

STATE OF MICHIGAN
COURT OF APPEALS

DEPUTY SHERIFFS ASSOCIATION OF
MICHIGAN,

Plaintiff-Appellee,

v

STATE OF MICHIGAN, SHERIFF'S
COORDINATING AND TRAINING COUNCIL,
MICHIGAN SHERIFF'S ASSOCIATION
EDUCATIONAL SERVICE, d/b/a MICHIGAN
SHERIFF'S ASSOCIATION, TERRENCE
JUNGEL, SHERIFF'S COORDINATING AND
TRAINING COUNCIL EXECUTIVE
SECRETARY, MISSAUKEE COUNTY
SHERIFF, GENESEE COUNTY SHERIFF,
JACKSON COUNTY SHERIFF, CLINTON
COUNTY SHERIFF, ALLEGAN COUNTY
SHERIFF, MACOMB COUNTY SHERIFF, ST.
JOSEPH COUNTY SHERIFF and HOUGHTON
COUNTY SHERIFF,

Defendants-Appellants.

UNPUBLISHED
March 26, 2013

No. 300936
Ingham Circuit Court
LC No. 10-000588-CZ

DEPUTY SHERIFFS ASSOCIATION OF
MICHIGAN,

Plaintiff-Appellant,

v

STATE OF MICHIGAN, SHERIFF'S
COORDINATING AND TRAINING COUNCIL,
MICHIGAN SHERIFF'S ASSOCIATION
EDUCATIONAL SERVICE, d/b/a MICHIGAN
SHERIFF'S ASSOCIATION, TERRENCE
JUNGEL, SHERIFF'S COORDINATING AND
TRAINING COUNCIL EXECUTIVE
SECRETARY, MISSAUKEE COUNTY

No. 304547
Ingham Circuit Court
LC No. 10-000588-CZ

SHERIFF, GENESEE COUNTY SHERIFF,
JACKSON COUNTY SHERIFF, CLINTON
COUNTY SHERIFF, ALLEGAN COUNTY
SHERIFF, MACOMB COUNTY SHERIFF, ST.
JOSEPH COUNTY SHERIFF and HOUGHTON
COUNTY SHERIFF,

Defendants-Appellees.

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

In Docket No. 300936, defendants State of Michigan, Sheriff's Coordinating and Training Council (SCTC), Michigan Sheriff's Association Educational Service (MSAES) d/b/a Michigan Sheriff's Association (MSA), Terrence Jungel, SCTC Executive Secretary James C. Reed, Missaukee County Sheriff James D. Bosscher, Genesee County Sheriff Robert J. Pickell, Jackson County Sheriff Daniel H. Heyns, Clinton County Sheriff Wayne K. Kangas, Allegan County Sheriff Blaine J. Koops, Macomb County Sheriff Mark A. Hackel, St. Joseph County Sheriff Matthew J. Lori, and Houghton County Sheriff Brian J. McLean, appeal by leave granted the trial court's order granting plaintiff's, Deputy Sheriffs Association of Michigan (DSAM), motion for enforcement of a permanent injunction, and its order granting plaintiff's motion for a writ of mandamus. In Docket No. 304547, following a bench trial, plaintiff appeals as of right the trial court's order dismissing counts III, IV, and V from the second amended complaint and closing the case. In Docket No. 300936 we reverse the trial court's orders and in Docket No. 304547 we affirm the trial court's orders.

I. FACTUAL PROCEEDINGS

A. DOCKET NO. 300936

In January 2007, the trial court granted plaintiff's motion for a permanent injunction and issued an order permanently enjoining defendants State of Michigan, SCTC, Reed, Bosscher, Pickell, Heyns, Kangas, Koops, Hackel, Lori, and McLean from disbursing any SCTC funds for corrections officer training to certified counties, i.e., those counties that do not forward the entire \$12 booking fee pursuant to MCL 801.4b(3) and MCL 791.545(3).¹

Thereafter, on January 28, 2010, SCTC held a meeting. At the meeting, SCTC approved co-sponsoring (in the amount of \$10,000) a corrections officer training program being conducted

¹ This Court upheld the trial court's issuance of the 2007 permanent injunction. *Deputy Sheriff's Ass'n of Mich v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2008 (Docket No. 276453), slip op, p 1.

by the Michigan Municipal Risk Management Association (MMRMA) and appropriating \$30,000 to sponsor in-service training seminars.

