

**STATE OF MICHIGAN
IN THE SUPREME COURT**

SHANNON BITTERMAN,
Plaintiff/Appellant,

v.

CHERYL BOLF,
Defendant/Appellee

Supreme Court Case No.: _____
Court of Appeals Case No.: 319663
Lower Court Case No.: 13-019397-CZ-2

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APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to entertain this application for leave to appeal pursuant to MCR 7.301(A)(2) from the Michigan Court of Appeals. The Michigan Court of Appeals had jurisdiction to entertain and adjudicate the appeal by right pursuant to MCR 7.202(6)(a)(i) and MCR 7.203(A)(1) as the *Opinion and Order of the Court* issued by the Saginaw County 10th Circuit Court, Judge Robert L. Kaczmarek presiding, constitutes a final order. A copy of Court of Appeals' opinion and a copy of the trial court order are attached hereto as required by MCR 7.302(A)(1)(f), (g).

STATEMENT OF QUESTION PRESENTED

I. MCL 15.273(1) reads—

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.

Who is a “public official?”

Appellant says: This Court is requested to apply an ordinary dictionary definition, contrary to the holding of the Court of Appeals, and conclude that a public official is “*one who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government’s sovereign powers*” and that the voter-elected Village Clerk is a public official.

INTRODUCTION

Under the *Open Meetings Act* (“OMA”), a **public official** is personally liable for his or her intentional violations of the Act. See MCL 15.273. The term ‘public official’ is not defined by OMA. However, this Court has long explained that when the Legislature does not define a term, the common ordinary definition must be applied, usually explained by a dictionary definition. Black’s Law Dictionary defines public official as “[o]ne who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government’s sovereign powers.” BLACK’S LAW DICTIONARY 8TH ED., p. 1119. Instead, the trial court and the Court of Appeals adopted its own self-made definition: one who is a voting member of a public board. The Circuit Court incorrectly held and the Court of Appeals later incorrectly affirmed that a village clerk, who is duly-elected by the public to her public post, is not a public official. This conclusion is legally absurd and contrary to the long-standing rules of statutory interpretation. This application for leave now follows.

FACTS¹

This case involves governmental records falsification by Cheryl Bolf, the publicly elected and serving Clerk of the Village of Oakley in Saginaw County, Michigan. Under the village form of local government, the clerk is an elected public-officer position. MCL 62.1(1). Her duties are defined and mandated by statute. MCL 64.5 – 64.8a. Duties include ministerial tasks like administering oaths and affirmations, countersigning and registering all licenses, and keeping the corporate seal and all the documents, official

¹ References to Exhibit ___ refers to the exhibits attached hereto from the lower court record, with the exception of the audio recording of Exhibit D which had been separately submitted to the Court of Appeals under separate cover.

bonds, papers, files, and records of the village. MCL 64.5(6), (4), (1). Her more substantive duties include being the general accountant of the village. MCL 64.6(1). She also has duties directly on the Village Council as she “is clerk of the council and shall attend its meetings.” MCL 64.5(1). At the Village Council meetings, the Clerk must record all the proceedings and resolutions of the council. MCL 64.5(3). OMA requires it too. MCL 15.267(2)(“A separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session.”). In light of being the general accountant, the Clerk must also report to the council, whenever required, a detailed statement of the receipts, expenditures, and financial condition of the village, of the debts to be paid, and moneys necessary to meet the estimated expenses of the corporation, and shall perform such other duties pertaining to her office as the council may require. MCL 64.8. As for village monies, the Clerk must also do all the following:

- (a) Have charge of all the books, vouchers, and documents relating to the accounts, contracts, debts, and revenues of the corporation.
- (b) Countersign and register all bonds issued, and keep a list of all property belonging to the village, and of all its debts and liabilities.
- (c) Keep a complete set of books, exhibiting the financial condition of the village in all its departments, funds, resources, and liabilities, with a proper classification, and showing the purpose for which each fund was raised.
- (d) Keep an account of all the money received for each of the several funds of the village, and credit all check disbursements drawn, keeping an account with each fund.

MCL 64.7(a)-(d). The Clerk is also the keeper and recorder of all ordained ordinances of the village. MCL 64.5(3). In other words, the Clerk is in charge of the official records and money of this general law village. It is an important job and one with the ability to commit malfeasance if not checked. That is what happened in the Village of Oakley.

