

CLARK HILL

Joseph W. Colaianne
T 517.318.3029
F 517.318.3065
Email: jcolaianne@clarkhill.com

Clark Hill PLC
212 East Grand River Avenue
Lansing, MI 48906
T 517.318.3100
F 517.318.3099

clarkhill.com

November 13, 2015

Bay County Circuit Court
Attn: Clerk of the Court
1230 Washington Ave., Suite. 725
Bay City, Michigan 48708

Re: *Cynthia A. Luczak, Bay County Clerk, in Her Capacity as an elected official v
Thomas L. Hickner, Bay County Executive, in his capacity as an elected official,
Bay County Board of Commissioners, the governing body for the County of Bay,
and Kim Mead, Bay County Circuit Court Administrator*
Case No. 15-3583-AW

Dear Sir or Madam:

Enclosed for filing, please find originals of Plaintiff's Motion for Summary Disposition on Count I - Appointment of Legal Counsel and Reimbursement of Legal Fees, Brief in Support of Her Motion for Summary Disposition with Exhibits A-D attached, Notice of Hearing and Proof of Service in the above-referenced matter.

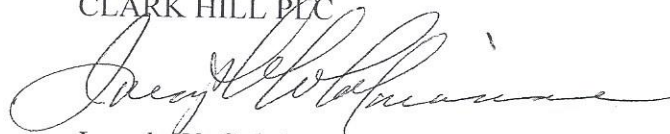
Also, I have enclosed a check in the amount of \$20 for the required motion fee.

Judge's copies of the pleadings are also enclosed.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

CLARK HILL PLC



Joseph W. Colaianne

JWC:kmt
Enclosures

cc: Client [w/Enclosures]
Hon. Paul H. Chamberlain [w/Enclosures]
Mr. Alexander D. Bommarito [w/Enclosures]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR BAY COUNTY

CYNTHIA A. LUCZAK, BAY COUNTY
CLERK in her capacity as an elected official,

15-3583-AW (KS)

Hon. Paul H. Chamberlain

Plaintiff,

v

NOTICE OF HEARING

THOMAS L. HICKNER, BAY COUNTY
EXECUTIVE, in his capacity as an elected
official, BAY COUNTY BOARD OF
COMMISSIONERS, the governing body for
the County of Bay, 18TH JUDICIAL CIRCUIT
COURT, and KIM MEAD, Bay County
Circuit Court Administrator,

Defendants.

CLARK HILL PLC
By: Matthew T. Smith (P46754)
Joseph W. Colaianne (P47404)
212 E. Grand River Avenue
Lansing, Michigan 48906
(517) 318-3100
Attorneys for Plaintiff

BOMMARITO LAW OFFICES, PLLC
By: Alexander D. Bommarito (P62704)
180 E. Washington Road
P.O. Box 189
Freeland, Michigan 48623
(989) 573-5300
Attorney for Defendants

NOTICE OF HEARING

PLEASE TAKE NOTICE that Plaintiff's Motion for Summary Disposition on Count I - Appointment of Legal Counsel and Reimbursement of Legal Fees will be brought on for hearing before the Honorable Paul H. Chamberlain in his courtroom at the Isabella County Courthouse, 300 N. Main Street, Mt. Pleasant, Michigan 48858 on **Friday, December 18, 2015 at 1:30 P.M.**, or as soon thereafter as counsel can be heard.

CLARK HILL PLC

By: 

Matthew T. Smith (P46754)
Joseph W. Colaianne (P47404)
212 East Grand River Avenue
Lansing, Michigan 48906
(517) 318-3100
Attorneys for Plaintiffs

Dated: November 13, 2015

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR BAY COUNTY

CYNTHIA A. LUCZAK, BAY COUNTY
CLERK in her capacity as an elected official,

Plaintiff,

15-3583-AW (KS)

Hon. Paul H. Chamberlain

v

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EXECUTIVE, in his capacity as an elected
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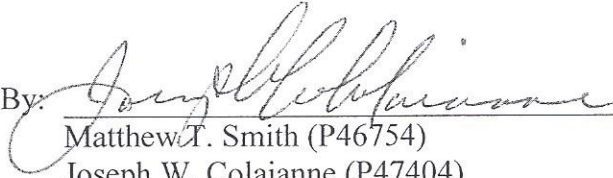
BOMMARITO LAW OFFICES, PLLC
By: Alexander D. Bommarito (P62704)
180 E. Washington Road
P.O. Box 189
Freeland, Michigan 48623
(989) 573-5300
Attorney for Defendants

**PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION ON COUNT I - THE
APPOINTMENT OF LEGAL COUNSEL AND REIMBURSEMENT OF LEGAL FEES**

Plaintiff Cynthia A. Luczak, Bay County Clerk, in her capacity as an elected official, by and through her attorneys Clark Hill PLC, hereby moves this Court for summary disposition pursuant to MCR 2.116(C)(10), because there is no issue of material fact as to whether equity requires the appointment of counsel, reimbursement and payment of legal fees. In support of her Motion, Plaintiff relies on the following Brief in Support and the exhibits attached thereto.

CLARK HILL PLC

Date: November 13, 2015

By: 

Matthew T. Smith (P46754)

Joseph W. Colaianne (P47404)

CLARK HILL PLC

Attorneys for Plaintiff, Cynthia A. Luczak

212 E. Grand River Avenue

Lansing, Michigan 48906

(517) 318-3100

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR BAY COUNTY

CYNTHIA A. LUCZAK, BAY COUNTY
CLERK in her capacity as an elected official,

Plaintiff,

15-3583-AW (KS)

Hon. Paul H. Chamberlain

v

THOMAS L. HICKNER, BAY COUNTY
EXECUTIVE, in his capacity as an elected
official, BAY COUNTY BOARD OF
COMMISSIONERS, the governing body for
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212 E. Grand River Avenue
Lansing, Michigan 48906
(517) 318-3100
Attorneys for Plaintiff

BOMMARITO LAW OFFICES, PLLC
By: Alexander D. Bommarito (P62704)
180 E. Washington Road
P.O. Box 189
Freeland, Michigan 48623
(989) 573-5300
Attorneys for Defendants

**PLAINTIFF'S BRIEF IN SUPPORT OF HER MOTION
FOR SUMMARY DISPOSITION ON COUNT I - THE APPOINTMENT OF LEGAL
COUNSEL AND REIMBURSEMENT OF LEGAL FEES**

Plaintiff Cynthia A. Luczak, Bay County Clerk, in her capacity as an elected official, ("Luczak"), by and through her attorneys Clark Hill PLC, submits this Brief in Support of Her Motion for Summary Disposition on Count I of the Amended Complaint filed in this matter, pursuant to MCR 2.116(C)(10) in this action for the appointment of legal counsel, reimbursement and payment of legal fees.

INTRODUCTION

This action is part of a larger effort by Ms. Luczak to resolve the situation in Bay County over who has the responsibility and decision-making authority over the Office of the Bay County Clerk. Over the last several years, Ms. Luczak maintains that there has been a systematic, methodical and deliberate effort through both direct action and inactions by the County Executive (“County Executive”) and his staff, and/or the County Board of Commissioners (“Board”) to interfere and/or prevent through county administrative processes, to deny, marginalize, and to control Luczak and her office. Despite making repeated attempts, over several county budgeting cycles to impress upon and educate the County Executive and Board of Commissioners regarding the significant and important functions of her office, and the necessity of having experienced and trained personnel, experienced consultants to assist, and the ability to make technological upgrades of the office, the County Executive and the Board of Commissioners have cut her staff, ignored and denied her requests for assistance, and ignored the extra after hours work she and her staff have incurred in an effort to meet the demands of the taxpayers. Luczak contends that the County Executive and the Board of Commissioners have made it virtually impossible for her to adequately perform her constitutional and statutory responsibilities to such a degree that she felt compelled to file this lawsuit seeking declaratory, mandamus and injunctive relief.

