

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

SHANNON BITTERMAN,

Plaintiff-Appellant,

v

CHERYL D. BOLF,

Defendant-Appellee. /

Supreme Court No. 151520

Court of Appeals No. 319663

Lower Court No. 13-019397-CZ-2

DEFENDANT-APPELLEE CHERYL BOLF'S SUPPLEMENTAL BRIEF

MARY MASSARON (P43885)
AUDREY J. FORBUSH (P41744)
RHONDA R. STOWERS (P64083)
PLUNKETT COONEY
Attorneys for Defendant-Appellee
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304
(313) 983-4801
E-mail: mmassaron@plunkettcooney.com

TABLE OF CONTENTS

	Page(s)
Table of authorities	i
Statement of the question presented	iv
Statement of facts.....	1
A. Nature of the action	1
B. Material facts.....	1
C. Material proceedings	5
Statement of appellate jurisdiction.....	8
Argument	9
The Term “Public Official” Under Section 13(1) Of The Open Meetings Act, MCL 15.273(1) Potentially Imposes Civil Liability <i>Only</i> On Those Public Officials Who Are Members Of A “Public Body” As Defined In MCL 15.262(2)(a)	9
A. The interpretative process requires the Court to consider of MCL 15.273(1)'s use of the phrase "public official" within its context to find its meaning.....	9
B. The meaning of "public official" as used within MCL 15.273(1) can best be gleaned by considering the words within the provision and the provision within the Open Meetings Act as a whole.....	10
C. Bitterman's arguments are inconsistent with this Court's teachings on contextual reading of statutes, past analysis of how to interpret the meaning of "public official" in other statutes, and a proper reading of the phrase “public official” in the context of MCL 15.273.....	16
D. Alternatively, Bitterman failed to establish the requisite intent necessary to sustain a violation of the Open Meetings Act.....	23
Conclusion.....	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bowerman v Sheehan</i> , 242 Mich 95; 219 NW 69 (1928)	15
<i>Breighner v Michigan High School Athletic Association, Inc</i> , 471 Mich 217; 683 NW2d 639 (2004)	10
<i>Burnett v Moore</i> , 111 Mich App 646; 314 NW2d 458 (1981)	21, 22
<i>Fowler v Bd of Registration in Chiropody</i> , 374 Mich 254; 132 NW2d 82 (1965)	9
<i>Hagen v Dep't of Ed</i> , 431 Mich 118; 427 NW2d 879 (1988)	9
<i>Macomb County Prosecuting Attorney v Murphy</i> , 464 Mich 149; 627 NW2d 247 (2001)	17
<i>Mastro Plastics Corp v Nat'l Labor Relations Bd</i> , 350 US 270; 76 S Ct 349; 100 L Ed 309 (1956).....	9
<i>Mayor of the City of Lansing v Michigan Public Service Comm'n</i> , 470 Mich 154; 680 NW2d 840 (2004)	10, 16
<i>McCarthy v Bronson</i> , 500 US 136; 111 S Ct 1737; 114 L Ed 2d 194 (1991).....	9
<i>Miller-Davis Co v Ahrens Constr, Inc (On Remand)</i> , 296 Mich App 56; 817 NW2d 609 (2012).....	23
<i>People v Coutu</i> , 459 Mich 348; 589 NW2d 458 (1999)	17
<i>People v Whitney</i> , 228 Mich App 230, 240; 578 NW2d 329 (1998)	6, 14, 15, 19, 24
<i>Ritchie v Coldwater Community Sch</i> , No 11-530, 2012 WL 2862037 (WD Mich July 11, 2012).....	14, 15
<i>Schobert v Inter-Co Drainage Board</i> , 342 Mich 270; 69 NW2d 814 (1955)	17
<i>State Bd of Ed v Houghton Lake Community Schools</i> , 430 Mich 658; 425 NW2d 80 (1988).....	9
<i>Sun Valley Foods Co v Ward</i> , 460 Mich 230; 596 NW2d 119 (1999)	9

Sweatt v Dep't of Corrections,
468 Mich 172; 661 NW2d 201 (2003) 9

Throop v Langdon,
40 Mich 673 (1879) 22

Tyler v Livonia Pub Schools,
459 Mich 382; 590 NW2d 560 (1999) 9

Court Rules

MCR 7.203(H)(1)..... 8

MCR 7.215(J)(1) 22

Statutes

General Law Village Act..... 15, 21

Incompatible Offices Act 17

MCL 15.181b 17

MCL 15.261 *et seq.* 14, 19, 23

MCL 15.262..... 17

MCL 15.262(2)(a) iv, 9

MCL 15.262(a)..... 21

MCL 15.263..... 10

MCL 15.264..... 10

MCL 15.265..... 10

MCL 15.266..... 10

MCL 15.267..... 10, 20

MCL 15.267(1) 18, 20

MCL 15.267(2) 20

MCL 15.268..... 10

MCL 15.269..... 10, 12, 13, 22

MCL 15.269(1) 23

MCL 15.271..... 18

MCL 15.272..... 10, 18, 19, 21

MCL 15.273..... 1, 5, 10, 12, 14-19, 21

MCL 15.273(1) iv, 9, 10

MCL 62.1..... 18, 19, 21

MCL 62.1(1)..... 15

MCL 64.5..... 18, 19, 21, 23

MCL 64.8a..... 21

Open Meetings Act.....iv, 1, 4-7, 9-12, 14-25

Miscellaneous

BLACK'S LAW DICTIONARY (6th ed.).....9, 21

ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF
LEGAL TEXTS (2012) 15

STATEMENT OF THE QUESTION PRESENTED

Does the term “public official” under Section 13(1) of the Open Meetings Act, MCL 15.273(1) potentially impose civil liability *only* on those public officials who are members of a “public body” as defined in MCL 15.262(2)(a)?

