STATE OF MICHIGAN

COURT OF APPEALS

GAYE SCHULKE,

Plaintiff-Appellant/Cross-Appellee,

v

MASON COUNTY BOARD OF COMMISSIONERS, MASON COUNTY SURVEY &REMONUMENTATION PEER REVIEW GROUP, MASON COUNTY REMONUMENTATION BOARD and MASON COUNTY SURVEYOR,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
December 17, 1996

No. 189450
Mason County
LC No. 95-010475

Before: Sawyer, P.J., and Markman and H. A. Koselka,* JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order denying her motions for summary disposition and granting summary disposition for defendants pursuant to MCR 2.116(I)(2). Plaintiff brought this action pursuant to the Michigan Open Meetings Act, MCL 15.261 *et seq*.; MSA 4.1800(11) *et seq*. (hereinafter the "Act"), seeking to compel defendants' compliance and/or enjoin defendants' further noncompliance therewith. See MCL 15.271; MSA 4.1800(21). The record reveals that defendants admitted that they had indeed violated section 11 of the Act; however, defendants contend that plaintiff was estopped from obtaining the statutory relief provided by the Act because the instant action was in fact a selfish abuse of that remedy, primarily because plaintiff participated in the very meetings she later challenged, and only so challenged them because she was displeased with the substantive decisions made at them. We reverse.

As an initial matter, the Act purposefully provides for its injunctive enforcement by any of several mechanisms, including actions by private persons. MCL 15.271(1); MSA 4.1800(21)(1). Furthermore, the Supreme Court has acknowledged with approval this Court's recognition that the purpose of the Act is to promote governmental openness and accountability and that it should be

* Circuit judge, sitting on the Court of Appeals by assignment.

broadly interpreted to accomplish that goal. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 223; 507 NW2d 422 (1993). Given defendants' admission that they violated § 11 of the Act, plaintiff was entitled to injunctive relief as a matter of law, MCL 15.271; MSA 4.1800(21), and the trial court therefore improperly denied plaintiff's motion for summary disposition.

Defendants contend that plaintiff did not show that their violative actions resulted in any material prejudice to plaintiff, either public or private, and argue that such a showing was necessary for plaintiff to recover. We disagree. It is not the only purpose of the Act to recognize and remedy specific *prejudice* resulting from a violation thereof, MCL 15.270; MSA 4.1800(20); the Act also contemplates correcting the *violation* in and of itself. MCL 15.271; MSA 4.1800(21). Nothing in § 11 of the Act indicates that a plaintiff need show prejudice in order to obtain relief.

Defendants also contend that principles of equity preclude statutory relief for plaintiff, arguing that plaintiff should be estopped from seeking relief as a result of her participation in the very process that she now challenges. Whatever initial appeal this contention might have for this Court is constrained by the clear language of the Act, i.e., there is no "equitable prerequisite" to bringing such an action. MCL 15.271; MSA 4.1800(21). Moreover, we note that in the case cited by defendants in primary support of this contention,[1] the Idaho Supreme Court applied a doctrine (known as "quasi-estoppel") that has never been recognized in Michigan.[2] The purpose of the action for injunctive relief under the Act is not principally to vindicate the interests of the individual plaintiff but rather to vindicate, through the plaintiff, the larger public interest perceived by the Legislature in open meetings by governmental bodies.

Furthermore, the Act provides for mandatory recovery by plaintiff of her costs and actual attorney fees for this action, MCL 15.271(4); MSA 4.1800(21)(4), and the trial court therefore erred when it failed to so order. *Hovanesian v Nam*, 213 Mich App 231, 238; 539 NW2d 557 (1995).[3]

The trial court's order is reversed and the case remanded for entry of an order granting plaintiff's motion for summary disposition with regard to her § 11 claim, and for a determination of an appropriate attorney fee to be awarded plaintiff.

Reversed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Stephen J. Markman
/s/ Harvey A. Koselka

[1] *KTVB, Inc v Boise City*, 486 P2d 992 (Idaho, 1971).

[2] Rather, Michigan courts have recognized a much narrower doctrine known as the "prior success" model of "judicial estoppel," i.e., the specific situation wherein a party attempts to take a position in an action or administrative proceeding inconsistent with a previous position *successfully* taken by that

same party in an earlier, *separate* action or administrative proceeding. See *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994) (adopting this model in the context of administrative proceedings); *Lichon v American Universal Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990) (discussing judicial estoppel generally). The doctrine was developed to prevent parties from playing "fast and loose *with the legal system*." *Paschke*, *supra*, at 509 (emphasis added); see also *Edwards v Aetna Life Ins Co*, 690 F2d 595, 598 (CA 6, 1982) (while "[e]quitable estoppel protects litigants from less than scrupulous opponents, judicial estoppel . . . is intended to protect the integrity of the judicial process.") This distinction was further illustrated in the Supreme Court's opinion in the workers' compensation case of *Adams v National Bank of Detroit*, 444 Mich 329, 371-373; 508 NW2d 464 (1993), wherein the defendant first took the position that the plaintiff's injuries were not incurred in the course of his employment, and then later reversed this position by maintaining that any injuries incurred by the plaintiff had arisen in the course of employment. Explaining that judicial estoppel would not apply, the Court stated:

> Judicial estoppel . . . prevents a party who has successfully and unequivocally asserted a position in a prior proceeding from asserting an inconsistent position in a subsequent proceeding. [The doctrine does not] apply in this case because the defendant's assertion *did not occur in the context of prior proceedings*. [*Adams*, *supra*, at 373 (emphasis added) (citation omitted).]

Clearly, then, judicial estoppel, unlike equitable estoppel, specifically does not apply when a party maintains inconsistent positions within the *same* proceeding. As such it could not apply to the inconsistency of plaintiff's position in the instant case.

[3] We note defendants' argument that formal injunctive relief was unnecessary in this case because they had voluntarily corrected their admittedly once-violative meeting practices. However, the absence of a formal injunction per se does not preclude plaintiff from recovering statutory attorney fees pursuant to § 11(4) of the Act. See *Taxpayers v Menominee Clerk*, 139 Mich App 814, 820; 362 NW2d 871 (1984); *Ridenour v Dearborn Bd of Ed*, 111 Mich App 798, 806; 314 NW2d 760 (1981).