As Clerk for the 18th Circuit Court, Luczak is required to perform custodial and ministerial duties to ensure the safekeeping of all circuit court records, making those records available to the Circuit Court, and to the public where appropriate; to collect court ordered fees such as fines, costs and restitution, and to further transmit revenue collected by the State, the County and Victims; to attend every session of the Circuit Court; and to serve as the Clerk of the Jury Board. Most if not

all of these responsibilities have been assumed by the Court Administrator with no agreement with Luczak in place. Luczak maintains that her constitutionally and statutorily established duties in her capacity as Clerk of the Circuit Court are being threatened, impaired, hampered, minimized and/or divested by the actions and inactions, either actual or implied, by the assumption of her duties associated with the circuit court by the Court Administrator and/or the 18th Circuit Court. Luczak felt compelled to file this lawsuit against the 18th Circuit Court and/or Kim Mead, court administrator, for a declaratory ruling determining the statutory and constitutional duties of the County Clerk, and whether or not the Defendants, County Executive, Board, Court Administrator and/or 18th Circuit Court have the right or authority to excuse Luczak from performing those duties. Moreover, Luczak believes she should have the right to utilize circuit court clerks to assist her non-circuit court clerks with circuit court record retention duties involving the review, verification, organization and filing of microfilm images of circuit court proceedings and orders.

In order to meet the demands of the public and various outside agencies, and fulfill her statutory and constitutional duties, Luczak and her non-circuit court staff have had to work afterhours and/or have incurred significant delays in processing service requests from taxpayers and government agencies. Luczak personally works the counter of the County Clerk's office assisting with service requests from taxpayers, and working before and after business hours, sometimes 10-12 hour days in order to fulfill her constitutional and statutory duties. Finding her situation impossible, Ms. Luczak first sought the assistance of Bay County's corporation counsel. When the Bay County corporation counsel refused to acknowledge there was a controversy and conflict of interest, Luczak utilized her own personal funds to hire outside counsel in connection with asserting and defending the performance of her legal duties against

the County Executive, the County Board of Commissioner, the 18th Circuit Court, and/or Court Administrator.

After years of attempting to work with Defendants County Executive and Board by the following of their “policies” and being sandbagged, Luczak feels she has had enough. There is no other remedy than to seek the assistance of this Court in order to defend and assert the duties of her constitutional office. By this Motion, Luczak requests this Court grant her request to retain the law firm of Clark Hill, PLC and to have all outstanding fees and legal fees incurred in this action be reimbursed and paid by the County of Bay.

STATEMENT OF FACTS

In 1979 the Bay County electorate adopted an optional unified form of county government with an elected county board of commissioners and county executive pursuant to the Optional Unified Form of County Government Act, Michigan Public Act 139 of the Public Acts of 1973, as amended, MCL 45.551 et seq. (“Act 139”). Pursuant to Act 139, Defendant Board of Commissioners (“Board”) is the duly elected board of commissioners and governing body for the County of Bay. MCL 45.555. Defendant Thomas L. Hickner, is the duly elected county executive for the County of Bay (“County Executive”). Defendant 18th Judicial Circuit Court, is the circuit court for the County of Bay (“18th Circuit Court”), and Defendant Kim Mead is the appointed Court Administrator for the 18th Circuit Court (“Court Administrator”). Luczak is the duly elected County Clerk for the County of Bay, and has been the Bay County Clerk since 2004.

The position of County Clerk is created by Article VII, Section 4 of the Michigan Constitution of 1963. The County Clerk is one of the most diversified in county government, governed by almost 600 Michigan statutes. (Exhibit A, Luczak Affidavit, para 4). The County Clerk serves four major areas: Clerk of the Circuit Court; Clerk to the County Board of

Commissioners; Registrar of Vital Statistics; and Chief Election Official for Bay County. (Luczak Affidavit, para 5).

As Clerk for the Circuit Court, the County Clerk is required to perform custodial and ministerial duties to ensure the safekeeping of all circuit court records and making those records available to Circuit Court, and the public where appropriate; to collect Court ordered fees such as fines, costs and restitution, and to further transmit revenue collected to the State, the County and Victims; to attend every session of the Circuit Court; and to serve as the Clerk of the jury board. (Luczak Affidavit, para 6).

As Clerk to the County Board of Commissioners, Luczak attends every meeting of the County Board of Commissioners in which a quorum is present; and records and maintains the official minutes of each Board of Commissioners' regular, special or closed sessions (pursuant to the Michigan Open Meetings' Act). (Luczak Affidavit, para 7).