The Saginaw County Circuit Court answered "yes."

The Court of Appeals answered “yes.”

Plaintiff-Appellant Shannon Bitterman answers “no.”

Defendant-Appellee Cheryl D. Bolf answers “yes.”

STATEMENT OF FACTS

A. Nature of the action

Plaintiff-Appellant Shannon Bitterman brought this lawsuit under the Open Meetings Act, MCL 15.273, to challenge Defendant-Appellee Village of Oakley Clerk Cheryl Bolf's purportedly improper alteration to minutes of the Village of Oakley Board of Trustees meeting. Upon the parties' cross-motions for summary disposition, the Saginaw County Circuit Court granted summary disposition in Bolf's favor on the basis that she was not a member of a public body subject to liability under the Act. Bitterman challenged that ruling on appeal. The Court of Appeals affirmed the circuit court ruling in favor of Bolf. Bitterman sought leave to appeal. And in response to Bitterman's application for leave to appeal, this Court ordered supplemental briefing and oral argument. (Order, 11/25/15).

B. Material facts¹

This lawsuit concerns the minutes of the Village of Oakley Board of Trustees meeting that took place on November 8, 2012. (**Exhibit A**, Complaint). On that date, both an open meeting and a closed meeting took place. (**Exhibit D-1**, Bolf dep, pp 26, 35-36). The meeting began in open session, went into closed meeting, then returned to open session, from which it adjourned. *Id.*

Cheryl Bolf attended those meetings in her elected capacity as the Clerk of the Village of Oakley. *Id.*, p 11. At Village meetings, the Clerk generally takes handwritten notes, which she later types into a written format. *Id.*, pp 14-15. Copies of these unapproved

¹ These facts were accepted by Bolf for purposes of the motion and summary disposition only. (**Exhibit D**, Brief in Support of Defendant's Motion for Summary Disposition, p 4).

minutes are provided to the Trustees and read by the Clerk at the next meeting, at which they are approved. *Id.*, pp 16, 19.

The meeting as to which minutes are at issue took place two days after a presidential election cycle and a Village election. The Clerk recalled that “November was a very, very busy month.” *Id.*, pp 19, 45-46. As a result, the Clerk admittedly was scrambling to complete all of her duties and failed to complete the minutes of the open meeting that occurred on November 8, 2012, which she typed in chronologic order. She explained:

When I type up the minutes I type them up—I typed up my closed minutes, I did not come back and type up opening a meeting back up; I completely forgot about it, got distracted. November was a very, very busy month. I did not type them in that that point. I didn’t even think about it. I made the copies for it, got ready for the next meeting. *Id.*, p 19.

The unapproved minutes provided to the Board of Trustees therefore did not accurately reflect what had occurred at the open meeting. (**Exhibit D-2**, Unapproved minutes). The unapproved minutes were read aloud at the December Board meeting and approved by the Board without any corrections being made. (**Exhibit C**, Plaintiff’s Motion for Summary Disposition). It was not until after the close of the December Board meeting that the error was noticed and pointed out to the Clerk:

I believe it was shortly after the meeting. We were putting the chairs together and closing up the meeting and one of the trustees had said, “You didn’t put that in there, did you? Weren’t you supposed to put that in there?” I believe something like that. (**Exhibit D-1**, Bolf dep, p 20).

The Clerk was immediately concerned and brought it to the attention of the Village President, Doug Shindorf, who directed her to add the missing content to the minutes. *Id.*,

pp 19-20. She believed that she was obligated to do so because of her duty as Clerk to correctly document what occurred. She explained:

- Q. And did you—When Mr. Shindorf asked you to add this information to these meeting minutes did you object or make any reference that you could not do such a thing?
- A. I was worried because I made a mistake. I was more worried about feeling bad about making a mistake. He said, “This is what happened, it needs to be in the minutes. This is an accurate description of what happened, you know, you’re obligated to put this in. Go ahead and put it in. Don’t worry about it.”
- Q. Okay. Did you feel that you had a choice to say no if you wanted to?
- A. No. Because this is exactly what happened. I have a duty to present the minutes and accurately put them in. This is what happened, I just failed to type it back in there. *Id.*, pp 20-21.

Accordingly, at the direction of the Village President, the Clerk added in the previously omitted language to correctly reflect what had occurred at the meeting. (**Exhibit D-1**, Bolf dep, pp 21-22; **Exhibit D-3**, Approved minutes).

The last paragraphs of the minutes of the meeting as initially approved read as follows:

Per Fish Waste water discharge was done on November 11, 2012 all went well.

Motion made by Lorenz seconded by Dingo to appoint Jim Frelitz current Street Administrator to continue work on project until completed with a monthly labor cost of \$30.00 to continue until Trustee Dingo can take over for him or project is complete, motion accepted.

Motion made Lorenz and seconded by Dingo to pay bills.

Request by Deputy Chief Kaylor to go into closed meeting to discuss employee issues. Motion made by Dingo seconded by Lorentz to go into closed session to discuss issues.

Adjourned to closed meeting 8:45.

Cheryl Bolf, Clerk

Cheryl Bolf explained that when she typed the minutes, at the point she got to the closed session in her notes, she typed up the separate set of closed session minutes and then forgot to return to the minutes of the open meeting to add the reopening of it and the actions taken before adjournment. (**Exhibit D-1**, Bolf Dep, p 19).