Following this decision, plaintiff filed its complaint and first amended complaint in May 2010 alleging, in part, that SCTC's decisions at the January 28, 2010, meeting violated the 2007 permanent injunction. Plaintiff requested that the trial court hold defendants in contempt and issue a writ of mandamus enjoining defendants from disbursing any funds for corrections officer training. The trial court entered an order granting plaintiff's motion for enforcement of the permanent injunction, but declined to hold defendants in contempt:

IT IS ORDERED that the Sheriffs Coordinating and Training Council has violated the terms of the permanent injunction by designating \$10,000 to be used to assist financially in co-sponsoring training for local corrections officers to be conducted by the Michigan Municipal Risk Management Association and allocating \$30,000 to sponsor in-service training seminars for local correction officers. The Sheriffs Coordinating and Training Council will not be held in contempt for said violation.

IT IS FURTHER ORDERED that the Sheriffs Coordinating and Training Council is enjoined from disbursing any funds which underwrite directly or indirectly the training of local correction officers or that person's supervisor or administrator, who are employed by County Sheriff departments that do not submit the entire \$12.00 booking fee pursuant to MCL 791.545 and MCL 801.4b.

The trial court also granted plaintiff's request for a writ of mandamus:

IT IS ORDERED that the Defendant, Sheriff's Coordinating and Training Council comply with the provisions of MCL 791.538 and 791.539. In particular, the Court orders that the Sheriff's Coordinating and Training Council refrain from taking up matters relating to the minimum standards and requirements for local corrections officers, without first getting recommendations from the local corrections officers advisory board with respect to:

- (a) Recruitment, selection, and certification of new local corrections officers based upon at least, but not limited to, work experience, educational achievement, and physical and mental fitness;
- (b) New employee and continuing training programs;
- (c) Recertification process;
- (d) Course content of the vocational certificate program, the central training academy, and continuing training programs, which shall include education and training on how to identify and manage prisoners with a mental illness; and
- (e) Decertification process.

IT IS FURTHER ORDERED that the Michigan Sheriff's Coordinating and Training Council can only consider training facilities that have been recommended and approved by the local corrections officers advisory board.

Following the entry of these orders, on November 3, 2010, defendants State of Michigan, SCTC, Reed, Bosscher, Pickell, Heyns, Kangas, Koops, Hackel, Lori, and McLean sought leave to appeal the trial court's orders enforcing the 2007 permanent injunction and issuing a writ of mandamus, and this Court granted defendants application for leave to appeal, limited to the issues raised in the application. *Deputy Sheriffs Ass'n of Mich v State of Michigan*, unpublished order of the Court of Appeals, entered May 18, 2011 (Docket No. 300936).

B. DOCKET NO. 304547

In November 2009, plaintiff's executive director, Lawrence Orlowski, made a Freedom of Information Act (FOIA) request for SCTC's entire check registry from January 2004 to the date of the request. In response, SCTC's executive secretary, defendant Reed, sent Orlowski a letter informing Orlowski that SCTC would honor the request. Shortly thereafter, Reed sent Orlowski the check registry that Reed received from SCTC's accountant, Richard Leader.

Additionally, following SCTC's January 28, 2010 meeting, on January 30, 2010, Orlowski made another FOIA request to Reed for the audio tape of the January 28, 2010 meeting. On February 4, 2010, Reed sent a letter to Orlowski informing Orlowski that SCTC's minute taker, Jean Ruff, used the audio tape to assist her in completing the meeting minutes and SCTC did not keep a copy of the audio tape. Subsequently, on February 9, 2010, Orlowski made a FOIA request to Ruff for the audio tape of the January 28, 2010 meeting. On February 12, 2010, Ruff sent a letter to Orlowski informing him that she had erased the audio tape on February 8, 2010, after she had completed the meeting minutes.

Thereafter, on March 31, 2010, Reed sent an e-mail to Ruff, Mark Reminga, Mark Sabin, Patrick Melton, and defendants Heyns, Bosscher, Pickell, and Kangas inquiring about whether SCTC should pay for SCTC members to attend the American Jail Association (AJA) Conference. After Reed sent the e-mail, Sabin and Melton objected that the e-mail violated the open meetings act, and no further action was taken by SCTC.

As previously indicated, plaintiff initially filed its complaint in May 2010. Subsequently, in November 2010, plaintiff filed its second amended complaint which alleged, in part, that defendants State of Michigan, SCTC, Reed, Bosscher, Pickell, Heyns, Kangas, Koops, Hackel, Lori, and McLean violated the FOIA (counts III and IV) and the open meetings act (OMA) (count V). Plaintiff also alleged that defendants State of Michigan, SCTC, Reed, Bosscher, Pickell, Heyns, Kangas, Koops, Hackel, Lori, and McLean and defendants MSAES d/b/a MSA and Jungel engaged in a civil conspiracy (count VI).

Plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) on counts III, IV, and V, asserting that there were no genuine issues of material fact regarding whether defendants violated the FOIA and the OMA. At the same time, defendants State of Michigan, SCTC, Reed, Bosscher, Pickell, Heyns, Kangas, Koops, Hackel, Lori, and McLean and defendants MSAES d/b/a MSA and Jungel filed motions for summary disposition pursuant

to MCR 2.116(C)(8) on count VI, arguing that plaintiff had failed to state a civil conspiracy claim as a matter of law. The trial court denied plaintiff's motion for partial summary disposition pursuant to MCR 2.116(C)(10), concluding that there were genuine issues of material fact regarding whether defendants had violated the FOIA or the OMA. The trial court granted defendants' motions for summary disposition pursuant to MCR 2.116(C)(8), concluding that plaintiff had failed to state a civil conspiracy claim as a matter of law.

A bench trial was held on counts III, IV, and V. Following the bench trial, the trial court dismissed all counts and closed the case. On June 13, 2011, following the trial court's final order, plaintiff appealed as of right to this Court, and on March 28, 2012, this Court consolidated Docket Nos. 300936 and 304547. *Deputy Sheriffs Ass'n of Mich v State of Michigan*, unpublished order of the Court of Appeals, entered March 28, 2012 (Docket Nos. 300936 & 304547).

II. ANALYSIS

A. DOCKET NO. 300936

1. MOTION FOR ENFORCEMENT OF THE PERMANENT INJUNCTION

Defendants State of Michigan, SCTC, Reed, Bosscher, Pickell, Heyns, Kangas, Koops, Hackel, Lori, and McLean argue that the trial court erred in granting plaintiff's motion to enforce the permanent injunction because it incorrectly interpreted MCL 791.545. "We review a trial court's grant of injunctive relief for an abuse of discretion." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 105; 662 NW2d 387 (2003). "The granting of injunctive relief is within the sound discretion of the trial court, although the decision must not be arbitrary and must be based on the facts of the particular case." *Id.* at 105-106 (quotation marks and citations omitted). To the extent that this issue also involves the interpretation of a statute, issues of statutory interpretation are reviewed de novo. *Taylor v Currie*, 277 Mich App 85, 94; 743 NW2d 571 (2007).

"Injunctive relief is an extraordinary remedy that courts normally grant only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury." *Higgins Lake Prop Owners Ass'n*, 255 Mich App at 106 (quotation marks and citations omitted). In interpreting a statute, the primary goal is to "ascertain and give effect to the intent of the Legislature." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012) (quotation marks and citation omitted). If the statutory language is unambiguous, it must be enforced as written. *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006). "In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory." *Mich Props*, 491 Mich at 528. "When considering the correct interpretation, the statute must be read as a whole." *Id.* "Individual words and phrases, while important, should be read in the context of the entire legislative scheme." *Id.*

According to the 2007 permanent injunction, defendants were permanently enjoined "from disbursing any funds for the training of local corrections officers to any county sheriff's department that has not paid to the Defendants the \$12.00 per prisoner booking fee, in total,

pursuant to MCL 801.4b(3), and MCL 791.545(3).” Following this order, at its January 28, 2010, meeting, SCTC decided to approve two disbursements of funds related to the training of local corrections officers:

9. Proposal to co-sponsor training with MMRMA

Jim Reed referred to a copy of a letter that was sent by the council’s direction of May 26, 2009[,] to MMRMA expressing that we support the proposal’s concept. Jim stated that this is a request to the council to put in place[] designated funds of \$10,000 that would be used to assist financially in corrections training sponsored by MMRMA. Jim stated that again he has asked the AG office, as well as the Advisory Board Council if there [sic] opinion was that we had the right to contract and they have always expressed consistently that they feel we do. The council discussed the proposal to co-sponsor training with MMRMA and the different opinions on the proposal. The council also discussed their working relationship with MMRMA and Mr. Page on how he would represent the council. Motion by Sheriff Heyns to move forward with the co-sponsor with MMRMA, second by Mark Sabin. Mark Reminga passed on the motion. Sheriff Heyns, Mark Sabin, Sheriff Bosscher, Sheriff Kangas approved.

10. Proposal for contracting for in-service training seminars

Jim Reed is asking the council to consider allocating some money for in-service training seminars. Jim discussed that the \$30,000 would be used for multiple contracts not single contracts. Sheriff Kangas asked for a motion to move forward with the proposal for contracting in-service training seminars. Motion by Mark Sabin to accept the proposal for contracting in-service training seminars, second by Sheriff Bosscher. Mark Reminga passed on the motion. Sheriff Heyns, Mark Sabin, Sheriff Bosscher and Sheriff Kangas approved.

Thereafter, plaintiff argued, and the trial court agreed, that SCTC’s actions appropriating \$10,000 to co-sponsor corrections officer training with MMRMA and \$30,000 for future in-service corrections officer training seminars violated the terms of the 2007 permanent injunction because, pursuant to MCL 791.545(3), SCTC was prohibited from disbursing any funds related to corrections officer training. Thus, the trial court entered an order enforcing the 2007 permanent injunction that “enjoined [SCTC] from disbursing any funds which underwrite directly or indirectly the training of local correction officers or that person’s supervisor or administrator, who are employed by County Sheriff departments that do not submit the entire \$12.00 booking fee pursuant to MCL 791.545 and MCL 801.4b.”

