

STATE OF MICHIGAN
COURT OF APPEALS

RONALD FIELD and KENNETH J. LASALLE,

Plaintiff-Appellees,

v

WAYNE COUNTY COMMUNITY COLLEGE,

Defendant,

and

JUANITA FORD, LARRY LEWIS,
OLLIE MCKINNEY, CHARLES MORTON,
and SUE E. RADULOVICH,

Defendant-Appellants.

UNPUBLISHED

March 11, 1997

No. 176056

Wayne Circuit Court

LC No. 93 333693 CZ

Before: Jansen, P. J., and Reilly, and M.E. Kobza,* JJ.

PER CURIAM.

The individual defendants (defendants) appeal by leave granted a circuit court order granting plaintiffs' motion to compel defendant Lewis to answer deposition questions. The issue in this case is whether the trial court abused its discretion when it granted plaintiffs' motion to compel in spite of defendants' assertion of an evidentiary privilege. We affirm.

Plaintiffs Field and LaSalle were employed as Vice President for Academic Affairs and Vice President for Finance, respectively. Defendants were on the board of trustees of Wayne Community College on November 23, 1993, when they voted to terminate the employment of plaintiffs. Plaintiffs filed a complaint alleging, among other claims, racial discrimination, intentional infliction of emotional distress, defamation, invasion of privacy and conspiracy to interfere with contractual relationships.

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

During the deposition of defendant Lewis, defense counsel informed plaintiffs' counsel that he would be instructing Lewis not to answer any question that dealt with Lewis' motives in voting to fire plaintiffs. Defense counsel stated his reliance on *Sheffield Development Co v City of Troy*, 99 Mich App 527; 298 NW2d 23 (1980) and *Chonich v Ford*, 115 Mich App 461; 321 NW2d 693 (1982). Plaintiffs' counsel ended the deposition, and filed a motion to compel pursuant to MCR 2.313(A)(2)(a) and 2.306(D)(3) and (G). Plaintiffs argued that defendants' motive for voting to terminate plaintiffs' employment was relevant to plaintiffs' claims and that there was no privilege prohibiting inquiry into Lewis' motives for firing plaintiffs.

In their response to the motion, defendants again relied on *Sheffield* and *Chonich* to support the assertion of a privilege. Defendants' brief did not identify whether they were asserting an evidentiary privilege¹ or the defense of privilege² and did not distinguish between the two in their arguments. For example, they asserted that the alleged defamatory statements would be absolutely privileged. They also stated, "Plaintiffs' Complaint contains numerous allegations but do [sic] not include any allegations which would avoid the privilege asserted." These statements suggest that defendants were arguing that the claims were barred by a defense of privilege. However, defendants also argued that *Sheffield* held that there was limited judicial review for any inquiry into legislators' motives behind their decisions and that *Chonich* held that the board of trustees is a legislative body. The thrust of defendants' argument in their response to plaintiffs' motion was that *Sheffield* precluded plaintiffs from questioning defendants about their motives for their votes. Thus, the argument essentially asserted the existence of an evidentiary privilege.

The trial court held that *Chonich* and *Sheffield* did not preclude plaintiffs from inquiring about the individual defendants' reasons for the decision to terminate plaintiffs' employment because that decision was not legislative in nature. The court distinguished between the legislature's "enacting laws and carrying out public business" and its "dealing with their own in-house personnel matters" The court granted plaintiffs' motion to compel.

A motion to compel discovery is a matter within the trial court's discretion, which we review for an abuse of discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). Michigan law is strongly committed to open and far-reaching discovery, and generally provides for discovery of any relevant, non-privileged matter. *Ostoin v Waterford Twp Police*, 189 Mich App 334, 337; 471 NW2d 666 (1991). In accordance with MRE 501, the existence of an evidentiary privilege is governed by common law, except where modified by statute or court rule. *Id.*

Because we are reviewing the court's ruling on plaintiffs' motion to compel, defendants' arguments concerning the defense of privilege are not properly before us. Citing *Tenney v Brandhov*, 341 US 367; 71 S Ct 783; 95 L Ed 2d 1019 (1951), defendants assert that the doctrine of legislative immunity protects the defendants from liability for their conduct "while acting in the sphere of legitimate legislative activity." The defense of privilege is properly raised in a motion for summary disposition pursuant to MCR 2.116(C)(7) ("[t]he claim is barred because of . . . immunity granted by law")

Whether the individual defendants are immune from liability on any or all of the claims raised by plaintiffs is not properly before us now when we are reviewing the court's ruling on the motion to compel.

Defendants appear to assert the evidentiary privilege that is applicable to state legislators and is based on the Speech or Debate Clause of the Michigan Constitution, Const 1963, art 4, § 11. The Clause states in pertinent part:

Except as provided by law, senators and representatives shall be privileged from civil arrest and civil process during sessions of the legislature They shall not be questioned in any other place for any speech in either house.

