

STATE OF MICHIGAN
IN THE SUPREME COURT

KENNETH J. SPEICHER, an Individual,

Plaintiff-Appellee,

v

COLUMBIA TOWNSHIP BOARD OF
TRUSTEES and COLUMBIA TOWNSHIP
PLANNING COMMISSION,

Defendants-Appellants.

Supreme Court No. 148617

Court of Appeals No. 306684

Van Buren County Circuit Court
No. 11-600857-CZ

Hon. Paul E. Hamre

John J. Bursch (P57679)
Counsel of Record
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000

Robert W. Smith (P31192)
SILVERMAN, SMITH & RICE, P.C.
151 South Rose Street, Suite 707
Kalamazoo, Michigan 49007
269.381.2090

Attorneys for Plaintiff-Appellee

Mary Massaron Ross (P43885)
Robert A. Callahan (P47600)
PLUNKETT COONEY
38505 Woodward Avenue, Suite 200
Bloomfield Hills, Michigan 48304
248.901.4000

Attorneys for Defendants-Appellants

148617
AE's Supplemental
**APPELLEE KENNETH J. SPEICHER'S SUPPLEMENTAL BRIEF
ORAL ARGUMENT REQUESTED**

FILED

JUL 23 2014

LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF QUESTION PRESENTED.....	iv
STATUTORY LANGUAGE AT ISSUE.....	v
INTRODUCTION.....	1
BACKGROUND.....	2
I. Columbia Township’s history with the OMA.....	2
II. Proceedings below	3
ARGUMENT.....	5
Both the plain text of the Open Meetings Act and the policies underlying it support an award of costs and actual attorney fees when a plaintiff files an injunctive action and receives a declaratory judgment.....	5
CONCLUSION AND REQUESTED RELIEF	10

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Booth Newspapers, Inc v University of Michigan Bd of Regents</i> , 444 Mich 211, 221; 507 NW2d 422 (1993)	5, 7
<i>Craig v Detroit Pub Schs Chief Executive Officer</i> , 265 Mich App 572; 697 NW2d 529 (2005);	4
<i>Davis v Wayne County Airport Authority</i> , COA No. 308919 (April 18, 2013).....	4
<i>Manning v East Tawas</i> , 234 Mich App 244; 609 NW2d 574 (2000)	4
<i>Morrison v City of East Lansing</i> , 255 Mich App 505; 660 NW2d 395 (2003)	4
<i>Nicholas v Meridian Charter Twp Bd</i> , 239 Mich App 525; 609 NW2d 574 (2000)	4
<i>People v Peltola</i> , 489 Mich 174, 185; 803 NW2d 140 (2011)	1, 6
<i>Ridenour v Dearborn School District Board of Education</i> , 111 Mich App 798; 314 NW2d 760 (1981)	8, 9
<i>Russello v United States</i> , 464 US 16, 23 (1983)	6
<i>Schmiedicke v Clare Sch Bd</i> , 228 Mich App 259; 577 NW2d 706 (1998)	4
<i>Speicher v Columbia Township Board of Election Commissioners</i> , Van Buren County Case No. 10-60-345 CZ	2, 3
<i>Speicher v Columbia Township Board of Trustees</i> , COA No. 313158 (Feb. 25, 2014)	3
<i>Speicher v Columbia Township</i> , COA No. 298016 (Sept. 20, 2011)	2, 6, 9
<i>WPW Acquisition Co v City of Troy</i> , 466 Mich 117, 124-125; 643 NW2d 564, 568 (2002)	7

State Statutes

MCL 15.271.....passim

State Rules

MCR 2.6056

MCR 7.2154

Other Authorities

1968 PA 2615

STATEMENT OF QUESTION PRESENTED

Whether a plaintiff who (1) commences an action against a public body for injunctive relief to compel compliance, or to enjoin further noncompliance, with the Open Meetings Act, and (2) succeeds in obtaining a declaratory judgment, has “obtain[ed] relief” and is thus entitled to an award for court costs and actual attorney fees under MCL 15.271(4).

STATUTORY LANGUAGE AT ISSUE

MCL 15.271(4) states, in relevant part:

If a public body is not complying with this act, and a person commences a civil action against the public body **for injunctive relief** to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining **relief** in the action, the person shall recover court costs and actual attorney fees for the action.