MCL 791.545(3) provides:

(3) The council shall use the fund only to defray the costs of continuing education, certification, recertification, decertification, and training of local corrections officers; the personnel and administrative costs of the office, board, and council; and other expenditures related to the requirements of this act. Only counties that forward to the fund 100% of fees collected under section 4b of 1846

RS 171, MCL 801.4b, are eligible to receive grants from the fund. A county that receives funds from the council under this section shall use those funds only for costs relating to the continuing education, certification, recertification, and training of local corrections officers in that county and shall not use those funds to supplant current spending by the county for those purposes, including state grants and training funds. [Emphasis added.]

A plain reading of MCL 791.545(3) clearly limits what SCTC may use its funds for — to defray the costs of continuing education, certification, recertification, decertification, and training of local corrections officers; for SCTC’s personnel and administrative costs; and for other related expenditures.

However, pursuant to MCL 791.544, SCTC may provide funding to other public or private agencies or organizations, provided that the funding is used to implement the intent of the act. MCL 791.544 provides:

The council may do all of the following:

(a) *Enter into agreements with other public or private agencies or organizations to implement the intent of this act.*

(b) *Cooperate with and assist other public or private agencies or organizations to implement the intent of this act.*

(c) Make recommendations to the legislature on matters pertaining to its responsibilities under this act. [Emphasis added.]

The trial court abused its discretion in concluding that SCTC violated the 2007 permanent injunction when it approved the disbursement of funds at its January 28, 2010, meeting. Rather, as the 2007 permanent injunction, MCL 791.544, and MCL 791.545 make clear, SCTC cannot disburse funds for corrections officer training to *certified counties*. But, MCL 791.544 and MCL 791.545 (and, consequently, the injunction) do not limit SCTC from disbursing funds to other entities. Rather, MCL 791.544(a) and (b) allow SCTC to enter into agreements with, cooperate with, or assist public or private agencies or organizations as long as the agreement accomplishes the intent of the act. The preamble to the local corrections officers training act provides the intent of the act, and it states:

AN ACT to improve the training and education of local corrections officers; to provide for the certification of local corrections officers and the development of standards and requirements for local corrections officers; to provide for the creation of a sheriffs coordinating and training office and a local corrections advisory board; and to prescribe the powers and duties of certain local and state officers and agencies.

Consequently, a plain reading of MCL 791.544 and MCL 791.545 reveals that SCTC may appropriate funds for corrections officer training with a public or private agency or organization as long as the funding is restricted to: defraying the costs of continuing education, certification, recertification, decertification, and training of local corrections officers; SCTC’s

personnel and administrative costs; and for other related expenditures. The appropriations in this case meet these requirements.

Moreover, the language of the 2007 permanent injunction only enjoins SCTC from disbursing money to certified counties (i.e., counties that do not forward the entire \$12 booking fee). Thus, SCTC's appropriation of funds at its January 28, 2010, meeting to other entities for the purpose of training corrections officers was a permissible use of SCTC funds and did not run contrary to the injunction. Consequently, because SCTC's appropriation of funds did not violate MCL 791.544, MCL 791.545, or the 2007 permanent injunction, the trial court abused its discretion in entering an order enforcing the permanent injunction.

2. WRIT OF MANDAMUS

Defendants State of Michigan, SCTC, Reed, Bosscher, Pickell, Heyns, Kangas, Koops, Hackel, Lori, and McLean argue that the trial court abused its discretion in issuing a writ of mandamus because plaintiff failed to establish its burden that it has a clear legal right to performance of the requested act and that defendants have a clear legal duty to perform the requested act. A trial court's decision on a request for mandamus is reviewed for an abuse of discretion. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367; 820 NW2d 208 (2012). "An abuse of discretion occurs when a trial court's decision is not within the range of reasonable and principled outcomes." *Taylor*, 277 Mich App at 93. "However, we review de novo the first two elements required for issuance of a writ of mandamus — that defendants have a clear legal duty to perform, and plaintiffs have a clear legal right to performance of the act requested — as questions of law." *Coalition for a Safer Detroit*, 295 Mich App at 367. Additionally, issues of statutory interpretation are reviewed de novo. *Taylor*, 277 Mich App at 94.