Shortly after the December 2012 meeting of the Village Council while they were putting the chairs away and closing up the meeting, one of the trustees, Sue Gingo, pointed out that Bolf had neglected to include in the minutes that the Village Council came back into session and what happened afterward. *Id.* at p20. Bolf was concerned about having made a mistake, and the Village President told her to add the missing information to the minutes. Bolf included exactly what happened in the minutes. *Id.* at p 21. The corrected minutes read exactly as the initial minutes with the addition of the following:

Regular meeting reopened vote taken on all police contracts, all approved. W.W contracts voted upon Frelitz and Fish abstained from vote from their contract all approved. Meeting adjourned at 9:25p.m.

The Clerk testified that it was not her intention to violate the OMA; she was attempting to comply with the OMA's purpose by providing a correct record to the public:

- Q. Ms. Bolf, when you made the changes to the approved minutes...was it your intent to violate a law?
- A. Absolutely not. I was trying to put the minutes as they were recorded. I made an error. I fixed it because I had to. This is what happened at the meeting. If I didn't it wouldn't be on record. (**Exhibit D-1**, p 56).

The December meeting minutes reflected that corrections had been made to the November minutes and those minutes were provided to and approved by the Board. (**Exhibit D-4**, December minutes). The existence and contents of the minutes of the closed session that took place on November 8, 2012 are not at issue in this lawsuit.²

C. Material proceedings

Plaintiff-Appellant Shannon Bitterman filed this action in Saginaw County Circuit Court suing Defendant-Appellee Cheryl Bolf, the duly elected Clerk of the Village of Oakley. (**Exhibit A**, Complaint). Bitterman claimed that the Clerk was a public official under the Open Meetings Act and intentionally violated it by allegedly altering approved written meeting minutes. (**Exhibit A**, Complaint ¶¶ 20-24). Bitterman sought injunctive relief, exemplary damages, and court costs and actual attorney fees against Ms. Bolf under MCL 15.273. *Id.* at ¶ 25 a-d. Bolf filed an answer, the thrust of which was to deny liability.

Bitterman subsequently sought summary disposition on the basis that the Clerk intentionally violated the Open Meetings Act by altering official minutes of a meeting held by the Village Council. (**Exhibit C**, Brief in Support of Plaintiff's Motion for Summary Disposition, p 10). According to Bitterman, the Clerk is a public official because the clerk is responsible for being the official recordkeeper of the Village Council. Bitterman argued that Bolf is responsible for recording the proceedings and resolutions of the council under state law, and that the Open Meetings Act requires the Village Council to keep minutes of its

² No allegation concerning the existence or contents of the minutes of the closed session was raised in the application for leave to appeal. Although Bitterman mentioned the closed session in passing in his statement of facts at pages 2 and 3 in a rather lengthy series of speculative ad hominem attacks on Bolf and others active in the Village, neither the propriety of the closed session nor the existence or accuracy of those minutes are at issue in this lawsuit. Rather, the claim has been that Bolf initially left the last paragraph out of the minutes of the November open meeting and did not correct them in accord with the statute.

meetings. Finally, Bitterman contended that specific intent to violate the Act could be inferred from the fact that Bolf attended a training on the Open Meetings Act, the Act requires corrections to minutes to be made a public meetings, and Bolf failed to return to the Village Council later to seek a vote to amend the “admittedly unauthorized version of the minutes” that Bitterman challenged. *Id.*, pp 10-12.

Bolf also moved for summary disposition in her favor, arguing that Bitterman was unable to establish at least two of the three elements necessary to hold her liable under the Act. (**Exhibit D**, Defendant Bolf’s Motion for Summary Disposition, 8/12/13). Specifically, Bolf explained that she was not a public official subject to the Act and did not intentionally violate the Act. *Id.*

The Saginaw County Circuit Court agreed with Bolf, granting summary disposition in her favor and denying Bitterman’s motion. (**Exhibit F**, Opinion and Order of the Court, 10/29/13). The circuit court noted in its opinion that “[n]o one appears to dispute that Bolf is a ‘public official’ in the sense that she is a person who holds public office. The question, however, is whether or not the village clerk is a public official subject to the provisions of the OMA.” *Id.* at p 3 n 1. The circuit court held that a village clerk is not a “public official” within the meaning of the Open Meetings Act. *Id.*, pp 3-7. In so ruling, the circuit court looked to *People v Whitney*, 228 Mich App 230, 240; 578 NW2d 329 (1998), wherein the Court of Appeals identified the elements that must be proven to establish a violation of the Act for purposes of criminal liability under § 12 of the Act, which uses identical language as § 13. *Id.*, pp 3-4. Further, the circuit court concluded that Bolf was not a member of the village council which is the subject to the Act. *Id.*, p 7. Accordingly, the circuit court did not need to address whether Bolf intentionally violated the Act. Bitterman moved for

reconsideration of the circuit court's opinion and order, but that motion was denied. (**Exhibit G**, Order Denying Reconsideration, 12/2/13).

Bitterman then sought leave to appeal arguing that the Court of Appeals erred in concluding that a village clerk is not a "public official" within the meaning of the Open Meetings Act and urging a peremptory reversal or grant of leave to appeal. (Application for leave to appeal, 4/20/15). Bolf urged denial of leave to appeal on the basis that the Court of Appeals had correctly interpreted the term "public official" and raised an alternate ground in support of the judgment. This Court issued an order directing the Clerk to schedule oral argument on whether to grant the application and requiring the parties to file supplemental briefs with the Court. (Order, 11/25/15).

