness in the context of a quo warranto action involving a public official appointed by the governor. In *Davis v Emergency Manager for the Detroit Public Schools*, 491 Mich 899 (2012), the Michigan Supreme Court was presented with a situation similar to this case where a pending quo warranto action was interrupted by an official change to the position of the

public officer in question. In *Davis*, Governor Snyder had appointed Roy S. Roberts as Emergency Manager for the Detroit Public Schools (DPS) on May 4, 2011, with his term to begin on May 16, 2011. Roberts failed to take the oath of office within the time period required by law, and only did so on August 30, 2011. In mid-August 2011, local activist Robert Davis began to pursue a quo warranto action alleging that Roberts' failure to timely take an oath rendered his office vacant pursuant to MCL 201.3(7). Davis' application for quo warranto action was rejected by the Attorney General and subsequently by the Court of Appeals. Davis then filed an application for leave to appeal the decision of the Court of Appeals.

The Supreme Court heard oral arguments on March 8, 2012. While the case was pending before the Supreme Court, Governor Snyder reappointed Roberts as Emergency Manager for the DPS. The reappointment became effective on April 2, 2012, and Roberts took his oath of office on the same day. Consequently, the Supreme Court then had to consider the effect of the reappointment of Roberts on the quo warranto proceeding. The Supreme Court's Order stated, "the application for leave to appeal is DENIED as moot in light of the fact that Roy S. Roberts was reappointed to serve as Emergency Manager for the Detroit Public Schools, effective April 2, 2012, and he signed an Oath of Office on that date." *Id.* at 899. In separate concurring opinions Chief Justice Young and Justice Markman provided minimal but straightforward reasoning. Chief Justice Young stated, "the burden is on Davis to show that there are sufficient grounds to file a complaint for quo warranto to oust Roberts from this position," *Id.* at 904, and found, "there is not sufficient apparent merit to allow Davis to initiate a quo warranto action," *Id.* at 905. Justice

Markman stated, "it is clear that the present controversy concerning the timeliness of the emergency manager's oath has now been rendered moot." *Id.*

In this case, as in *Davis*, the question is whether a quo warranto action is moot when an officer previously served while in violation of MCL 201.3, but was not in a position to be ousted from office at the time of judgment. In *Davis*, Roberts served without having taken an oath of office, but was later properly reinstated in the position. Here, Fiscelli served despite not maintaining continuous residency in the Township, and was later removed from office through the recall election.

The *Davis* decision supports the proposition that a quo warranto action can only be brought to presently oust an officer from his or her current position. Fiscelli does not currently hold a position from which she can be ousted. Further, Justice Young's statement that "the burden is on Davis to show that there are sufficient grounds to file a complaint for quo warranto to oust Roberts from his position," suggests he interprets a quo warranto action as only an action that can oust a person from his or her current position, not whether Davis could be retroactively ousted from his position for the period when he served in violation of MCL 201.3. That reasoning applies here as well.

If Plaintiff is not entitled to present award of "costs" plaintiff contends the quo warranto action is still not moot because Plaintiff is entitled to damages as a part of his quo warranto claim, even if Fiscelli cannot be ousted because she usurped the office of supervisor after having vacated the same in February 2013. Plaintiff appears to be arguing MCL 600.4111 provides him a damages remedy and that the damages referenced in the statute can be assessed as costs against Fiscelli under MCL 600.4515. They cannot, at least not on these facts.

MCL 600.4511 does not apply. While Plaintiff claims Fiscelli has usurped her office, Plaintiff is not a person rightfully entitled to the office of supervisor and asserting his right to it. If that were the case, and if Zoran was found to be entitled to the office and a judgment rendered in his favor, he would be entitled to claim damages sustained because of the usurpation. In this case no other person claimed an entitlement to the office of supervisor until after the recall election and Fiscelli was removed from office. At that time the newly elected supervisor took office without incident.

Plaintiff further claims his quo warranto action is not moot because it will affect a future claim he or someone else intends to bring against Fiscelli pursuant to MCL 129.61 to recover what Plaintiff claims is a misappropriation of public monies wrongfully paid to Fiscelli from February 2013 to November 3, 2015. MCL 129.61 provides the following.

> Sec. 1. Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto. Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or person instituting the same unless and until a recovery of such funds or moneys be obtained as the result of such proceedings.

Plaintiff is correct, in theory. A case is not moot "if it will continue to effect a *party* (emphasis added) in some collateral way." *In re Dodge Estate*, 162 Mich App 573 (1987). However, Plaintiff has not articulated how the absence of a quo warranto judgment against Fiscelli will affect him in some other way. There is no case currently pending against Fiscelli alleging misappropriation of public monies under MCL 129.61. If a private citizen intends

to commence an action under 129.61 that person must be a taxpayer paying taxes to the Township. Plaintiff has failed to provide any evidence that he has the necessary taxpayer standing to bring the lawsuit. Current Township assessment records suggest he does not. Moreover, a successful private citizen suit under MCL 129.61 does not directly benefit the named plaintiff, it benefits the treasury of the public entity.