The issuance of "a writ of mandamus is an extraordinary remedy." *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008) aff'd in part 482 Mich 960 (2008). "[M]andamus is appropriate where (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other legal or equitable remedy exists that might achieve the same result." *Hanlin v Saugatuck Twp*, __ Mich App __; __ NW2d __ (Docket No. 300415, issued January 15, 2013), slip op, p 7, quoting *City of Bay City v Bay Co Treasurer*, 292 Mich App 156, 164-165; 807 NW2d 892 (2011).

"Plaintiffs must show that they have a clear legal right to performance of the specific duty sought and that the defendants have the clear legal duty to perform the act requested." *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 520; 810 NW2d 95 (2011), citing *Tuggle v Dep't of State Police*, 269 Mich App 657, 668; 712 NW2d 750 (2006). "Within the meaning of the rule of mandamus, a 'clear, legal right' is one 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.'" *Univ Med Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 143; 369 NW2d 277 (1985) (citation omitted). And, "[e]ven where such a right can be shown, it has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is not possessed by citizens generally." *Id.*

Here, the trial court's writ of mandamus ordered SCTC to comply with MCL 791.538 and MCL 791.539. MCL 791.538 provides:

Not later than October 1, 2004 and as often as necessary after that, *the council shall approve minimum standards and requirements for local corrections officers* with respect to the following:

(a) Recruitment, selection, and certification of new local corrections officers based upon at least, but not limited to, work experience, educational achievement, and physical and mental fitness.

(b) New employee and continuing training programs.

(c) Recertification process.

(d) Course content of the vocational certificate program, the central training academy, and continuing training programs. The course content shall include education and training on how to identify and manage prisoners with a mental illness.

(e) Decertification process. [Emphasis added.]

MCL 791.539 provides:

(1) The local corrections officers advisory board is created within the council. The board shall consist of 9 members appointed by the council, as follows:

(a) Three members of the board shall be members of the deputy sheriff's association of Michigan.

(b) Three members of the board shall be members of the Michigan sheriffs' association.

(c) One member of the board shall be a member of the police officers association of Michigan.

(d) One member of the board shall be a member of the fraternal order of police.

(e) One member of the board shall be a member of the Michigan association of counties.

(2) All members of the board shall hold office for terms of 3 years each, except that of the members first appointed 3 shall serve for terms of 1 year each, 3 shall serve for terms of 2 years each, and 3 shall serve for terms of 3 years each. Successors shall be appointed in the same manner as the original appointment.

(3) A person appointed as a member to fill a vacancy created other than by expiration of a term shall be appointed in the same manner as the original appointment for the remainder of the unexpired term of the member whom the person is to succeed.

(4) Any member may be reappointed for additional terms.

(5) The members of the board shall serve without compensation but shall be entitled to their actual expenses in attending meetings and in the performance of their duties.

(6) Not later than April 1, 2004 and as often as necessary after that, *the board shall develop and recommend minimum standards and requirements for local corrections officers and shall submit those standards and requirements to the council for the council's approval under section 8.*

(7) The board shall recommend to the council all facilities that the board approves for providing training to local corrections officers under this act. [Emphasis added.]

As concluded by the trial court, MCL 791.539(6) clearly provides that the *advisory board* is to develop and recommend minimum training standards and requirements and MCL 791.538 clearly provides that SCTC is to then consider approving the advisory board's recommendations on minimum training standards and requirements. Assuming, then, that there is a clear, legal right to require SCTC to follow these statutes and not approve any minimum training standards and requirements that have not been presented to SCTC by the advisory board, that right would be held by the advisory board. However, plaintiff is not the advisory board. And, although plaintiff is an organization with several members on both the advisory board and SCTC, it has not presented any evidence establishing that it has a clear, legal right founded or granted by the law to seek SCTC's performance under these statutes.² *Univ Med Affiliates*, 142 Mich App at 143.

Additionally, to the extent that plaintiff argues that SCTC cannot appropriate funds without the approval of the advisory board, this argument is misplaced. While MCL 791.544 and MCL 791.545 do place limits on how SCTC may appropriate funds, these statutes do not require SCTC to seek advisory board approval before appropriating funds. Rather, according to MCL 791.538 and MCL 791.539, the only advisory board recommendations that SCTC must either accept or reject involve the minimum training standards and requirements for corrections

² We reject plaintiff's contention that because it has standing to bring suit, it also has a clear, legal right to performance of the specific duty. Standing and duty are separate legal questions, *MOSES, Inc v Southeastern Mich Council of Governments*, 270 Mich App 401, 414; 716 NW2d 278 (2006); *Univ Med Affiliates*, 142 Mich App at 143, and thus whether a party has standing does not determine whether a party has a clear, legal right to the performance of a duty for the issuance of a writ of mandamus.

officers. Because plaintiff cannot establish that it has a clear, legal right to performance, the trial court abused its discretion in issuing the writ of mandamus.