As Registrar of Vital Statistics, Luczak is responsible for recording and maintaining all vital statistics occurring in Bay County which includes, birth certificates, death certificates, marriage certificates, notary public licenses, veterans' discharge licenses and assumed names certificates for businesses. (Luczak Affidavit, para 8). In addition, as Registrar of Vital Statistics, Luczak is the access point for Bay County residents to obtain a Concealed Pistol License (CPL), accepting all CPL applications, attending and serving as Clerk for the Concealed Weapons Licensing Board. (Luczak Affidavit, para 9). As Clerk for the Concealed Weapons Licensing Board Luczak is required to attend every meeting of the Concealed Weapons Licensing Board, prepare and maintain all official minutes, and ultimately issuing CPLs to applicants that are approved. (Luczak Affidavit, para 10). Effective December 1, 2015 the Concealed Weapons Licensing Board will be eliminated and the County Clerk will continue to be responsible for:

storing and maintaining all records related to the issuance of concealed weapons licenses; the issuance of licenses to carry a concealed pistol; the issuance of notices of statutory disqualification, notices of suspensions, notices of denials, and notices of revocations; the issuance of emergency licenses in the event that an individual has obtained a personal protection order; and the retention and destruction of concealed pistol records at the direction of the Michigan State Police. See MCL 28.425a, and 28.425b, as amended by Michigan Public Act 3 of the Public Acts of 2015. (Luczak Affidavit, para 11).

As the Chief Election Official for the County, Luczak is required to preside over every election held within Bay County, which may include three election dates per year: May, August and November. (Luczak Affidavit, para 12). In addition, as the Chief Election Official for the County, Luczak is responsible for accepting candidate filings, programming voting equipment, testing and coding of the ballots and machines, preparing and ordering the printing of all ballots, distributing ballots to all local jurisdictions, maintaining all campaign finance reports, training of all election inspectors, and the tabulation of election results. (Luczak Affidavit, para 13).

As County Clerk, Luczak is the Clerk for the Board of Canvassers, where she is required to attend all meetings of this board, review, audit and certify all local election results; maintain all minutes and permanent record of all official election results; and oversee and manage all recounts conducted by the County. (Luczak Affidavit, para 14).

As County Clerk, Luczak serves on the County Election Commission, whose duties include proof of all ballots prior to printing, managing all precinct consolidation and polling location changes, and all other election related responsibilities; and required to attend clarity hearings when a recall petition has been filed. (Luczak Affidavit, para 15).

As the Chief Election Official for the County, Luczak is required to maintain the Voter Registration and Street Index File (also known as Qualified Voter File or QVF) to ensure that all voters get proper ballots. (Luczak Affidavit, para 16).

The current staffing level for carrying out these functions and duties related to Luczak's role as Clerk of the Circuit Court includes, four (4) full-time employees, while the staffing level for all other non-circuit court functions and duties includes, three (3) full-time employees: Luczak, her chief deputy and one full time employee designated as clerical. (Luczak Affidavit, para 17).

In 2011 Luczak's non-circuit court staff was reduced by two (2) full-time employees, a reduction of approximately 50% to compensate for reductions in appropriations. (Luczak Affidavit, para 18). On information and belief in 2011 other county-wide departments, including the County Executive administrative staff, Sheriff, Treasurer and/or the Register of Deeds, also observed staff reductions. (Luczak Affidavit, para 19). However, Luczak believes that since 2011, the County Executive ("County Executive") and County Board of Commissioners ("Board") have permitted restoration, re-classification, and/or increases in staffing levels, and/or created "new positions," for the County Executive administrative staff, Sheriff, Treasurer and/or Register of Deeds to address both mandated and non-mandated constitutional and statutory duties. (Luczak Affidavit, para 20). Luczak contends that before authorizing the restoration and/or increasing staffing levels, and creation of new positions, the Defendants did not require extensive study of the operations of the County Executive administrative staff, Sheriff, Treasurer and/or Register of Deeds. (Luczak Affidavit, para 21).

Since at least 2011, Luczak has made repeated requests for assistance and sought appropriations, including presenting the Defendants County Executive and Board, extensive

information of the services provided by her office and remedies to fund said positions, only to be summarily denied her requests for assistance. Instead, Luczak maintains that her office was subjected to unreasonable demands made by the County Executive and his staff, such as submitting to “study of the Clerk’s operations,” which on information and belief, no other county-wide elected official has had to endure before restoration, re-classification and/or increases in staffing levels. (Luczak Affidavit, para 22).