A case from the Missouri Court of Appeals has similar by distinguishable facts that led the court to find an appeal from a trial court's quo warranto judgment ousting a mayor from office was not moot, even after the mayor was recalled from office after the ouster (and regardless of whether the recall election should be considered void). *State ex rel. McCulloch v Hoskins*, 978 SW2d 799 (Mo. Ct. App. 1998). In that case, the court found that the appeal was not moot because a reversal of the judgment of ouster could have the collateral effect of allowing the mayor to bring a claim for emoluments of office of which he was deprived during that period between the trial court's ouster and recall. *Id.* at 782. In finding no mootness the court also noted the mayor's claim that he would be aggrieved by the trial court's ouster because it was the predicate for a civil action against him in federal district court seeking to impose liability upon him. *Id. In other words, a case or* controversy existed in the mayor's potential claim for pay during the period he was erroneously ousted and in its direct and collateral effect on the separate suit in federal district court alleging his liability because he illegally served as mayor.

This case similarly deals with a period between a cause of action for a quo warranto claim and a subsequent recall. However, the cases differ in what the courts are asked to do, in the collateral effect of the judgment sought, and in whether the plaintiff has a legally cognizable interest in the outcome. *In State ex rel. McCulloch*, the court was asked to find

that the mayor was wrongfully removed from office, and actually should have been in office during the period at issue. Such a finding would allow the mayor to bring a claim for emoluments of office during the period he was improperly ousted. Here, Plaintiff has failed to show he has a cognizable legal interest that could affect him in some collateral way so as to prevent a finding of mootness.

An action pursuant to MCL 129.61 is not dependent upon a finding against Fiscelli in this matter. If the basis for a claim under MCL 129.61 exists it can be pursued as a separate, independent action by a proper plaintiff. Here, Plaintiff has failed to show he will be affected in some collateral way by a finding of mootness on the quo warranto claim. Accordingly, the claim must be dismissed as moot.

The Intentional Violation of Open Meetings Act Claim

This Court previously found Defendant, Cottrellville Township violated the Michigan Open Meetings Act, MCL 15.261 *et seq.*, when it cut short the comments of Plaintiffs Zoran, Sunday and Adams during the public participation segment of its regular board meeting in May 2013. Each of the named Plaintiffs was denied the opportunity to address the board for the full three minutes of their allotted time under the Township's Public Participation Policy. Defendant, Fiscelli, F/K/A Kelly Ann Lisco, was the Township Supervisor and acted as moderator of the meeting. In each case Fiscelli was the person that terminated the Plaintiffs'/speaker's address prior to the three minute time limit. The question before the Court is whether Fiscelli's actions constitute an intentional violation of the Open Meetings Acts as defined in the statute.

Additional Factual Background,
Findings of Fact and Conclusion of Law

On February 12, 2016 this Court conducted a bench trial on the intentional violation claim set forth in Count IV of Plaintiffs' second amended complaint. The Court heard the testimony of Defendant, Fiscelli and received seven exhibits. The testimony and exhibits also included potential evidence on Zoran's quo warranto claim as that matter had not yet been ruled on by the Court and could have involved unresolved questions of fact. The evidence relevant to Count IV consists of portions of Fiscelli's testimony, Plaintiffs' Exhibit 1 (Notice on Public Participation), Exhibit 6 (Video from the May 2013 meeting and Exhibit 7 (Index and time reference for various video clips from the meeting).

The Open Meetings Act provides for both criminal penalties and civil liability for an intentional violation of the act. MCL 15.272(1) and MCL 15.273(1) provide, respectively the following:

> (1) A public official who intentionally violations this act is guilty of a misdemeanor punishable by a fine of not more than $1,000
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> ***
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> (1) A public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action.

This is obviously not a criminal case. It is a civil action brought by three separate plaintiffs against Defendant, Fiscelli. A paucity of appellate authority exists that has applied or interpreted the penalty provisions of the Open Meetings Act cited above. Only one reported case, *People v Whitney*, 228 Mich App 230 (1998) has addressed the crime of intentionally violating the act and what kind of "intent" must exist to support an intentional violation. No appellate authority exists that addresses the intent element that applies in a civil action alleging an intentional violation. Both parties spent a significant amount of time in their briefs discussing *Whitney* and the meaning of an intentional

violation found to apply in that case. Both parties then suggest the *Whitney* standard should be applied by the Court in this civil action. Before that conclusion can be made a further analysis of *Whitney* and the current thinking regarding "specific intent" crimes should be considered.