B. DOCKET NO. 304547

1. MCR 2.116(C)(10):

GENUINE ISSUES OF MATERIAL FACT ON COUNTS III, IV, AND V

Plaintiff argues that the trial court erred in denying its motion for partial summary disposition pursuant to MCR 2.116(C)(10) because there was no genuine issue of material fact regarding the FOIA claims (counts III and IV) and the OMA claim (count V). This Court reviews the trial court's ruling on a motion for summary disposition de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When deciding a motion for summary disposition under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "There is a genuine issue of material fact when 'reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.'" *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010), quoting *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "This Court considers only the evidence that was properly presented to the trial court in deciding the motion." *Id.* "This Court also reviews de novo a trial court's legal determination in a FOIA case." *Hopkins v Duncan Twp*, 294 Mich App 401, 408; 812 NW2d 27 (2011). Whether the OMA applies is a question of law that is reviewed de novo. *In re Jude*, 228 Mich App 667, 670; 578 NW2d 704 (1998).

"Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins*, 294 Mich App at 409, citing MCL 15.233(1). The parties agree that SCTC is a public body. MCL 15.232(d). A public record is "'a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.'" *Hopkins*, 294 Mich App at 409, quoting MCL 15.232(e). And a writing "includes all means of recording or retaining meaningful content, including . . . [magnetic or paper tapes]." *Id.*, citing MCL 15.232(h). Although mere possession of a record by a public body does not always result in it being a public record, "[a] writing can become a public record after its creation if possessed by a public body in the performance of an official function, or if used by a public body, regardless of who prepared it." *Id.*

The trial court properly concluded that questions of material fact existed regarding the alleged FOIA violations. Regarding count III, plaintiff asserted that the audio tape was a part of the public record because SCTC had a policy of maintaining an audio tape until the meeting minutes were approved by SCTC. In contrast, defendants argued that the audio tape was not a public record because it was not used by SCTC for the performance of an official function. To support its motion for partial summary disposition, plaintiff presented evidence suggesting that, at the very least, SCTC's policy was to keep a copy of the audio tape until the next SCTC

meeting because that was when the minutes were officially approved. Specifically, although Reed testified that SCTC had not established a prior policy or practice of keeping the audio tape until the meeting minutes were approved while Kathy Cole was the SCTC minute taker, plaintiff produced an e-mail from Cole stating that the audio tapes were not erased until the meeting minutes were approved, and Ruff's February 12, 2010, letter in response to plaintiff's February 9, 2010, FOIA request for the audio tape indicated that Ruff destroyed the audio tape the day before plaintiff sent the FOIA request.

On the other hand, defendants presented evidence that the audio tape was not a public record. Specifically, Reed and Kangas testified that Ruff was a SCTC contract employee. Reed further testified that SCTC did not have a policy of maintaining audio tapes of its meetings, and Kangas testified that SCTC did not have requirements regarding how Ruff prepared the meeting minutes. Additionally, Kangas stated that Ruff merely used the tapes to assist her in completing the meeting minutes. Because reasonable minds could differ on whether the audio tape was used by SCTC, the trial court properly denied plaintiff's partial motion for summary disposition on count III.

Regarding count IV, plaintiff argued that SCTC provided an incomplete check registry in response to the FOIA request, while defendants argued that they did not violate the FOIA in providing plaintiff with the check registry. To support its motion, plaintiff presented a letter from Reed indicating that SCTC's entire check registry was enclosed along with the check registry and a check registry analysis that highlighted the irregularities of the check registry, including the non-sequential order of check numbers and numerous missing check numbers.

However, defendants presented contradictory evidence. Specifically, Reed stated that he provided plaintiff with an exact copy of the check registry he received from SCTC's accountant. Furthermore, Reed stated that once he realized that there were irregularities with the check registry, he investigated and was able to account for most of the missing checks. Reed stated that most of the missing check numbers from the check registry were actually voided, lost, destroyed, or had not actually been processed by SCTC's accountant at the time the check registry was created. Moreover, Reed testified that after correcting the check registry's discrepancies and reviewing SCTC's bank statements there were no unaccounted SCTC expenditures on the check registry. Because reasonable minds could differ on whether defendants failed to turn over a public record and therefore violated the FOIA, the trial court properly denied plaintiff's partial motion for summary disposition on count IV.

Turning to count V, "[t]he Open Meetings Act generally requires 'decisions' or 'deliberations' of a 'public body' to be open to the public. The Open Meetings Act allows individuals to bring civil actions for injunctive relief to either compel compliance or enjoin further noncompliance." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 576-577; 821 NW2d 896 (2012). "[T]he purpose of the OMA is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern." *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002). "The Open Meetings Act defines a 'meeting,' in part, as 'the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy'" *Davis*, 296 Mich App at 577, quoting MCL 15.262(b). "And the Open Meetings Act defines a

‘decision’ as a ‘determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.’” *Id.*, quoting MCL 15.262(d). However, “an informal canvas by one member of a public body to find out where the votes would be on a particular issue is not violative of the OMA.” *St Aubin v Ishpeming City Council*, 197 Mich App 100, 103; 494 NW2d 803 (1992).