INTRODUCTION

It is undisputed that Columbia Township did “not comply[] with” the Open Meetings Act. MCL 15.271(4). It is also undisputed that Mr. Speicher “commence[d] a civil action against [the Township] for injunctive relief to compel compliance or to enjoin further non-compliance with” the Act. *Id.* The only remaining question is whether Mr. Speicher “succeed[ed] in obtaining *relief* in the action” he filed. *Id.* (emphasis added). And he undoubtedly did: the Court of Appeals held specifically that Mr. Speicher was entitled to “declaratory *relief*.” (1/22/13 COA Slip op. at 1 (emphasis added).)

The Township tries to rewrite MCL 15.271(4) to require that Mr. Speicher “succeed[] in obtaining *injunctive* relief in the action.” But under this Court’s well-settled interpretive canons, when the Legislature includes language in one portion of a statute but omits that language from another, “it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion.” *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). So when the Legislature said an OMA plaintiff was entitled to attorney fees after “obtaining relief,” the Legislature did not mean after “obtaining injunctive relief.” That is the end of the analysis.

In derogation of the statutory language, the Township advances a policy argument: “If there is no reason to believe that a public body will deliberately fail to comply with the Open Meetings Act in the future, injunctive relief is unwarranted” (Twp. App. at 25), and the courts should not award fees. But if the Legislature wanted to adopt that policy, it could have easily done so by specifying that attorney fees are appropriate only when a plaintiff obtains “injunctive relief.” It did not choose that route, and with good reason. If governments could avoid paying fees simply by promising to abide by the Open Meeting Act in the future, plaintiffs would never be compensated in such actions, deterring citizens from even trying to enforce the Act. Because the Legislature did not desire that result, the Court of Appeals should be affirmed.

BACKGROUND

I. Columbia Township's history with the OMA

This case involves a single instance where Columbia Township violated the Open Meetings Act. But it is only the latest in a series of lawsuits necessitated by the Township's persistent inability or refusal to comply with the Act's most basic requirements.

In 2009, after Township officials ignored repeated complaints about Open Meeting Act violations, Plaintiff (and former Township clerk) Ken Speicher made a written request pursuant to the Open Meetings Act that the Township provide him copies of any notice that the Act required the Township to post. The Court of Appeals, acknowledging that it was undisputed the Township failed to provide the requested notices, reversed the trial court's dismissal of the suit and held that the Township had violated the Open Meetings Act. *Speicher v Columbia Township*, COA No. 298016 (Sept. 20, 2011). In the same action, the Court of Appeals ruled that there were factual questions regarding whether the Township, acting in an intra-corporate conspiracy, excluded Mr. Speicher from the process of selecting a new Township treasurer amid allegations that Township board members were acting "for a personal purpose of their own" and "out of self-interest." *Id.* And the Court also concluded that the Township's posted notices did not substantially comply with the OMA's requirements, and that the Township may have deliberately kept notice of the meeting from another individual who was interested in the treasurer position. *Id.* The Township settled the suit with Speicher on remand.

Soon thereafter, the Township wrongfully refused to allow Speicher to make a comment at a public meeting. Speicher filed another Open Meetings Act suit, *Speicher v Columbia Township Board of Election Commissioners*, Van Buren County Case No. 10-60-345 CZ. Although the Township has conceded liability (though denying any intentional wrongdoing), it is still fighting the trial court's decision that Speicher is entitled to appellate attorney fees.

The Township then appointed a fire chief in 2010 but made its decision based on interviews that were not open to the public. The trial court ruled that the Township Board violated the Open Meetings Act, and the court enjoined the Board from further noncompliance. The Court of Appeals reversed that part of the trial court's ruling that denied Speicher his costs and attorney fees and remanded so those expenses could be calculated. *Speicher v Columbia Township Board of Trustees*, COA No. 313158 (Feb. 25, 2014).

Next, in a highly publicized 2011 dispute, the Township refused to consider Mr. Speicher and another Township resident for election inspectors. The Court of Appeals again was forced to reverse the trial court, concluding that the Township violated the Open Meetings Act, this time for failing to include the roll-call votes involving the election-inspector decisions in the relevant meeting minutes or in any corrected minutes. *Speicher v Columbia Township Board of Election Commissioners*, COA No. 312209 (April 29, 2014).