Because this is a civil action and not a criminal case the applicable burden of proof is the preponderance of evidence standard, not the criminal standard of beyond a reasonable doubt. When legal concepts such as "specific intent" and "specific intent crimes" are borrowed from criminal law and applied to civil actions the potential for problems and confusion can exist. *Whitney* is a criminal case that was tried before a jury involving a criminal standard of proof. When *Whitney* was decided crimes would often be categorized by the court as general intent crimes or specific intent crimes based upon the type of *mens rea* set forth in the statute or common law. If the crime was a specific intent crime a jury would be instructed on what specific intent meant. Evidence supporting specific intent would have to exist to satisfy the criminal standard of proof and support a conviction.

In *Whitney*, the Court of Appeals concluded MCL 15.272(1) was a specific intent crime and the jury was not adequately instructed regarding the mental state necessary to intentionally violate the act. The *Whitney* court interpreted intentionally violating the act to mean a subjective desire to violate the act or knowledge the offender is committing an act violative of the Open Meetings Act. *Whitney* at 256. Recklessness or even deliberate ignorance was held to be insufficient to replace the specific intent essential to commit a specific intent crime. *Id.*

In 1998 when *Whitney* was decided the standard criminal jury instructions included an instruction regarding the meaning of specific intent for specific intent crimes. The instruction was deleted by the committee in May 2005. The decision to delete the instruction was premised on the Supreme Court's opinion in *People v Maynor*, 470 Mich 289 (2004).

In *Maynor*, the issue involved the intent necessary to support the crime of first degree child abuse. The Court of Appeals concluded first degree child abuse is a specific intent crime. The Supreme Court granted leave on the limited issue of whether it is sufficient to instruct the jury on the statutory language regarding intent, which in that case was "knowingly or intentionally causing serious physical or serious mental harm to a child", MCL 750.136b(2), or whether it is also necessary to instruct the jury regarding specific intent. The court reasoned,

> [I]t is unnecessary for the jury to be given further instruction on "specific intent," such as that found in CJI2d 3.9 The need to draw the common-law distinction between "specific" and "general" intent is not required under the plain language of the statute, as long as the jury is instructed that it must find that defendant either knowingly or intentionally caused the harm. Moreover, the enactment of MCL 768.37, which abolished the defense of voluntary intoxication except in one narrow circumstance, has significantly diminished the need to categorize crimes as being either "specific" or "general" intent crimes. *Maynor* at 296-297.

All that remains of former CJI2d 3.9 is the third paragraph now found in CJI 2d 4.16 which states:

> The defendant's intent may be proved by what [he/she] said, what [he/she] did, how [he/she] did it, or by any other facts and circumstances in evidence.

In *Maynor*, the criminal statute contained the language "knowingly or intentionally" which the court found to be sufficient to describe the necessary intent to cause physical or

mental harm to a child. Since *Maynor* was decided the approach has been to move away from the traditional notions of specific intent addressed in older decisions and focus more on the facts and circumstance that bear on the questions of intent, such as what a defendant said when doing an act, what a defendant did and how defendant did it. All of these inquiries relate to a level of knowledge regarding a particular subject matter and the consequences of particular actions. Whether the facts prove the requisite intent is to be determined by the trier of fact based upon the evidence.

Whether *Whitney* was correctly decided on the question of general intent or specific intent is not for this court to decide. However, it is unlikely the issue in *Whitney* regarding the intent element under the Open Meeting Act would be analyzed the same way today. That should not mean the rationale behind the general verses specific intent distinction had no place under a present day intent analysis. Likewise, it should not matter whether the intent required applies equally to a criminal case or a civil action, except when applying the burden of proof. Barring the unusual situation when a defendant admits to having a subjective intent to violate the Open Meetings Act, intent must be inferred based upon relevant direct and circumstantial evidence. Claims of ignorance must be contrasted with evidence against it. The totality of the circumstances must be examined to determine a defendant's state of mind and whether culpable knowledge exists. This is the "intent" standard that will be applied in this case.

In this case the evidence shows Fiscelli was familiar with the public participation policy and referred to it as being located at the podium for speakers to review. She reminded speakers if they would not follow the policy they would be asked to leave. Her testimony shows she knew it was in place because of the Open Meetings Act, even though

she never actually read the Open Meeting Act. Critical to this issue is the element of time. Fiscelli testified it was the usual practice for either the Clerk or Sergeant-of-Arms to keep time and then signal to her when the time was up. This practice appeared to be in place at the May 2013 meeting. The video evidence shows an exchange between Fiscelli and an audience member regarding whether a speaker's time was up. This speaker was critical of Mr. Zoran. Fiscelli stated "my Sergeant-of-Arms is timing it, thank you." The Sergeant-at-Arms then says, "Not yet".