This case involves Defendant Cheryl Bolf, who is and was at all relevant times the “duly elected” Clerk of the Village of Oakley. **Exhibit A, Bolf Dep, pp. 7, 9; Answer, ¶12.** She has served in this capacity since 2010. **Exhibit A, Bolf Dep, p. 8.** Near the time of her becoming the clerk, Bolf attended the Clerking 101 training conference offered by the Michigan Association of Municipal Clerks. **Exhibit A, Bolf Dep., p. 10; Exhibit E.** From this training, Bolf had actual knowledge of and training in the requirements of OMA. See **Exhibit F.** Bolf has never denied the same.

On November 6, 2012, a watershed election took place and three long-time local politicians, Jim Frelitz, Richard Fish, and Art Early, were voted off the Village Council by the citizens of Oakley. **Exhibit G.** This was a major political change in the small community of Oakley. The Village Council held its regular council meeting two days later, on November 8, 2012 (hereinafter “November Meeting”) to conduct the business of the Village. **Exhibit B, Lorencz Dep, p. 7.** This November Meeting was fraught with improprieties resulting in the Saginaw County Circuit Court finding violations of OMA. Among the many issues, it is sufficient to say that the meeting minutes created by Bolf (but never approved by the Village Council) reflect that the Village Council went into closed session for a singular purpose—to discuss the employment application of Lt. Kaylor and to “discuss issues.” **Exhibit C, p. 2.** Instead, the closed session deliberations and likely decisions made went into other issues and topics, including the employment of at least six additional officers who did not request their applications be reviewed in closed session. **See Exhibit B, Lorencz Dep, pp. 15-16.** By these actions, the Village was previously held to be in violation of the Michigan *Open Meetings Act*.

Bitterman v Village of Oakley, Saginaw County Circuit Court Case No. 13-019893-CZ (case still pending in Circuit Court).

Also at this November Meeting, outgoing Village trustees Richard Fish and James Frelitz, with little or any qualifications in waste water, were granted private governmental contracts to handle the waste water system in Oakley. **See Exhibit C, p. 2.** This appears to be a graft contract, being that their roles in the Village's politics were ending and neither had any expertise in this area of environmental operations.² Among all this, Bolf, being the Clerk, had the responsibility to keep complete and accurate minutes of this meeting in both the open and closed meeting sessions. **Answer, ¶11; Exhibit B, Trustee Lorencz Dep, p 11.**

While the Village of Oakley's process for approving meeting minutes is somewhat non-typical for public bodies, the process is simple. Bolf kept minutes of the meeting in the form of notes. At the subsequent meeting, Bolf would orally read the minutes (but not provide a written copy) to the members of the Village Council. After discussion, the Village Council would be make the necessary changes and approve the minutes typically "as read" or "as amended" via Bolf. The meeting minutes are then set.

The November Meeting was no different, on its face. Following the November Meeting, Bolf compiled notes for the upcoming oral reading of the minutes of the November Meeting (not provided in written form) at the next regular Village Council meeting (i.e the next month's meeting) consistent with MCL 15.269(1).³ **Exhibit A, Bolf**

² These contracts, unsurprisingly for graft contracts, were not included in the oral reading of the meeting minutes by Bolf. See *infra*.

³ "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."

Dep, p. 16.⁴ As is typical for monthly board meetings, the November Meeting minutes would be approved or corrected at next regular meeting of the Village Council, the December 2012 Village Council Meeting (hereinafter “December Meeting”). Given the watershed elected, the Village Council now consisted of three new trustees, including Francis “Fuzz” Koski, and two of the three former trustees on the public payroll.

As it was explained, it was the usual and normal practice for Bolf to orally read the meeting minutes at the next meeting for approval—no written draft was provided to the members of the Village Council to review. **Exhibit A, Bolf Dep, pp. 22-24.** As the keeper of the official records, Bolf had the ability to alter and hide critical information to protect her political allies—Richard Fish and Jim Frelitz—who were just awarded graft contracts. Mr. Frelitz is today the Deputy Clerk under Bolf. With three new trustees, the secret contracts had to be hidden from the new trustees taking office likely because Bolf realized what had happened in closed session with her close political allies was illegal.