STATEMENT OF APPELLATE JURISDICTION

This Court has ordered oral argument to consider whether to grant or deny leave or order other relief as it is authorized to do pursuant to MCR 7.203(H)(1). Defendant-Appellee Cheryl D. Bolf urges this Court to peremptorily affirm the Court of Appeals decision in her favor, or to deny leave to appeal. Failing that, Bolf urges the Court to grant leave to appeal to fully consider the issue.

ARGUMENT

The Term “Public Official” Under Section 13(1) Of The Open Meetings Act, MCL 15.273(1) Potentially Imposes Civil Liability Only On Those Public Officials Who Are Members Of A “Public Body” As Defined In MCL 15.262(2)(a)

A. The interpretative process requires the Court to consider of MCL 15.273(1)'s use of the phrase "public official" within its context to find its meaning

This Court has taught that when interpreting a statute, it appropriately considers both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. *Sweatt v Dep't of Corrections*, 468 Mich 172, 179-180; 661 NW2d 201 (2003); *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

“Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: ‘it is known from its associates,’ see BLACK’S LAW DICTIONARY (6th ed.), p 1060. This doctrine stands for the principle [of interpretation] that a word or phrase is given meaning by its context or setting.” *Tyler v Livonia Pub Schools*, 459 Mich 382, 390–391; 590 NW2d 560 (1999). Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. *McCarthy v Bronson*, 500 US 136; 111 S Ct 1737; 114 L Ed 2d 194 (1991); *Mastro Plastics Corp v Nat'l Labor Relations Bd*, 350 US 270; 76 S Ct 349; 100 L Ed 309 (1956); *Hagen v Dep't of Ed*, 431 Mich 118, 130–131; 427 NW2d 879 (1988); *Fowler v Bd of Registration in Chiropody*, 374 Mich 254, 257–258; 132 NW2d 82 (1965). Therefore, “[a] statute must be read in its entirety...” *State Bd of Ed v Houghton Lake Community Schools*, 430 Mich 658, 671; 425 NW2d 80 (1988). Thus, the Court explained that you can't just insert a dictionary definition of a work into a provision to get the meaning:

The interpretative process does not ... remove words and provisions from their context, infuse these words and provisions with meanings

that are independent of such context, and then reimport these context-free meanings back into the law. The law is not properly read as a whole when its words and provisions are isolated and given meanings that are independent of the rest of its provisions.

Mayor of the City of Lansing v Michigan Public Service Comm'n, 470 Mich 154, 168; 680 NW2d 840 (2004). See also, *Breighner v Michigan High School Athletic Association, Inc*, 471 Mich 217; 683 NW2d 639 (2004).

B. The meaning of "public official" as used within MCL 15.273(1) can best be gleaned by considering the words within the provision and the provision within the Open Meetings Act as a whole

The Open Meetings Act provisions that Bitterman relies on provide that “[a] public official who intentionally violates this act shall be personally liable....” MCL 15.273. Notably, MCL 15.273, like its analogue for criminal liability in MCL 15.272, includes the phrase “under this act” when defining the circumstances in which a “public official” may be held liable. See MCL 15.272-273.

The duties and requirements set forth in the Open Meetings Act are imposed upon public bodies and their members, not other office holders or officials. For example, MCL 15.263 concerns meetings, decisions, and deliberations of a “public body,” public attendance at a meeting of a “public body,” public address at a meeting of a “public body” and rules “established and recorded by the public body.” MCL 15.264 and MCL 15.265 set forth meeting notice requirements to be given by a “public body.” MCL 15.266 requires a “public body” to provide copies of the notice to those requesting it. MCL 15.267 and MCL 15.268 govern when and how a “public body” may hold a closed session.

Notably, the section discussing the minutes of a public body, likewise, speaks to duties and obligations of the public body. MCL 15.269 provides:

(1) Each public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. The public body shall make any corrections in the minutes at the next meeting after the meeting to which the minutes refer. The public body shall make corrected minutes available at or before the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction.

(2) Minutes are public records open to public inspection, and a public body shall make the minutes available at the address designated on posted public notices pursuant to section 4. The public body shall make copies of the minutes available to the public at the reasonable estimated cost for printing and copying.

(3) A public body shall make proposed minutes available for public inspection within 8 business days after the meeting to which the minutes refer. The public body shall make approved minutes available for public inspection within 5 business days after the meeting at which the minutes are approved by the public body.

(4) A public body shall not include in or with its minutes any personally identifiable information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the general education provisions act, 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974.

Each duty or legal obligation set forth in the Open Meetings Act is directed toward the “public body”. Thus, the plain language reflects the Legislature’s intent that the law hold public bodies, and their members, liable.

Reading the words “public official” in light of the requirement that the liability for the intentional violation of “this act” supports Bolf’s argument that she is not potentially liable. Bitterman’s theory against Bolf is that she improperly amended the minutes of the November 8, 2012 meeting to add information. Bitterman’s theory is that Bolf secretly

added references to the “illegal closed session, along with the public waste water and police contracts.” (Application for leave to appeal, p 7). Bitterman speculates that the last paragraph that was added to the minutes was not initially included because “there would have been questions and challenges by the newly elected trustees about these 11th hour graft and police contracts” which Bitterman speculates might have jeopardized “Bolf’s future in public office. .. at the next election.” *Id.* at p 6.³ In any event, Bitterman’s theory was not based on a claim that Bolf failed to take or keep accurate minutes of a closed session. Rather, Bitterman’s case against Bolf is entirely predicated on her action in adding the last paragraph to the minutes of the open session after the minutes were approved by the Village at its December meeting. No one disputes the accuracy of the information Bolf added.