Due to the extensive and diverse functions required of the County Clerk and her staff, each work day can and often presents different and multiple tasks, with limited time available to meet the demands of the public, courts (in and outside of Bay County), federal, state and local governments, and law enforcement agencies. (Luczak Affidavit, para 23). For example requests for birth, death and marriage certificates, certification of convictions, expungement, civil judgments, indexing and filing of circuit court documents come not only from the public, but from law enforcement agencies, court systems and other governmental agencies (*e.g.* Michigan Department of Community Health), in and outside of Bay County. (Luczak Affidavit, para 24). Responding to requests for birth, death and marriage certificates, certification of convictions, expungement, civil judgments, indexing and filing of circuit court documents, require time for the research, verification and retrieval of information and can take as little as 5 minutes or a 1/2 hour, and at many times much longer depending on the request. (Luczak Affidavit, para 25). Luczak implemented cost saving measures by offering to the public the ability to order birth, death and marriage certificates online through the county’s website. However, but due to the loss of two full time employees in 2011, as well as the daily operations and demands of the workload placed on the two remaining non-circuit court employees, Luczak is the sole person responding and completing the online orders. (Luczak Affidavit, para 26). Absent Luczak

personally working 10-12 hour days, often coming in before the office is open and/or staying as late 11:00 p.m., filling online orders that would otherwise not be completed and/or would be delayed. (Luczak Affidavit, para 27).

Pursuant to Michigan Law, the County Clerk is required to “flag” missing person vital records with immediate action in the event a child is kidnapped and there is an attempt to obtain an unauthorized record, but due to limited staff, this action has not been addressed since June, 2015. (Luczak Affidavit, para 28).

As record keeping has become more automated with loads of information needing to be imputed and stored electronically, Luczak and her non-circuit court staff, when not responding to requests for vital statistical information and court information (*e.g.* civil judgments, divorce decrees, conviction records), must also verify information imputed and stored electronically to ensure it accurately reflects the written records on file. (Luczak Affidavit, para 29). However, since 2004 the County Clerk’s staff has been unable to comply with the mandated State of Michigan record retention requirements by reviewing, verifying, organizing and filing Circuit Court microfilm images of circuit court proceedings and orders, and as a result over 10 years of records that are required to be indexed and filed, remain in an indeterminate state and not readily accessible. (Luczak Affidavit, para 30).

Michigan law (MCL 445.1 et seq.) requires that, a “person shall not carry on, conduct, or transact business in this state under an assumed name... unless the person files ...in the office of the clerk ... certificate on a form furnished by the county clerk setting forth the name under which the business is owned, or is to be, conducted or transacted....” and further requires the Clerk to notify business owners of the renewal of the assumed name, but due to limited staff, this mandated County Clerk activity has not been maintained since 2011. (Luczak Affidavit, para 31).

In order to meet the demands of the public and fulfill her constitutional and statutory duties, Luczak and her staff have had to work afterhours or have incurred significant delays in processing service requests from taxpayers. (Luczak Affidavit, para 27, 32). Because of the volume of service requests, Luczak has personally worked the counter of the County Clerk's office assisting with service requests from taxpayers, and working afterhours, sometimes 10-12 hour days in order to fulfill her constitutional and statutory duties. (Luczak Affidavit, para 33). It is not uncommon for Luczak to leave work between 10:00 P.M. – 11:00 P.M. Moreover, from time-to-time the Clerk's office is without sufficient trained non-circuit court staff when her Chief Deputy and/or clerical staff are not available to work due to injuries, sickness, vacation or other leave afforded by union contract; and it is not uncommon for either Luczak, or non- circuit court staff to be left alone solely to conduct daily operations presenting what Luczak believes is a serious security concern in the workplace. (Luczak Affidavit, para 34-35). In an attempt to accommodate for the limited and insufficient trained non-circuit court staff, Luczak has closed the County Clerk's Office from Noon to 1:00 P.M. each day only to receive criticism from the County Executive, members of the Board and the public. (Luczak Affidavit, para 36).