At the December Meeting, Bolf presented an oral version of the November Meeting minutes to the newly empaneled Village Council which did not include any references to the closed meeting session or the waste water contracts or the police contracts. An audio recording⁵ of the December Meeting’s reading of the proposed November Meeting minutes is in the court record as **Exhibit D.** At the start of the recording, Bolf is orally reciting the meeting minutes. **Exhibit D, ¶13; see also Exhibit B, Lorencz Dep, p. 36.** The disputed issues in this case start at the 02:20 audio timestamp when Bolf is reading the proposed minutes of the November Meeting and in reaching

⁴ Q: Okay, how do the minutes then become approved meeting minutes?
 A: The following month we have our council meeting and we approve the meeting minutes.

⁵ The OMA specifically permits the audio recording of public meetings. See MCL 15.263(1).

the end of the minutes (which is the section in contention in this lawsuit) finished by stating:

...Motion by Lorencz, seconded by Dingo to pay bills. Request by Deputy Chief Kaylor to go into closed meeting (sic) to discuss employees issues. Adjourned at 4:45, or 8, I'm sorry, 8:45p.m.

This is the end of meeting minutes as read. **Exhibit D**. Yet the later-altered purportedly 'official' copy, attached as **Exhibit C** (as admitted as being improperly altered), contains more which was not read to the Council nor approved at the December Meeting by the Village Council. It is Appellant's legal theory that the reason for this was political—there would have been questions and challenges by the newly elected trustees about these 11th hour graft and police contracts. Had such malfeasance come to light, Bolf's future in public office could be in jeopardy at the next election.

Unsurprisingly for such political cover-ups, the oral reading by Bolf has no reference to the closed meeting as ever having had occurred. **Exhibit D**. The oral reading also has no record of any vote to go into closed session by roll call vote. **Id.** There is no reference to the officer applications being considered or voted upon. **Id.** There is no reference to the waste water contracts being considered or approved. **Id.** There is no reference to the closed meeting having occurred at all. **Id.**

The next voice following Bolf's reading is then-Village Council President Douglas Shindorf. He asks: "*Any additions or corrections to the minutes?*" Neither he, nor Bolf, nor any other non-new⁶ Village Council members noted or complained of the lack of minutes as to the police contracts, the waste water contracts, or the closed session.

⁶ The newly elected members of the Village Council, Mr. Koski, Mr. Wolfe, and Mr. Bitterman (see Exhibit G), would have had no idea what had happened at the open or closed sessions of the November Meeting because none were serving as trustees in November 2012.

After some discussion on the sewer bond, a motion was then made by one of the new trustees, Francis “Fuzz” Koski, to “accept the minutes as read” by Bolf. **Exhibit D (at approx. 02:55)**. By that vote, the official and permanent meeting minutes of the Village of Oakley’s November Meeting were made and limited to that “as read” by Bolf. But that is not the end of the story.

As alleged by Plaintiff in her Complaint and confirmed by a discovery deposition, the final written copy of the November Meeting minutes on file at the Village offices were altered by Bolf to secretly add references to the illegal close session, along with the public waste water and police contracts. These additions, secretly added after the December 2012 meeting, were never approved by the Village Council.

Page 13:

Q: Okay. And is this copy of minutes that’s before you today [Bolf Deposition Exhibit 1, attached as Exhibit C in the court record] a fair and accurate copy of the minutes that were approved by the Village Council?

A: No. I added the last paragraph in, as we all know.

Page 18:

Q: ... I’m going to give you my pen right here – and I’d actually ask you to make on [Bolf Deposition] Exhibit 1 [attached as Exhibit C herein], circle the parts of Exhibit 1 what has been added by you.

A: As far as I know, this portion right here.

Page 18-19:

Q: Now when was this paragraph added to these minutes?

A: After the meeting.

Q: After which meeting?

A: The December 8th (sic) meeting

Q: Was the fact that this additional paragraph, as you've marked as on Exhibit 1 right now, was that brought to the attention of the Village Council that you added this additional information to these meeting minutes?

A: No, it was not.

Under Michigan law, only the Village Council itself, as the public body, may approve or change the minutes. MCL 15.269(1). A village clerk lacks plenary authority to secretly add unapproved additions to the minutes.

On April 4, 2013, Plaintiff filed her lawsuit against Bolf alleging personal liability for her violations of Michigan's *Open Meetings Act*.