The Speech or Debate Clause has been held applicable to individuals other than senators or representatives when the challenged activity of the individual falls within the legislative sphere. In *Prelesnik v Esquina*, 132 Mich App 341; 347 NW2d 226 (1984), the Speech or Debate Clause was held applicable to the job responsibilities of the defendant who was Legislative Corrections Ombudsman. *Prelesnik, supra* at 347-348.³ This Court analyzed the issue of the applicability of the Clause by inquiring whether the defendant's activities "fell within the legislative sphere." *Id.* at 347. This Court, quoting *Gravel v United States*, 408 US 606, 625; 92 S Ct 2614; 33 L Ed 2d 583 (1972), stated that an activity falls within the legislative sphere if it is:

"[A]n integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." [*Prelesnik, supra* at 347.]

Defendants' decision to terminate plaintiffs' employment does not fall within the legislative sphere merely because the Legislature provided the board of trustees with the authority to take the action. In *Wayne County Jail Inmates v Wayne County Sheriff*, 391 Mich 359, 364; 216 NW2d 910 (1974), the Court, addressing the defendants' separation of powers argument, recognized that a local board of commissioners is not necessarily performing a legislative function when it carries out a duty imposed by the Legislature. Similarly, in *Prelesnik*, this Court considered not only that the defendant's ombudsman position was authorized by statute, but also noted that the "position is pertinent to legislative functions . . .", specifically, the Legislature's ability to investigate of the Department of Corrections. *Id.* at 347-348. These cases indicate that the fact that an action is authorized by statute does not necessarily mean that the action falls within the legislative sphere. Thus, defendants' decision to terminate plaintiffs' employment does not fall within the legislative sphere for the purposes of the Speech or Debate Clause merely because the Legislature provided the board of trustees with the authority to "select and employ such administrative officers, teachers and employees . . . as shall be necessary to effectuate its purposes." MCL 389.124(b); MSA 15.615(1124)(b).

Cases from federal courts of appeal concerning the defense of legislative immunity support the trial court's view that an employment decision is not legislative in nature. In *Roberson v Mullins*, 29 F3d 132 (CA 4, 1994), a majority of a county's board of supervisors voted to remove the plaintiff from

his position as the public works superintendent. The plaintiff filed a complaint alleging that the votes against him were motivated by his political party affiliation in violation of the First and Fourteenth Amendments to the United States Constitution. The defendants moved to dismiss the complaint on the basis that the claim was barred by “absolute legislative immunity.” The Fourth Circuit Court of Appeals upheld the district court’s decision that the defendants were not entitled to legislative immunity.

Not all actions undertaken by local governmental bodies that have legislative responsibilities are necessarily “legislative.” Rather a local governmental body acts in a legislative capacity when it engages in the process of “adopt[ing] prospective, legislative-type rules.”

* * *

Here, the County Board terminated [the plaintiff] as the Public Works Superintendent for Wise County. Terminating a county employee is plainly unrelated to the process of “adopt[ing] prospective, legislative-type rules.” We conclude, therefore, that the Board’s termination of [the plaintiff] was not a legislative action; as a result, the County Board members did not act in their legislative capacity when they participated in it.” [*Id.* at 134-135. Citations omitted.]

See also *Gross v Winter*, 876 F2d 165; 277 App DC (1989); *Smith v Lomax*, 45 F3d 402 (CA 11, 1995).

Because the decision to terminate plaintiffs’ employment does not fall within the legislative sphere, the Speech or Debate Clause did not provide defendants with an evidentiary privilege with respect to their motives for their votes. We recognize that *Prelesnik* and the federal court of appeals cases cited above concern the defense of privilege in the form of legislative immunity, rather than the scope of an evidentiary privilege, as is at issue in this case. Nevertheless, we find these cases persuasive regarding the applicability of an evidentiary privilege to defendants’ motives for their votes to terminate plaintiffs’ employment. Their votes were not “an integral part of the deliberative and communicative processes” by which the Legislature participated in the legislative process. *Prelesnik, supra*, quoting *Gravel, supra*. As previously discussed, the employment decision did not become a legislative matter simply because the Legislature authorized the board of trustees to make the decision. Therefore, the activity did not fall within the legislative sphere, and was outside the scope of any evidentiary privilege provided by the Speech or Debate Clause.