Plaintiff argues that Reed’s March 31, 2010, e-mail constituted a request for a decision by a public body that was not open to the public. Reed’s e-mail stated, in part:

The situation is that the next Council meeting is scheduled for May 28, 2010; after the conference. We have done this the past few years with unanimous approval by the Council. This is an administrative expense and I would feel comfortable going forward with it if all (100%) council members are in favor. Would you please respond with your approval or disapproval.

However, defendants presented evidence suggesting that Reed’s March 31, 2010, e-mail was an informal canvas that did not violate the OMA. Specifically, Kangas testified that the e-mail was a polling regarding SCTC interest in AJA conference attendance, and while Reed admitted that his e-mail did not state that his intent was to call a special meeting, he testified that his intent in sending the e-mail was to see if there was enough interest to call a special meeting to approve the expenditure. Because reasonable minds could differ on whether Reed’s March 31, 2010, e-mail constituted a request for a decision or an informal canvas regarding the votes on a particular issue, the trial court properly denied plaintiff’s motion for partial summary disposition regarding count V.

2. THE BENCH TRIAL:

FINDINGS OF FACT ON COUNTS III, IV, AND V

Plaintiff argues that the trial court’s dismissal of counts III, IV, and V were against the great weight of the evidence because it erred in its findings of fact. “This Court reviews a trial court’s findings of fact following a bench trial for clear error and reviews de novo the trial court’s conclusions of law.” *Redmond v Van Buren Co*, 293 Mich App 344, 352; 819 NW2d 912 (2011); see *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652 n 14; 662 NW2d 424 (2003) (noting that a great weight of the evidence argument in the context of a bench trial should be reviewed under the clearly erroneous standard). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made.” *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009) (quotation marks and citation omitted).

There is record evidence to support the trial court’s dismissal of count III based on its findings that the January 28, 2010, audio tape was not a public record and did not exist. The trial court accepted Ruff’s testimony that it was her practice to record SCTC meetings to help her in preparing the meeting minutes, and that it was her practice to erase the audio tape once she completed typing the minutes. The trial court also accepted Ruff’s testimony that she had never

been told to keep the audio tape until the minutes were approved by SCTC. Also supporting the trial court's findings was Cole's testimony that when she took the SCTC meeting minutes, it was her practice to record the meetings to help her in preparing the minutes, and SCTC had never instituted a policy or practice regarding her use of the audio tape. Additionally, Kangas testified that SCTC never requested or required the SCTC minute taker to record its meetings and SCTC did not keep any audio tapes. Reed also testified SCTC did not have a policy or practice to maintain the audio tapes because they were not SCTC property. In light of these findings, the trial court did not err in concluding that the audio tape was not a public record as it was used only by Ruff as a result of her own personal choice, and it was never owned or possessed by SCTC.³ MCL 15.232(e).

There is likewise record evidence to support the trial court's dismissal of count IV based on its findings that defendants complied with plaintiff's FOIA request and provided plaintiff with the entire check registry. The trial court found that defendants provided the complete check registry, covering an almost five year period. And, although there were 31 checks unaccounted for, the trial court accepted the testimony that those 31 checks were missing because they were either voided or never cashed. Because record evidence supports this conclusion, the trial court did not err in finding no FOIA violation.

Turning to count V, there is evidence to support the trial court's dismissal because Reed's March 31, 2010, e-mail was an informal canvas to determine the votes on a particular issue, and thus it did not constitute a meeting in violation of the OMA. Although Reed admitted that his March 31, 2010, e-mail was poorly worded, he testified that he was not asking for a decision on the expenditure of funds. Rather, the intent of Reed's e-mail was to determine if there was enough support among SCTC to call a special meeting to then make a decision for the approval of funds for the AJA Conference. Reed stated that if all members would have voted "yes" in response to his e-mail, he would have requested a special meeting. In light of these facts, which the trial court accepted, the trial court correctly ruled that this was not a decision under the act, but instead amounted to a "polling" of the members which is not prohibited by the OMA. *St Aubin*, 197 Mich App at 103. Thus, the record evidence supports the trial court's finding that the OMA was not violated.