II. Proceedings below

In the instant case, the Columbia Township Board of Trustees and its Planning Commission failed to post notice of a change to the Planning Commission's meeting schedule from monthly to quarterly. "Because defendants plainly violated the OMA," ruled the Court of Appeals, "the trial court erred in failing to grant declaratory relief." *Speicher v Columbia Township Board of Trustees*, COA No. 306684 (Jan. 22, 2013). But the Court of Appeals affirmed the trial court's denial of injunctive relief because the Township's failure to comply with the Act "was a technical violation of the OMA, there was no evidence that the Commission had a history of OMA violations, there was no evidence that this violation was done willfully, and there was no evidence that the public was harmed in any manner by this OMA violation." (*Id.*, Slip op. at 2.) In the absence of injunctive relief, the Court of Appeals denied Speicher his costs and attorney fees under MCL 15.271(4).

Speicher filed a motion for reconsideration solely on the attorney-fee issue, and in a December 19, 2013 order, the Court of Appeals granted it. Although the panel disagreed with the outcome, the panel considered itself bound by the long line of Court of Appeals precedent holding that an Open Meetings Act plaintiff is entitled to costs and attorney fees when that plaintiff obtains “relief,” as MCL 15.271(4) specifies, even if the plaintiff does not obtain an injunction. See, e.g., *Craig v Detroit Pub Schs Chief Executive Officer*, 265 Mich App 572; 697 NW2d 529 (2005); *Morrison v City of East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000); *Manning v East Tawas*, 234 Mich App 244; 609 NW2d 574 (2000); *Schmiedicke v Clare Sch Bd*, 228 Mich App 259; 577 NW2d 706 (1998). Indeed, only one year ago, a different Court of Appeals panel (Judges Owens, Whitbeck, and Ford Hood) held that an Open Meetings Act plaintiff was entitled to costs and attorney fees under MCL 15.271(4) when he obtained declaratory relief but not an injunction, holding that the outcome was dictated by precedent and the statutory plain language. *Davis v Wayne County Airport Authority*, COA No. 308919 (April 18, 2013). The panel here recommended a special conflict resolution panel under MCR 7.215(J)(2), but the Court of Appeals rejected that suggestion. (1/14/14 Order.)

The Township then filed its application for leave, asserting that cases interpreting MCL 15.271(4) were “muddled” and in need of this Court’s review. (Twp. App. at v.) This Court then directed the Clerk to schedule oral argument on whether to grant the application and invited the parties to submit supplemental briefs “addressing whether MCL 15.271(4) authorizes an award of attorney fees and costs to a plaintiff who obtains declaratory relief regarding claimed violations of the Open Meetings Act, or whether the plaintiff must obtain injunctive relief as a necessary condition of recover fees and costs under MCL 15.271(4). (6/11/14 Order.)

ARGUMENT

Both the plain text of the Open Meetings Act and the policies underlying it support an award of costs and actual attorney fees when a plaintiff files an injunctive action and receives a declaratory judgment.

Before 1968, Michigan laws addressing accountability and openness in government consisted of a “patchwork.” *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 221; 507 NW2d 422 (1993). The Legislature tried to address the problem by enacting an open meetings law that applied to most public bodies. See 1968 PA 261. But “because the 1968 statute failed to impose an enforcement mechanism and penalties to deter noncompliance, nothing prevented the wholesale evasion of the act’s provisions.” *Booth Newspapers*, 444 Mich at 221 (citation omitted).

The current Open Meetings Act resulted from the Legislature’s efforts to fix the 1968 statute “and to promote a new era in governmental accountability.” *Id.* at 222. Members of the Legislature praised the act as “a major step forward in opening the political process to public scrutiny.” *Id.* (quotation omitted). And to advance that purpose, Michigan courts have “historically interpreted the statute broadly, while strictly construing its exemptions and imposing on public bodies the burden of proving that an exemption exists.” *Id.* at 223 (numerous citations omitted).