Due to her limited non-circuit court staff, Luczak's statutory responsibilities, such as preparing and filing of minutes of the Concealed Weapons Licensing Board, filings with the State of Michigan, and other responsibilities associated with vital statistics (*i.e.* birth certificates, death certificates, and marriage certificates), have been delayed or remain incomplete. (Luczak Affidavit, para 37). The detailed and permanent minutes of the Concealed Weapons Licensing Board from November 2014, April 2015, May 2015, June 2015, July 2015, and August 2015, have not been completed. (Luczak Affidavit, para 38). Moreover, the Clerk, as secretary to the Concealed Weapons Licensing Board, is responsible for notifying permit holders when a permit

has been revoked or suspended but Luczak has not been able to issue timely notifications due to the lack of available time and resources. (Luczak Affidavit, para 39). As indicated, effective December 1, 2015 the Concealed Weapons Licensing Board will be eliminated, and an entirely new process and forms for the issuance of concealed weapon permits must be in place in order to comply with new requirements pursuant to Michigan Public Act 3 of the Public Acts of 2015, and Luczak maintains there is an immediate concern she will not be able to comply with Act 3 with the current non-circuit court staff, absent assistance from Defendants. (Luczak Affidavit, para 40).

Under Michigan election law, among other things, candidates for local political office are required to file with the County Clerk, quarterly campaign finance disclosure statements, in addition to pre-primary election, post primary election, pre general election and post-general election reports, the failure of which results in fines to a candidate. (Luczak Affidavit, para 42). The County Clerk is required to notify candidates for local political office when, a candidate fails to file the required report, and impose and collect fines under Michigan election law. (Luczak Affidavit, para 43). In or about November 2014, Luczak presented a request to the Board of Commissioners for the approval of the purchase and implementation of a campaign finance indexing and reporting computer software system in order to comply with Michigan Campaign Finance Act (that requires the filing and maintenance of campaign committee statements), and a separate request dealing with a record retention system. (Luczak Affidavit, para 44). The campaign finance indexing and reporting computer software system and the record retention system software were accounted for in the Clerk's budget and thus, did not require a budget amendment. (Luczak Affidavit, para 45). On December 2, 2014 the Board of Commissioners approved every item on their agenda, except for Luczak's request to purchase the campaign

finance indexing and reporting computer software system and her request for dealing with a record retention system; and instead, directed that her requests be reviewed by the County Executive, where it has remained without further action by the Defendants. (Luczak Affidavit, para 46). See attached Exhibit B, Bay County Board Minutes, December 2, 2015 and supporting documentation.

Luczak maintains that her purchase requests for goods and/or services to the County Executive and Board of Commissioners are unusually delayed and/or funding withheld as compared to other county-wide elected officials and county departments even though she has provided sufficient information to the County Executive and Board. (Luczak Affidavit, para 48). For example, in February, 2015 she submitted purchase requests for the programming services and ballot printing for the May 2015 election which takes weeks to prepare and involves the coordination between a number of people, including her office and the State of Michigan. (Luczak Affidavit, para 48). Despite the fact that the State of Michigan would be reimbursing the County for the full cost of the May 2015 election, the County Executive staff refused to process her purchasing requests insisting that she submit a sole source letter or new bid request even though since 2005, Bay County has utilized the same vendor and the only vendor, who could service the election equipment and had, just a year before, approved the vendor used for the printing of ballots. (Luczak Affidavit, para 30). Of every election performed, Luczak maintains that she has experienced delays in the processing of purchasing requests necessary for the election by the County Executive staff. (Luczak Affidavit, para 48).

In 2015, Luczak was informed by the county corporation counsel that her staffing concerns would require a new study of the County Clerk's operations by the County Executive, and the Board, allocated up to \$6,000 of taxpayer dollars for said study on July 14, 2015. (See

Luczak Affidavit, para 49). Luczak maintains that no other county-wide official has been subjected to or required to undertake a study of their respective operations before receiving assistance. (Luczak Affidavit, para 50). Luczak maintains that the suggested operational study, which would be under the complete control of the County Executive, is unlikely to be objective and meaningful; and simply designed to unlawfully control her constitutional office and therefore is suspect. (Luczak Affidavit, para 51).