3. MCR 2.116(C)(8):

FAILURE TO STATE A CLAIM ON COUNT VI

Plaintiff argues that the trial court erred in granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(8) regarding the civil conspiracy claim. This Court

³ Thus, defendants' position in its response brief and at oral argument suggesting that the audio tape was not a public record because it was not used until Ruff actually listened to it is misplaced. Indeed, the record evidence established that the audio tape was used by Ruff at the January 28, 2010, meeting. We conclude that the trial court's ruling was not clearly erroneous because there was record evidence establishing that Ruff's use of the audio tape was personal, and thus it did not constitute use by SCTC. See *Hopkins*, 294 Mich App at 409-417.

reviews the trial court's ruling on a motion for summary disposition de novo. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 669; 760 NW2d 565 (2008). Summary disposition is appropriate under MCR 2.116(C)(8) when "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Detroit Int'l Bridge*, 279 Mich App at 669 (quotation marks and citation omitted). "The pertinent question is whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recover." *Id.* at 669-670 (quotation marks and citation omitted). In reviewing the motion, this Court accepts as true all factual allegations supporting the claim, as all as any reasonable inferences that can be drawn from the facts. *Id.* at 670.

The elements of civil conspiracy are: (1) a concerted action (2) by a combination of two or more persons (3) to accomplish an unlawful purpose (4) or a lawful purpose by unlawful means. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). A civil conspiracy claim is not actionable by itself. Instead, there must be a separate, actionable tort underlying the conspiracy. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003) aff'd 472 Mich 91 (2005). And, while the underlying tort may sound in law or equity, *Detroit Bd of Ed v Celotex Corp (On Remand)*, 196 Mich App 694, 713; 493 NW2d 513 (1992), "[t]he law is well established that in a civil action for damages resulting from wrongful acts alleged to have been committed in pursuance of a conspiracy, *the gist or gravamen of the action is not the conspiracy but is the wrongful acts causing the damages[.]*" *Roche v Blair*, 305 Mich 608, 613-614; 9 NW2d 861 (1943). (Emphasis added.) This means that "[t]he conspiracy standing alone without the commission of acts causing damage w[ill] not be actionable . . . [because] [t]he *cause of action* does not *result from* the conspiracy but from *the acts done*." *Id.* at 614. (Emphasis added.)

In the second amended complaint, count VI alleged that there was a conspiratorial relationship between defendants Reed and SCTC and defendants MSA and Jungel that resulted in defendants avoiding their statutory duties. In other words, plaintiff alleged that defendants' malfeasance, misfeasance, or nonfeasance in office for failing to vote on reading and writing standards for local corrections officers was a result of their willful and concerted conspiracy. Likewise, in its brief on appeal, plaintiff argues that "[t]he named Sheriff Defendants, through its conspiratorial relationship with the MSA and its director, Terry Jungel, refused to implement Section 8 of the Act [MCL 791.538] as above set forth. This willful and concerted conspiratorial action on the part of the Defendants/Appellees constitutes malfeasance, misfeasance and/or nonfeasance in office."

Consequently, in plaintiff's own words, it has failed to state a separate, actionable tort in law or equity. Plaintiff inappropriately declares that defendants engaged in "willful and concerted conspiratorial" acts that prove malfeasance, misfeasance, or nonfeasance in office. Plaintiff cannot base the underlying claim upon a willful and concerted conspiratorial act because it is well-established that the gravamen of the action is the wrongful acts causing damages — not the conspiracy itself. *Roche*, 305 Mich at 614. Thus, plaintiff has failed to state

a claim upon which relief may be granted because it has failed to identify a separate, wrongful act of defendants that caused damage to plaintiff.⁴ The trial court properly granted defendants' motions for summary disposition on the civil conspiracy claim.

III. CONCLUSION

In Docket No. 300936, we reverse the trial court's orders granting plaintiff's motion for enforcement of the permanent injunction and writ of mandamus. In Docket No. 304547, we affirm the trial court's orders denying plaintiff's motion for partial summary disposition, dismissing the case, and granting defendants' motions for summary disposition. We do not retain jurisdiction.

No costs to either party. MCR 7.219(A).

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ William C. Whitbeck

⁴ At oral argument, plaintiff cited *People v Riddle*, 467 Mich 116; 649 NW2d 30 (2002), for the proposition that malfeasance, misfeasance, or nonfeasance in office could be the underlying cause of action for the civil conspiracy count. Plaintiff's brief on appeal actually cites to *People v Perkins*, 468 Mich 448; 662 NW2d 727 (2003). Our review of *Perkins* confirms that malfeasance, misfeasance, or nonfeasance in office is a criminal common law offense, *id.* at 455-456, and consequently it cannot be the separate, actionable underlying tort in a civil conspiracy claim, see *Advocacy Org for Patients & Providers*, 257 Mich App at 384.

Additionally, in plaintiff's brief on appeal, it asserts that defendants' violation of the trial court's orders regarding the permanent injunction and writ of mandamus provide an underlying equitable cause of action for the civil conspiracy claim. However, as previously concluded in Docket No. 300936, defendants did not violate the trial court's orders, and thus there is no violation to establish an underlying cause of action.