The question is whether a clerk, who may be a “public official” for some purposes, should be deemed a “public official” within the meaning of MCL 15.273 and potentially held liable in a civil suit under the Open Meetings Act if that person is NOT a member of a “public body.” The answer is no because the duties regarding the minutes that give rise to Bitterman’s claim are imposed on the public body. MCL 15.269, the section that Bitterman relies on for her claim, provides as follows:

15.269 Minutes.

Sec. 9.

³ The logic of this speculation is hard to follow since the actual conduct that Bitterman complains about is Bolf’s effort to add information to the minutes, not hide it. Moreover, if the timing of the information was of concern because of the election, it also makes no sense since the December meeting at which the draft minutes were considered took place after the election.

(1) Each public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. The public body shall make any corrections in the minutes at the next meeting after the meeting to which the minutes refer. The public body shall make corrected minutes available at or before the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction.

(2) Minutes are public records open to public inspection, and a public body shall make the minutes available at the address designated on posted public notices pursuant to section 4. The public body shall make copies of the minutes available to the public at the reasonable estimated cost for printing and copying.

(3) A public body shall make proposed minutes available for public inspection within 8 business days after the meeting to which the minutes refer. The public body shall make approved minutes available for public inspection within 5 business days after the meeting at which the minutes are approved by the public body.

(4) A public body shall not include in or with its minutes any personally identifiable information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the general education provisions act, 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974.

The “public body” is obligated [shall] to keep minutes of its meetings. MCL 15.269. The Legislature explicitly imposed this duty on to the “public body.” In doing so, the Legislature specified what to include in the minutes, when to approve them, and how and when to make them available to the public. But each of these duties is directed to the “public body,” and not to any scribe or person who is performing the act of taking notes or typing proposed or corrected minutes or maintaining the past minutes so that they are available to the public. The “public body” as a group is charged with assuring that the duties are satisfied.

To be a “public official” potentially liable “under this Act,” even one who may be deemed a “public official” under some other statute, the individual must be a member of a public body. This is precisely the analysis employed by the Court of Appeals in this case. Relying on *People v Whitney*, 228 Mich App 230; 578 NW2d 329 (1998), the Court of Appeals reasoned that a person cannot be liable unless they are a member of a public body. *Bitterman v Bolf*, Docket No 319663, slip op, April 14, 2015, p 4. This conclusion is correct because the duties established in the Act fall only upon the public bodies, whose conduct it governs. MCL 15.261, *et seq.*

Ritchie v Coldwater Community Sch, No 11-530, 2012 WL 2862037 (WD Mich July 11, 2012) (unpublished) (**Exhibit D-5**), is instructive on this issue and highlights the error in Bitterman’s reasoning. The plaintiff in *Ritchie* claimed, among other things, violations of the Open Meetings Act pursuant to MCL 15.273 by superintendents of a school district who were not members of the school’s board. *Id.* at *21. The question raised was “whether, for purposes of the OMA, a superintendent can be a ‘public official’ within the meaning of the Open Meetings Act without being a member of a ‘public body.’” *Id.* The Court ruled in the negative and found the superintendents were not proper defendants to an action under MCL 15.273, relying on *Whitney, supra*:

Whitney dealt with a criminal prosecution under Section 12 of the OMA, MCL § 15.272, which makes an intentional violation by a “public official” a misdemeanor offense. In defining the elements of the offense, the court stated that the prosecutor must prove: “(1) the defendant is a member of a public body, (2) the defendant actually violated the OMA in some fashion, and (3) the defendant intended to violate the OMA.” (*Id.* at 253, 578 NW2d at 340). Although the court did not conduct an extensive analysis of the statute, it purported to apply the plain meaning of the pertinent language. (*See id.*).

Although *Whitney* involved the criminal provision of the OMA, both Section 12 and its civil counterpart, Section 13, use the same “public official” language. Moreover, the *Whitney* court's conclusion that a defendant must be “a member of a public” body is consistent with the purpose the OMA, which is to ensure public access to official decision-making of public bodies. In this regard, Section 11, MCL § 15.271, authorizes a person to sue a public body for noncompliance, while Sections 12 and 13 authorize criminal and civil actions against the individual public body members for intentional violations. Accordingly, the Court concludes that Section 13, like Section 12, applies only to members of public bodies. (*Id.* at *21-22).

Like the superintendents in *Ritchie*, who were not members of the school board, Cheryl Bolf is not a member of the Village of Oakley’s Board of Trustees. She does not sit on the Board and does not have a vote. (**Exhibit D-1**, p 27-28). While Bitterman argues on appeal that voting rights are not a prerequisite to finding that an individual is a “public official” (Appellant Brief, p 18), *Ritchie* and *Whitney* compel the opposite conclusion. Further, the General Law Village Act expressly defines the public body, and does not include a village clerk in that definition: “The president and trustees constitute the council.” MCL 62.1(1). Bolf is not a member of a public body regulated under the Act. She, therefore, cannot be held liable for an alleged violation of the Open Meetings Act under MCL 15.273 and was properly granted summary disposition.