After discovery, Plaintiff filed her motion for summary disposition arguing that the three elements under the Section 13 claim were met: 1.) Bolf is a public official, 2.) she violated OMA, and 3.) did so with knowledge of what OMA required via her training from the Michigan Association of Municipal Clerks. Bolf, as defendant, opposed. On October 29, 2013, the Circuit Court issued its "Opinion and Order" solely addressing only one of the three elements under the Section 13 claim: whether Bolf is a "public official." Undisputedly, "public official" under Section 13 is undefined. Instead of looking to the plain dictionary definition of "public official," the Circuit Court looked to dicta from the Court of Appeals' decision in *People v Whitney*, 228 Mich App 230; 578 NW2d 329 (1998) and concluded that because Defendant Clerk was "not a member of the Village Council" she is not a "public official," despite MCL 64.5(1). *Opinion and Order*, dated Oct 29, 2013, p. 4. On this basis alone, the Circuit Court granted summary disposition. Plaintiff appealed, after reconsideration was denied.

On appeal to the Court of Appeals, the panel concluded that *People v Whitney* was not dicta and held the elected clerk is not a public official contrary to the common definition provided by a dictionary. The panel concluded that "consulting a dictionary is

not necessary to assist in determining the meaning of the phrase ‘public official’ because we have already interpreted this phrase in a different section of the statute” and instead blindly followed *Whitney’s* statement that a defendant must be “a member of a public body.” *Bitterman v Bolf*, unpublished decision of the Court of Appeals, issued March 24, 2015 (Docket No. 319663), slip op at *4. The Court of Appeals’ holding was clear: “we conclude that a person is only a public official for the purposes of MCL 15.273(1) if they are a member of a public body.” *Id.* As such, “[b]ecause Bolf was not a member of the council, she was not a member of a public body and was not a public official under MCL 15.273(1).” *Id.* This application for leave now follows.

ARGUMENT

I. The Court of Appeals erred in concluding that a duly-elected and duly-serving Village Clerk is not a “public official.”

A. Standard of Review

Questions of statutory interpretation and grants of summary disposition are reviewed de novo. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007).

B. An undefined statutory word or phrase must be accorded its plain and ordinary meaning.

At issue in the present action is the civil liability provision of the *Open Meetings Act* which provides, in pertinent part:

Sec. 13. (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.

MCL 15.273(1) (emphasis added). Public official is not defined as a term of art. Thus, it is black-letter law that an undefined statutory word or phrase must be accorded its plain and ordinary meaning. MCL 8.3a; *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753

NW2d 207 (2008). The Legislature is presumed to know of and follow this methodology of interpretation when drafting statutes. See *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006). When a term is undefined, a dictionary may be consulted as the analytical tool to ascertain the term's plain and ordinary meaning. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

This Court has further explained in *Council of Orgs & Others for Educ About Parochiaid v Governor*, 455 Mich 557, 585 fn22; 566 NW2d 208 (1997) that “[t]he issue who is and who is not a public official was discussed in *Bandfield v Wood*, 104 Mich App 279, 282; 304 NW2d 551 (1981), quoting *People v Freedland*, 308 Mich 449, 457-458; 14 NW2d 62 (1944)”—

After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature:

- (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature;
- (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public;
- (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority;
- (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body;
- (5) it must have some permanency and continuity, and not be only temporary or occasional.

C. Public official is a general term under law.

Black’s Law Dictionary directs its readers searching for a definition of “public official” to look to the first definition of “official.” BLACK’S LAW DICTIONARY 8TH ED., p. 1267. An “official,” in turn, is defined as “[o]ne who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government’s sovereign powers.” *Id.*, p. 1119. The definition in no way requires the added caveat, as lower courts self-imposed, of being a voting⁷ member of a public body.

D. Bolf is a public official; she is the duly elected and serving clerk.

It is undisputed that Bolf is and was, during the relevant events described above, the Village Clerk. **Exhibit A, Bolf Dep, p. 7, 11.** The Village Clerk is an elected position. *Id.*, at 7, 8. As the elected clerk of the Village of Oakley, Bolf had the responsibility of being official recordkeeper of the Village Council. MCL 64.5(1). Bolf, by her answer, admitted⁸ she is the “public official responsible for the creation and maintenance of these minutes as well as proceedings and resolutions of the council.” Answer, ¶12 (emphasis added). Moreover, the clerk is part of the Village Council as “[t]he [village] clerk is the clerk of the council and shall attend its meetings.” MCL 64.5(1). The clerk position is provided for and defined in the “Officers” section of the *General Law Village Act*, MCL 62.1(1).