The plain language of MCL 15.271(4) specifies that an Open Meetings Act plaintiff is entitled to costs and actual attorney fees whenever three conditions are met: (1) “[i]f a public body is not complying with this act,” (2) “a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act,” and (3) the person “succeed in obtaining relief in the action.” MCL 15.271(4) (emphasis added). It is undisputed that Speicher satisfies the first two conditions here; the only question is whether a declaratory judgment constitutes “relief.”

The answer has to be yes. As the Court of Appeals held below, Mr. Speicher was entitled to “declaratory *relief*” based on Columbia Township’s violation of the Open Meetings Act. (1/22/13 COA Slip op. at 1 (emphasis added).) And that holding is consistent with the Michigan Court Rules, which specifically recognize declaratory judgments as an alternative form of “relief” in appropriate cases. See MCR 2.605(C) (“The existence of another adequate remedy does not preclude a judgment for declaratory *relief* in an appropriate case.”) (emphasis added); accord MCR 2.605(A)(1) (“In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not *other relief* is or could be sought or granted”) (emphasis added); MCR 2.605(A)(2) (“an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought *relief other than a declaratory judgment*”) (emphasis added); MCR 2.605(B) (“The procedure for obtaining *declaratory relief* is in accordance with these rules . . .”) (emphasis added).

The Township’s argument is that when the Legislature said in MCL 15.271(4) that a plaintiff is entitled to costs and attorney fees if he obtained “relief” in an OMA action, what the Legislature really meant to say was “injunctive relief.” But that argument violates two separate canons of statutory interpretation, and its acceptance would completely undermine the Open Meetings Act’s purpose.

The first interpretive canon is that when the Legislature includes language in one portion of a statute but omits that language from another, “it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion.” *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011) (citing *Russello v United States*, 464 US 16, 23 (1983)). So the courts must assume that if the Legislature had wanted to limit attorney-fee awards under the Act, it would have made them available only when a plaintiff obtained “injunctive relief.”

The Legislature did not write the statute that way, and this Court should reject the Township's invitation to re-write the law. As explained below, there was a very specific policy reason for the Legislature to draft the statute in such a way as to authorize an attorney-fee award regardless of the kind of relief ultimately awarded to an Open Meetings Act plaintiff.

The second applicable interpretive canon is the one this Court noted in *Booth Newspapers* that the Open Meetings Act should be interpreted broadly, and its exemptions construed narrowly. 444 Mich at 223. Interpreting the Act's substantive provisions broadly maximizes the accountability and openness the Legislature was trying to promote, and interpreting the Act's attorney-fees provision broadly encourages private citizens to police government actors to ensure compliance with the Act.

Giving the word "relief" its broadest interpretation, a plaintiff who sues for injunctive relief and obtains declaratory relief falls easily within MCL 15.271(4)'s ambit. Indeed, to construe the provision in this way hardly requires a "broad" interpretation at all; such a construction is more accurately described as applying the statutory plain language.

The problem with the Township's policy-based (rather than text-based) interpretation is twofold. First, it defies the plain-language approach that this Court follows when interpreting legislative enactments. E.g., *WPW Acquisition Co v City of Troy*, 466 Mich 117, 124-125; 643 NW2d 564, 568 (2002). And second, the Township's interpretation promotes bad policy, because it allows a governmental unit to escape attorney-fee liability simply by promising a trial court that it will not violate the Act in the future. (Indeed, that appears to be how Columbia Township has repeatedly persuaded the local circuit court to reject attorney-fee awards in Speicher's lawsuits involving the Township's repeated violations of the Act, resulting in the seriatim of Court of Appeals reversals noted above.) But such a commitment is a classic pie-crust promise: easily made and easily broken.

The Court of Appeals recognized that reality in *Ridenour v Dearborn School District Board of Education*, 111 Mich App 798; 314 NW2d 760 (1981), the decision that the panel below characterized as “the genesis of th[e] entire line of cases” awarding attorney fees to Open Meetings Act plaintiffs who obtained declaratory but not injunctive relief. There, the plaintiff sought an injunction for the school district’s violation of the Open Meetings Act, and the trial court entered a declaratory judgment in the plaintiff’s favor, indicating that a permanent injunction was also appropriate. 111 Mich App at 801. But the school district’s counsel represented that an injunction was unnecessary, “since the defendant would comply with the court’s interpretation.” As a result, the trial court did not enter an injunction, but still awarded attorney fees. *Id.* The Court of Appeals affirmed, apparently recognizing that the Legislature chose to incentivize private attorneys general to enforce the Open Meetings Act by widening the gateway to an attorney-fee award to include not only plaintiffs who successfully obtain injunctive relief, but plaintiffs who sue to enforce the Act and obtain any “relief” at all.