The video evidence is clear. It shows in each case Plaintiffs Zoran, Sunday and Adams were not allowed to speak for three full minutes and Fiscelli is the one that terminated their presentations well short of a full three minutes. No evidence suggests this was done due to a mistake in time keeping. Fiscelli had not been informed by the Sergeant-at-Arms time had expired for any of the Plaintiffs' presentations. Fiscelli's actions clearly show she meant to stop them. Because failure to follow the public participation policy can result in a presentation being terminated early the reason for the early termination must be examined.

Kyle Sunday was first of the three plaintiffs to speak. His presentation was somewhat awkward in that it was largely in the format of questions being addressed to Fiscelli regarding her legal problems and her fitness for office. Fiscelli advised Sunday she does not discuss her personal business and if he continued he would be excused. Sunday then changed the focus of his presentation to that of supporting Zoran's actions as a board member and Zoran's idea of reviving an ordinance committee. Fiscelli told Sunday his time was up when he actually had 45 seconds remaining. Arguably, Sunday's remarks about Fiscelli's personal legal issues could have been considered beyond the "common courtesy"

requirement in the public participation policy, but he was not stopped for that reason. He had moved on as Fiscelli directed him, but she decided to stop him without further explanation.

Austin Adams was next. He did not provide his address. Fiscelli insisted that he provide his address and he politely declined. Trustee Zoran then stated there is no legal requirement to provide an address. Fiscelli then stated. "It's a requirement of my meeting, thank you Michael." Fiscelli had failed to demand an address from other speakers that also failed to provide one. She allowed them to speak without terminating their presentations.

Adams continued to speak challenging Fiscelli's fitness for office and criticizing the Board's treatment of Zoran at the April 2013 meeting. After speaking for about half of his allotted time Fiscelli terminated Adam's presentation because he did not provide an address. Fiscelli testified she intended to stop Adams early. The public participation policy does not require that an address be given and Fiscelli has provided no legal authority for such a requirement.

After Adams presentation was stopped Zoran indicated he wanted to make a comment. Fiscelli refused to allow him to speak from his seated position as a board member and told him he needed to go to the podium to speak, the same as any other resident. Zorn was on his way to the podium to speak when he was stopped by Fiscelli so two other presenters could speak. When it appeared no one else wished to speak Zoran was allowed to speak. One of the speakers that Fiscelli allowed to bump Zoran exceeded his three minute allotment and was allowed to conclude his presentation without interruption until he was finished.

When Zoran was allowed to speak he was critical about what he claimed was a lack of proper notification to the public for a prior meeting and his opinion on how the Township awarded contracts which he viewed as public corruption. He did not attack or criticize Fiscelli directly. Zoran's address was terminated at the 02 minute, 04 second mark.

Fiscelli's actions at the very least are ill informed and unprofessional, and at the worst, discriminatory and a suppression of free speech. Without question, Fiscelli's actions demonstrate a pattern of restricting public participation comment that is supportive of Mr. Zoarn or his positions on Township issues. When Mr. Zoran is the subject of personal attacks and criticism Fiscelli seems content to not intervene and allow the speaker to continue. However, when Fiscelli was the subject of criticism and personal attacks she was obviously flustered by them. She was able to re-direct the comments of Mr. Sunday away from the specifics of her personal criminal issues, but she never settled into the fact that Adams, Sunday and Zoran were commenting on the subjects she did not want to hear and that they were entitled to continue speaking. When ***she*** thought it was enough ***she*** terminated their presentations. She did not ask the Sergeant-at-Arms about remaining time, nor was she advised the time was up.

The totality of the circumstances demonstrate that Fiscelli intended to violate the Open Meetings Act. Her claims of ignorance about the specifics of the Open Meetings Act from never having read the statute and her relative lack of experience in the position of Supervisor is belied by her actions and statements. She knew the public participation policy and the three minute timeframe was an extension of the Open Meetings Act and the purposes behind open and transparent government. She had no actual knowledge or legitimate basis to believe Plaintiffs' time limits had expired, but she chose to terminate

their presentations. It was intentional, not accidental or inadvertent. Therefore, Fiscelli is personally liable to each of the Plaintiffs for intentionally violating the Open Meetings Act.

Plaintiffs have not claimed to have suffered any actual damages due to Fiscelli's intentional violation of the Open Meeting Act. However, Plaintiffs are entitled to an award of exemplary damages. Accordingly, each of the Plaintiffs shall be awarded the sum of $250 against Defendant Fiscelli as exemplary damages. Plaintiffs are also entitled to an award of costs and attorney fees pursuant to MCL 15.273(1) in an amount to be determined, after which time a final judgment shall be entered consistent with this opinion and order.

IT IS SO ORDERED

May 25, 2016

Michael L. West
Circuit Judge