Two canons of interpretation also support Bolf’s interpretation of the provision. First, the canon that requires a court to avoid an interpretation that would result in a statute being unconstitutional *Bowerman v Sheehan*, 242 Mich 95; 219 NW 69 (1928) (as between two possible interpretations of a statute, one of which would render it unconstitutional and the other valid, the court’s duty is to adopt an interpretation that would save the act). See also, ANTONIN SCALIA AND BRYAN A. GARNER, *READING LAW: THE*

INTERPRETATION OF LEGAL TEXTS, pp 66-68 (2012). Interpreting the provision at issue here to impose liability on a clerk, who cannot vote to approve or disapprove or modify the minutes threatens to render the provision unconstitutional; that interpretation could impose liability onto a person with no ability to engage in or not engage in the regulated act. In other words, a clerk or any other scribe is not authorized to approve or disapprove the minutes, thus assuring that they satisfy the requirements of the Open Meetings Act. Holding someone liable for conduct that they are not able to engage in or avoid threatens the constitutionality of the provision. Second, the canon sometimes called the rule of lenity applies. As articulated in Scalia and Garner's book, the rule provides that "ambiguity in a state defining a crime or imposing a penalty should be resolved in the defendant's favor." *Id.* at p 296. Of course, this rule is only to be applied when other tools of statutory interpretation, including reading words within their context, leave a reasonable doubt about the meaning. Bolf believes that the meaning of "public official" when read within its context is not ambiguous but clear and encompasses only those persons who are members of public bodies. But if this Court finds doubt about that interpretation, then these canons should help to resolve the doubt in favor of Bolf's proposed interpretation.

C. Bitterman's arguments are inconsistent with this Court's teachings on contextual reading of statutes, past analysis of how to interpret the meaning of "public official" in other statutes, and a proper reading of the phrase "public official" in the context of MCL 15.273

Bitterman argues that the phrase "public official" is not defined in the Act and insists that the Court should simply import a dictionary definition of it into the provision. But this is precisely the analysis that this Court warned against in *Mayor of the City of Lansing*, 470 Mich at 168. Contrary to Bitterman's approach, this Court has previously recognized that the meaning of "public official is dependent upon the legal context in which it arises."

People v Coutu, 459 Mich 348, 357; 589 NW2d 458 (1999) citing *Schobert v Inter-Co Drainage Board*, 342 Mich 270, 281-282; 69 NW2d 814 (1955) (holding that the same officeholder may be an officer for one purpose but not for another). Interpreting the same phrase in another context decades later, this Court lamented that the Legislature’s “inartful draftsmanship” has, on occasion, made interpretation of this precise term a matter of difficulty. See *Macomb County Prosecuting Attorney v Murphy*, 464 Mich 149, 157-158; 627 NW2d 247 (2001). There, the Court sought to determine the meaning of “public official” within the meaning of the Incompatible Offices Act. The statute included a definition for “incompatible offices” in MCL 15.181b, a definition for “public officer” and a definition for “public employee;” but the Legislature also used the undefined term of “public official.” 464 Mich at 157-158 citing statute. The Court concluded that the phrase “public official” as used in the statute was ambiguous and therefore sought to construe it within the meaning of the statute as a whole, attempting to harmonize its provisions. *Id.* at 158-160. In that context, the Court embraced a broad definition in keeping with effectuating the specific provisions of that statute.

The same analytical framework is appropriately applied in this case where the Legislature has carefully defined terms for “[p]ublic body”, “[m]eeting, “[c]losed session,” and “[d]ecision,” but failed to define “public official.” MCL 15.262. Interpreting the meaning of “public official” as used in MCL 15.273 requires the Court to construe it within the meaning of the Open Meetings Act as a whole, attempting to harmonize its provisions. Bolf’s analysis best does so since it joins the provisions imposing duties on to “public bodies” to make their “decisions” in open meetings, to keep appropriate minutes, and to enter a “closed session” only in accord with specified procedures. Consistent with this

legislative strategy of obligating a “public body” as a whole to comply with various strictures regarding openness, including proper notice, accurate minutes, and roll call votes on closed sessions, the statute broadly mandates the public bodies, as defined in the statute, to do certain things and bars them from doing other things.

The remedial provisions of the statute likewise are focused on the public bodies, permitting actions against them to compel compliance or enjoin noncompliance with the statute, MCL 15.271. The Legislature permitted an award of court costs and actual attorney fees against the “public body” to “compel compliance or enjoin further noncompliance with the act.” MCL 15.271. The Legislature included civil and criminal penalties against a “public official” who “intentionally” violates the statute. MCL 15.272 and MCL 15.273. Reading these remedial provisions together with the other provisions of the statute supports the conclusion that, in this context, the term “public official” reaches only those public officials who are members of a public body that intentionally flouts the Act. Since a “public official” who is not a member of a “public body” is not subject to duties under the Act, the meaning of that phrase in this context is limited to those public officials who are members of public bodies.

The term “public body” has a specifically defined meaning in the Open Meetings Act, as follows:

“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; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit

corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o. MCL 15.262(a).

Ms. Bolf is not a member of the Village's Board of Trustees, its "local legislative or governing body" and therefore is not a "public official." She therefore cannot be held liable under MCL 15.273. *Id.*

Bitterman erroneously contends that the Clerk's admission that she is a "public official responsible for the creation and maintenance of these minutes as well as the proceedings and resolutions of council," equates to an admission that she is a public official for purposes of the Open Meetings Act. (Appellant Brief, p 16, n 10, quoting **Exhibit B**, Bolf's Answer to the Complaint, p 12). Bitterman seeks to couple provisions in the Open Meetings Act discussing the minutes, MCL 15.267(1), with statutory provisions governing the position of clerk in a general law village, including MCL 62.1, *et seq.* to create a basis for liability. But these provisions do not create liability for village clerks under the Open Meetings Act, which is directed to public bodies and their members. MCL 15.261 *et seq.*; *People v Whitney*, 228 Mich App 230 (1998).