With regard to staffing levels associated with her duties as Clerk of the Circuit Court, Luczak maintains that she has been denied the ability to utilize these circuit court clerk employees to perform circuit court related duties currently being performed by non-circuit court county clerk employees based on the direction of Defendant, 18th Circuit Court and/or Defendant Kim Mead, Court Administrator. (Luczak Affidavit, para 52). In addition, Luczak believes that the Court Administrator has not included her in the proceedings involving the transformation of the circuit court's e-filing system despite her repeated requests to be included, and following the training she received from the State Court Administrator's Office. (Luczak Affidavit, para 53). Many of Luczak's duties associated with the 18th Circuit Court are supposed to involve the safekeeping of all Circuit Court records and making those records available to the court, the collecting of court ordered fees such as fines, costs and restitution, and transmission of the revenue collected, and serving as the Clerk of the Jury Board, have been assumed by the Court Administrator with no agreement with Luczak in place. (Luczak Affidavit, para 54).

Luczak maintains that her constitutionally and statutorily established duties of her office and her obligations to protect the functions of her office are being threatened, impaired, or hampered by the actions and inactions, either actual or implied, and/or by deliberate indifference by the County Executive and the Board due to her repeated requests for assistance and

technology upgrades being routinely and repeatedly denied by these Defendants since at least 2011. (Luczak Affidavit, para 55). Luczak further maintains that it is unlikely that the County Executive and/or Board will grant any requests for assistance or re-allocation of staff from within the county or other departments, and/or technology needed in order to comply with the Michigan Campaign Finance Act, without guidance from this Court.

On June 8, 2015 Luczak notified the Bay County corporation counsel, requesting permission to hire independent legal counsel at the expense of the county to investigate and define the legal issues. At that time, Ms. Luczak expressed concerns that the County Clerk's office had insufficient staff to carry out its constitutional and statutorily mandated functions; to ensure that current, past and future employees of the Clerk's office were lawfully compensated for hours worked on behalf of the taxpayers; and to investigate any discriminatory behavior perpetrated against the Clerk's official position and the Clerk's office by the County Executive and Board. (Luczak Affidavit, para 58). Luczak also indicated to Bay County's corporation counsel that independent legal assistance was necessary in order to define the legal issues and if necessary, bringing suit to declare the rights of the office of the County Clerk and protect the constitutional duties and functions of the office of the County Clerk. (Luczak Affidavit, para 59). Luczak advised Bay County's corporation counsel that due to the allegations and concerns against the Board, there was an inherent conflict of interest requiring the hiring of independent legal counsel, and further requested the retention of legal services from Clark Hill, PLC. (Luczak Affidavit, para 60).

On June 18, 2015 Bay County's corporation counsel denied Luczak's request for independent legal counsel, asserting that there was no conflict of interest. Instead, the County's corporation counsel indicated that she would be retaining outside legal counsel to determine

whether the Luczak's legal claims had any merit to justify the retention of legal counsel by the Clerk. (Luczak Affidavit, para 61). Corporation counsel further noted that the County's outside legal counsel would be contacting Luczak to "confer with you and your staff regarding your current workload and statutorily or constitutionally required duties..", but then added: "Please remember during these consultations that there exists no attorney-client privilege between you and" outside counsel retained by the County's corporation counsel. (Luczak Affidavit, para 62).

On July 1, 2015 Luczak responded to Bay County corporation counsel requesting the counsel file suit seeking declaratory and injunctive relief against the County Board of Commissioners and the County Executive on her behalf. (Luczak Affidavit, para 63). On July 7, 2015 the Bay County corporation counsel responded that she had "NOT in fact 'denied your [Luczak's] request' for the retention of outside legal counsel" but was trying to resolve the issues without litigation, and continued to profess there was no conflict of interest, encouraged Luczak to consult with corporation counsel's hand-picked legal counsel (without any privileges associated therewith), and the retention of a consultant to study the operations of the County Clerk. (Luczak Affidavit, para 64).

On July 13, 2015 through legal counsel, the Bay County corporation counsel was notified via letter by counsel retention of the Clark Hill law firm, and further instructed counsel to preserve all documents and materials, regardless of medium or storage location that, may be relevant to the claims asserted by the County Clerk, *i.e.* Litigation Hold letter. (Exhibit C, Litigation Hold Letter). In a letter dated July 20, 2015 the Bay County corporation counsel acknowledged Luczak's retention of legal services of Clark Hill, PLC and asserting that the County has not and will not authorize the retention of and payment of fees incurred by Luczak. (Exhibit D).

By this Motion, Luczak requests this Court grant her request to retain the law firm of Clark Hill, PLC and to have all legal fees accrued and legal fees to be accrued in this action reimbursed and paid by the County of Bay.