Other cases cited by defendants do not support the applicability of an evidentiary privilege in these circumstances. In *Wayne County Sheriff v Wayne County Bd of Comm’rs*, 148 Mich App 702; 385 NW2d 267 (1983), the plaintiff sought declaratory relief after the board of commissioners and the board of auditors cut the plaintiff’s budget by eliminating a division. The trial court denied declaratory relief, concluding that the board of commissioners did not act in an arbitrary and capricious manner. This Court agreed with the trial court that the plaintiff had failed to make the requisite showing that would warrant “an equity court’s intrusion into an exercise of local legislative power” *Id.* at

705. In dicta, this Court stated, “We note that absent some showing of malicious action, bad faith or corruption, individual board members’ viewpoints are not relevant since the board exercises its power as a collective entity and not as individuals, *Saginaw County v Kent*, 209 Mich 160; 176 NW 601 (1920); *Crain v Gibson*, 73 Mich App 192, 200; 250 NW2d 792 (1977).” Defendants would have us believe that this quotation indicates that individual board members’ viewpoints are never discoverable unless there is a showing “of malicious action, bad faith or corruption” Having examined the context in which the statement was made and the cases cited by this Court in support of the proposition, we decline defendants’ invitation to interpret the sentence in the manner suggested. This Court was not setting forth a rule of law that extended beyond the issue presented in that case, e.g. whether the plaintiff had succeeded in showing an arbitrary and capricious action by the board of commissioners such that declaratory relief was warranted. *Wayne County Sheriff* case does not indicate the existence of an evidentiary privilege that would apply in these circumstances.

Likewise, *Chonich*, a case involving the defense of privilege, does not support defendants’ claim that the trial court abused its discretion by granting the motion to compel. In *Chonich*, the plaintiffs brought an action for defamation against Ford, a member of the Wayne County Community College Board of Trustees. The alleged defamatory statements were made at a meeting of the board. The trial court granted the defendant summary disposition on the basis that the plaintiffs had failed to state a claim upon which relief could be granted because the defendant’s statements, made within the course of a regularly convened meeting of the board, were absolutely privileged. This Court agreed that the statements, like those made during the course of legislative proceedings, were absolutely privileged. In the course of the analysis, this Court referred to the board as a “subordinate legislative body.” *Id.* at 468. *Chonich* indicates that, for statements made during the course of a regularly convened meeting of the board, board members are absolutely privileged, e.g. immune, in terms of a defamation action. *Chonich* is not controlling with respect to the applicability of an evidentiary privilege in this case.

Finally, this Court’s decision in *Sheffield, supra*, concerns the separation of powers doctrine, rather than the evidentiary privilege afforded legislators by the Speech or Debate Clause. In *Sheffield*, the plaintiff, a development company, challenged the city council’s denial of plaintiff’s petition for rezoning. During discovery, city officials refused to answer questions relating to the reason for their vote, the plaintiff moved to compel, and the trial court granted the motion. This Court concluded that “the limitations mandated by the constitutional provision with respect to the separation of powers preclude[d] this pretrial discovery.” *Id.* at 532-533. The result of this Court’s holding was that the city officials did not have to testify regarding their motivations for voting to deny the rezoning request. The basis of this court’s decision was the doctrine of separation of powers. The case does not provide support for defendants’ assertion of an evidentiary privilege.

Defendants have not identified the doctrine of separation of powers or 1963 Const, art 3, § 2 as the basis for reversal in this case. However, even if they had done so, the holding of *Sheffield* does not apply in this case because the employment decision at issue here is not legislative in nature. In *Sheffield*, this Court began its analysis by stating, “The rezoning of a specific parcel of land by a township or municipality constitutes an act that is legislative in nature.” *Id.* at 530. The analysis continues with quotations that concern inquiries regarding legislators’ motives in enacting legislation. As

previously discussed, the challenged action in this case concerns an employment decision, which is not legislative in nature. Therefore, *Sheffield* is distinguishable and the separation of powers doctrine does not provide a basis for precluding the discovery sought in this case.

In conclusion, we agree with the trial court that there was no evidentiary privilege that precluded plaintiffs from questioning the individual defendants regarding their motives for their votes to terminate plaintiffs' employment. The trial court did not abuse its discretion when it granted plaintiffs' motion to compel.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza

¹ Some of the more common evidentiary privileges recognized in Michigan as attorney-client, physician-patient, teacher-pupil, clergy, fiduciary, spousal communications and against self-incrimination. 2 Martin, Dean & Webster, Michigan Court Rules Practice, p 167. See also, *Howe v Detroit Free Press*, 440 Mich 203, 210-211; 487 NW2d 374 (1992).

² In tort law, "privilege" is "the ability to act contrary to another individual's legal right without that individual having legal redress for the consequences of that act; usually raised by the actor as a defense." Black's Law Dictionary (6th ed). A privilege in this context may be based upon consent of the person affected by the actor's conduct or be created by law irrespective of the affected person's consent. See Restatement Torts, 2d § 10, Comment c, pp 17-18. As one example of a nonconsensual-type privilege, the Restatement discusses the privilege a legislator enjoys with respect to publication of defamatory matter during the course of performing legislative functions. Restatement 2d, § 590.

³ Immunity for the particular act was held not to apply because the act was outside the scope of the defendant's employment.