The Open Meetings Act provisions that Bitterman relies on to try to impose liability onto the Clerk specifically contemplate liability for a "public official who intentionally violates *this act*...." (italics added). Both MCL 15.272 and MCL 15.273 include this phrase when defining the circumstances in which a "public official" may be held liable. Liability "under this act" does not include any potential liability for a "public official" or other individual who is NOT a member of a "public body." Contrary to Bitterman's assertion that the Clerk should be deemed a member of a public body because MCL 64.5 makes "the clerk the clerk of the council" and requires the clerk "to attend its meetings" (Appellant Brief, p 18), the clerk is not a member of the council. In fact, the Legislature made this explicitly

clear in MCL 62.1, which provides that “[t]he president and trustees constitute the council.” Thus, the clerk is clearly not a member of the council, which is the public body that might be sued under the Open Meetings Act.

Even MCL 15.267, which Bitterman cited in her application for leave to appeal at pages 2, 12, and 13 of her application for leave to appeal, and which governs the need for a roll call vote to enter a closed session and mandates that a separate set of minutes be taken and retained, appears directed toward the public body. The language does not speak directly to the “clerk” but requires “[a] separate set of minutes shall be taken by the clerk or designated secretary” and “shall be retained by the clerk of the public body....” This appeal does not pertain to any obligations regarding the taking of minutes of a closed session; nor does it pertain to any obligation to retain them or to not disclose them without a court order. MCL 15.267(1) mandates a roll call vote to call a closed session, and also mandates that the roll call vote and the purposes of the closed session must be “entered into the minutes of the meeting at which the vote is taken.” In using passive voice when mentioning the “clerk or the designated secretary” in MCL 15.267(2) and the “clerk of the public body” in MCL 15.267(2), the Legislature appears to be imposing an obligation on the public body to assure that the individual responsible for the ministerial task of taking down the minutes, which may be a clerk or a designated secretary, complies with these obligations. That reading makes sense since only the public body can control the outcome. The public body conducts its meetings including when it will take a roll call vote. The public body is empowered to direct someone to take its minutes by taking notes at the meeting, typing them up, and presenting them for approval. And most significantly, the public body approves or disapproves of the minutes before they become an official record. Moreover,

the duties imposed on a village clerk under MCL 64.5-.8a, a separate statute, are not duties imposed under the Open Meetings Act and can't be used to create liability under "this act".

Bitterman attempts to buttress her argument by citing the definition of a "public official" in BLACK'S LAW DICTIONARY and case law. (Appellant Brief, pp 14-15). But this argument is specious. The question is not whether Bolf, as clerk, is a public official within the meaning of the law, generally; it is whether she was a member of a "public body" governed by the Open Meetings Act, who intentionally violated the Act. The plain language of the Open Meetings Act imposes duties only on public bodies as defined in MCL 15.262(a). The liability sections of the Open Meetings Act, MCL 15.272 and MCL 15.273 allow liability only on "a public official who intentionally violates this act...." In other words, only a public official who, as a member of a public body governed by the Act, intentionally violates it, can be held liable.

Bitterman's explicit assertion that MCL 64.5 makes the clerk a member of the village council is patently mistaken. It does not. The statute merely provides that the clerk is "the clerk of the council" and is to attend council meetings. Indeed, MCL 62.1, another provision of the General Law Village Act, expressly provides that the "president and trustee shall constitute the council." The Clerk is not a member of the Village of Oakley council; the Legislature specifically enacted a statute that includes only the president and trustees as members of the council, and not the clerk. MCL 62.1. Thus, the Clerk cannot be liable under the Open Meetings Act. She cannot and did not vote at the meeting. (**Exhibit D-2**, Approved Minutes, November 8, 2012).

Bitterman points to *Burnett v Moore*, 111 Mich App 646; 314 NW2d 458 (1981), to support her position that a village clerk fits within the definition of a "public official."

(Appellant Brief, pp 16-17). However, this argument lacks merit for three reasons. First, *Burnett* was decided in 1981 and is not precedentially binding. MCR 7.215(J)(1) (stating that the Court is only required to follow “prior published decision[s] of the Court of Appeals issued on or after November 1, 1990...”). Second, *Burnett* was an assault and battery case brought against an off-duty state police officer and therefore is completely inapplicable to this Open Meetings Act claim. The *Burnett* Court’s discussion of elements to distinguish a “public official” versus an “ordinary government employee” for jurisdictional purposes is not instructive here, where the issue is whether an individual is a member of a public body and thus someone to be deemed a “public official” for purposes of liability under the Open Meetings Act. Finally, Bitterman overlooks that the *Burnett* Court concluded that the defendant in that case was *not* a state official, consistent with legislative intent.

Bitterman’s discussion of the criteria for a public official as supportive of her position is likewise unpersuasive. Importantly, unlike the traditional discretion afforded to a “public official” to engage in discretionary conduct independently, see generally, *Throop v Langdon*, 40 Mich 673, 682-683 (1879)(J. Cooley), the taking of minutes is essentially a ministerial act done by a scribe and then approved by the public body whose actions are being memorialized in them. Different public bodies use different individuals to take their minutes. Minute takers may be a staff person, an attorney, a member of the public body serving as secretary, or, as here, a clerk. Recognizing this, the Legislature directed its mandates to the public body. In doing so, it sought to assure that what happened at public meetings was accessible to the public by specifying that the minutes should include the date, time, place, members present, members absent, and any decisions made at a public meeting. MCL 15.269. It obligated the “public body” to “make any corrections to the

unapproved draft minutes and to make them available for public inspection. Thus, as Bolf has argued throughout, only a member of a public body is properly held liable for the breach of these duties.