Instead of following the plain definition, the Court of Appeals looked to the language under the Section 12 criminal action concluding it was bound to follow that

⁷ Appellant denotes the word “voting” because the lower courts were seemingly aware that an elected village clerk is, statutorily, “clerk of the council and shall attend its meetings.” MCL 64.5(1). The only possible distinct is that an elected clerk lacks a legislative vote in a general law village.

⁸ By her answer, Bolf pled “No Contest” to the allegation. A response of ‘no contest’ “has the effect of an admission only for purposes of the pending action.” MCR 2.111(E)(3).

conclusion in *Whitney*. This supposed strict obedience to *Whitney* was clearly done in direct affront to the requirement that undefined terms are given their “plain and ordinary meaning.” MCL 8.3a; *Brackett, supra*.

1. *Alternatively, the five element test of a public official under Council of Orgs has been met.*

Provided this Court prefers to look to its own precedence rather than a dictionary, the *Council of Orgs* Court provided five elements to determine a public official:

- (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature;
- (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public;
- (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority;
- (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body;
- (5) it must have some permanency and continuity, and not be only temporary or occasional.

Council of Orgs, supra, at 585 fn22.

For a clerk of a general law village, all five weigh in favor of being a public official. The office of the Village Clerk is created by the Legislature, whose duties are prescribed by law for the benefit of the citizens within the corporate village limits. See MCL 64.5 - 64.8a; MCL 15.267(2). The duties are performed independently and without control of a superior power other than the law. See MCL 64.5 - 64.8a. The office is permanent and continuing in the Village government. MCL 62.4 (“clerk... hold[s] office[] for the term of 2 years and until their successors are elected and qualified.”). All five elements have been met. *Council of Orgs, supra*, at 585 fn22.

E. Common sense, common parlance, public policy, and the rules of statutory interpretation counsels that the Court of Appeals erred in blindly following *Whitney*.

The lower courts' decisions are blatantly contrary to the plain and ordinary meaning of the utilized term by the Legislature or alternatively of this Court's precedence under *Council of Orgs* resulting in the lower courts wrongfully substituting a foreign, narrowed, and tortured definition of public official for the one selected by the Legislature. Nowhere does the concept of voting or public body membership come into play to logically exclude the publicly-elected official who creates and maintains the government records and then escapes liability by undertaking records falsification.

Moreover, good policy would direct that a village clerk is precisely the public official the Legislature intended to encompass by Section 13. The Village Clerk is legally bound to keep... "all the documents, official bonds, papers, files, and records of the village..." and "shall record all the proceedings and resolutions of the council." MCL 64.5(3). When enacting OMA, the Legislature defined what is required of public bodies during its proceedings. The Legislature specifically and explicitly made it the function of "the clerk" of the public body to take and make certain meeting minutes. MCL 15.267(2). The Legislature could not have met to limit the liability of intentional violations of OMA to only those who have a vote.

CONCLUSION

The lower courts erred. Instead of following the command of the Legislature and the legal admission of Bolf herself, the lower courts tortured the definition of public official from its common parlance to one contrary to the common understanding under law. Had the Legislature intended to limit the personal liability statute to only board members, it could have chosen narrower language. It did not. This Court is requested to

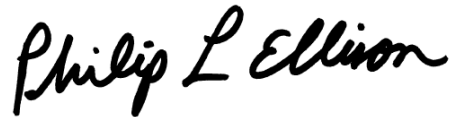
correct the lower courts' error as the same has significant public interest against a public official, MCR 7.302(B)(2), and involves legal principles of major significance to the state's jurisprudence, MCR 7.302(B)(3).

RELIEF REQUESTED

For the reasons cited herein, Appellant Shannon Bitterman respectfully requests this Court, pursuant to MCR 7.302(H)(1), to preemptory reverse the Court of Appeals' decision that a duly-elected clerk is not a public official and instead conclude Bolf, as the individual elected to the public position of village clerk, is a public official under MCL 15.273(1), together with direction to remand to the Circuit Court for further consideration.

In the alternative, this Court is requested to grant leave pursuant to MCR 7.302(H)(1) on the issue of "who is a public official."

RESPECTFULLY SUBMITTED:



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