In other words, unless the courts desire to rewrite the Open Meetings Act so defendants can escape attorney-fee liability in nearly every instance, *Ridenour* has to be correct. It cannot be the case that private attorneys general are deprived of costs and attorney fees simply because of a defendant’s promise to behave. Indeed, in criticizing the existing line of Court of Appeals precedent, the panel below did not take issue with *Ridenour* at all. Slip op. at 5 (“[W]e need not consider whether *Ridenour*’s concept of relief ‘equivalent’ to an injunction is adequate for the recovery of attorney fees and costs”). So even the panel was comfortable with an attorney-fee award where an injunction did not issue in the circumstance based on the defendant’s promise to comply with the Open Meetings Act in the future. *Id.* Yet the panel failed to recognize that the circumstances are not materially different here.

Consider the panel's reasoning as to why Speicher was not entitled to injunctive relief: (1) the Township committed only a "technical violation of the OMA," (2) "there was no evidence that the Commission had a history of OMA violations," (3) "there was no evidence that this violation was done willfully," and (4) "there was no evidence the public was harmed . . . by this OMA violation." (12/19/13 Slip op. at 2.) As one would expect in a statute that attempts to incentivize private attorneys general to police Open Meetings Act violations, MCL 15.271(4) contains no exceptions for technical violations, does not ask about a local government's intent when violating the Act, and does not require proof of harm as a condition for an attorney-fee award. That leaves the Township's lack of "a history of OMA violations," a factor that, like the circumstances in *Ridenour*, suggests an injunction is unnecessary because there are unlikely to be future OMA violations.

But the panel need only have looked at its own opinions database to see that the Township is a serial violator of the Open Meetings Act (and the opinions database only reflects those instances when suit was filed and a decision appealed). Moreover, the Township's violations have frequently involved decisions crucial to the Township's constituents, and the violations have often occurred in contexts suggesting intentional conduct. (E.g., the record in *Speicher v Columbia Township*, COA No. 298016 (Sept. 20, 2011), caused the Court of Appeals to question whether the Township may have deliberately kept notice of a meeting from an individual who was interested in the Township's treasurer position.) The fact that the Township is again promising not to violate the law does not provide much assurance. More important, that pie-crust promise is no reason to excuse the Township from paying Speicher for—yet again—having to police the Township's illegal conduct. This case, like *Ridenour*, presents exactly the circumstances the Legislature anticipated when it eschewed the modifier "injunctive" before the word "relief" in explaining when an OMA plaintiff is entitled to attorney fees.

CONCLUSION AND REQUESTED RELIEF

The Legislature enacted the Open Meetings Act in response to a recognized need for private attorney generals to enforce the Act's provisions and thereby promote openness and transparency in government. The only way for the Act to work is to properly incentivize private plaintiffs to file suit. So the Legislature spelled out precisely when private plaintiffs are entitled to their costs and attorney fees: when the plaintiff receives "relief." Not "injunctive relief." *Any* "relief." This Court should reject the Township's cavalier suggestion to rewrite the statute's plain language in such a way that would allow government officials to evade the attorney-fee obligation merely by promising to follow the Act in the future and evading an injunction. If the Legislature had desired such a result, it would have said so.

Accordingly, Mr. Speicher respectfully requests that the Court deny the Township's application for leave to appeal or, alternatively, affirm the award of costs and attorney fees (including appellate fees) in a summary opinion.

Respectfully submitted,

Dated: July 22, 2014

WARNER NORCROSS & JUDD LLP

By John J. Bursch (By O&A P#8719 with admission)
John J. Bursch (P57679)
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000

Robert W. Smith (P31192)
SILVERMAN, SMITH & RICE, P.C.
151 South Rose Street, Suite 707
Kalamazoo, MI 49007
269.381.2090

Attorneys for Plaintiff-Appellee