D. Alternatively, Bitterman failed to establish the requisite intent necessary to sustain a violation of the Open Meetings Act

This Court can alternatively affirm⁴ the dismissal Bitterman's claim against the Clerk on the alternate basis that she did not intend to violate any laws when she corrected the minutes. The Clerk sought to comply with her role under MCL 64.5, which requires the clerk to "record all proceedings and resolutions of the council...."

The Open Meetings Act itself provides no guidance on correcting erroneous minutes after they have been approved. MCL 15.261 *et seq.* Instead, it requires that corrections to the minutes be made "at the next meeting after the meeting to which the minutes refer." MCL 15.269(1). That could no longer occur, because the error was not brought to Ms. Bolf's attention until after the meeting was over and they were closing up the hall. (**Exhibit D-1**, p 20). Ms. Bolf had never experienced this situation before, the statute did not provide guidance, and she was not sure what to do.

Ms. Bolf accordingly turned to the Village President, Douglas Shindorf, who has served on the Village Board of Trustees for more than 30 years, for direction. He instructed her to make the changes so that the minutes would be accurate. (**Exhibit D-1**, pp 19-20).

⁴ The trial court did not reach the issue of whether Bolf intended to violate the Open Meetings Act, concluding that the village clerk is not a public official to which the Act applies. However, under the "right result, wrong reason" doctrine of appellate advocacy, the lack of intent to violate the Act serves as an additional reason for this Court's affirmance. See *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 74; 817 NW2d 609 (2012) (this Court "will affirm the trial court when it reaches the right result even if it does so for the wrong reason.").

Ms. Bolf believed it was her duty as Clerk to provide the public with correct and accurate minutes so that the record would reflect what was done. (**Exhibit D-1**, pp 20-21). So that everyone would be aware that changes had been made to the minutes, the December meeting minutes indicated that the November minutes had been accepted “as read with corrections” thus notifying any person reviewing the minutes that changes had been made from the original November meeting minutes. (**Exhibit D-4**, emphasis added).⁵ At all times, Ms. Bolf acted with the intent to inform the public of the actions of the Village of Oakley’s governing board.

This conduct does not equate with the specific intent necessary under the statute. As clarified in *Whitney, supra*, “under Michigan law, no lesser amount of recklessness or even deliberate ignorance suffices to replace the requisite specific intent that is essential to commit a specific intent crime.” *Id.* at 256. Ms. Bolf had no knowledge that her actions could even be construed as an alleged violation of the Open Meetings Act—the Act did not specify the means for correcting the error at issue or set forth what is to be done when minutes are not timely corrected.⁶ The Clerk was attempting to fulfill her role as clerk and the Open Meetings Act’s purposes, not to circumvent them. Likewise, there is no evidence of any intent by Ms. Bolf to violate the Open Meetings Act. Her actions were taken in good faith and at the direction of the Village President, who had more than 30 years of service on the Board.

⁵ In any event, given the fact that the corrections were indicated at a later public meeting, no violation occurred under the Open Meetings Act.

⁶ Again, these obligations are those of the “public body” (i.e., the Board), rather than Bolf’s. Nevertheless, Bolf acted in good faith and for the purpose of providing the public with accurate minutes.

In an implicit acknowledgment of the complete absence of proof that the Clerk intended to violation the Open Meetings Act, Bitterman urged the circuit court to infer specific intent from the alleged “failure to return to the Village Council to seek a vote to amend the now admittedly unauthorized version of the minutes of the November Meeting.” (**Exhibit C**, Plaintiff’s Brief in Support of Summary Disposition, p 11). But taking a vote on minutes is an act that can only be done by members of the body, not the Clerk, who is not a member of the council. This argument is further belied by the fact that Bolf was notified of the issue by one Board member, sought guidance from the President of the Board, and noted in the December meeting minutes that corrections had been made to the November minutes. Clearly, the Board was aware or should have been aware that changes had been made. Plaintiff’s argument fails to provide any support for Bitterman’s position; the facts do not support an inference that the Clerk intended to violate the Open Meetings Act.

Bitterman’s reliance on Bolf’s clerking training to attempt to establish an intent to violate the Open Meetings Act is misplaced. (See Appellant Brief, p 2). According to Bitterman, Bolf was trained for various clerk duties, to include the taking of accurate minutes. *Id.* If anything, this supports her conduct, which was an attempt to ensure the accuracy of the minutes. And it certainly offers no support for an inference that the Clerk intended to violate the Open Meetings Act. This is particularly true where the language of the Open Meetings Act is silent on what to do. While the statute governs a timing for approval of minutes and for making corrections, it includes no language explaining what to do in the circumstances at issue here where a mistake was discovered after the meeting at which minutes were supposed to be corrected and approved.

CONCLUSION

WHEREFORE, Defendant-Appellee Cheryl Bolf respectfully requests this Court affirm the circuit court's grant of summary disposition in her favor, and grant her all other relief that is proper in law and equity.

PLUNKETT COONEY

By: /s/Mary Massaron
MARY MASSARON (P43885)
AUDREY J. FORBUSH (P41744)
RHONDA R. STOWERS (P64083)
Attorneys for Defendant-Appellee
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

Dated: January 13, 2016

Open.00560.40112.16278213-1