ARGUMENT

I. A COUNTY CLERK HAS INHERENT AUTHORITY TO HIRE OUTSIDE COUNSEL IN EXIGENT CIRCUMSTANCES, AND EQUITY REQUIRES THAT THE COUNTY REIMBURSE THE LEGAL FEES INCURRED.

A. Standard of Review.

A motion for summary disposition under MCR 2.116(C)(10) “tests whether there is factual support for a claim.” *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 N.W. 2d 335 (1994). The trial court is to consider affidavits, pleadings, depositions, admissions, and documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 120; 597 N.W. 2d 817 (1999). The moving party has the initial burden of supporting its position through the presentation of such documentary evidence, and then the burden shifts to the opposing party to establish that a genuine issue of disputed fact exists. *See Neubacher*, 205 Mich App at 420. The nonmoving party may not rely on mere allegations or denials in its pleadings. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991).

B. The County Clerk Has Inherent Authority to Assert and Defend Her Constitutional Authority.

Article 3, Section 2 of the Michigan Constitution addresses the doctrine of separation of powers:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const., 1963, art 3, Sec. 2].

With respect to the County Clerk, Michigan Constitution provides:

There shall be elected for four-year terms in each organized county a sheriff, *a county clerk*, a county treasurer, a register of deeds and a prosecuting attorney, *whose duties and powers shall be provided by law*. The board of supervisors in any county may combine the offices of county clerk and register of deeds in one office or separate the same at pleasure. [Emphasis added] [Const 1963, art 7, § 4]

In addition, Const 1963, art 6, § 14 provides:

The clerk of each county organized for judicial purposes or other officer performing the duties of such office as provided in a county charter shall be clerk of the circuit court for such county. The judges of the circuit court may fill a vacancy in an elective office of county clerk or prosecuting attorney within their respective jurisdictions.

Thus, under our Constitution, the office of the County Clerk “serves a unique posture of being both an executive officer and an officer of the judicial branch.” *Lapeer County Clerk v Lapeer Circuit Court (In re Lapeer County Clerk)*, 469 Mich 146, 156; 665 NW2d 452 (2003).

“Each branch of government has inherent authority to preserve its constitutional authority.” *Employees & Judge of Second Judicial Dist. Court, Second Div. v Hillsdale County*, 423 Mich 705, 717; 378 NW2d 744 (1985). One department in the exercise of its powers, should not be “able to prevent another department from fulfilling its responsibilities to the people under the Constitution.” *Id.* at 717; quoting, *O’Coin’s Inc. v Worchester Co Treasurer*, 362 Mass 507, 511; 287 NE2d 608 (1972).

However, an indispensable ingredient of the concept of coequal branches of government is that “each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.” [Id.; quoting, *United States v Will*, 449 U.S. 200, 228; 101 S Ct 471; 66 L Ed 2d 392 (1980)].

As stated, the County Clerk is a constitutional office whose duties are as provided by law. Const. 1963, art 7, sec 4. See e.g., *People ex rel. Leonard v Papp*, 386 Mich 672; 194 NW2d 693 (1972) (Prosecutor is a constitutional officer whose duties are as provided by law); *Brownstown Township v County of Wayne*, 68 Mich App 244; 242 NW2d 538 (1976) (Office of

the sheriff is a constitutional office with duties and power prescribed law). Bay County is an optional unified form of county government with an elected county board of commissioners and county executive pursuant to Act 139. Pursuant to Section 4(4) of Act 139, “[T]he power vested in the office of county prosecuting attorney, county sheriff, county register of deeds, *county clerk*, county treasurer, county drain commissioner, or the board of county road commissioners, *shall not be minimized or divested by this act.*” MCL 45.554.

Luczak brings this action for the appointment of legal counsel and reimbursement of legal fees that she has incurred and will incur, in connection with asserting and defending the performance of her constitutional and statutory duties. Luczak maintains that the overall functions of her constitutional office are in jeopardy due to the actions and/or inactions of the Defendants. The issue in this case is not whether the Defendant Board is obligated to appropriate funds for Luczak to hire outside counsel. Luczak does not dispute the fact that the Board has complete discretion to approve or deny funding for legal expenses unless otherwise provided by statute. However, as a constitutional officer, Luczak has inherent authority and responsibility to preserve, protect and assert her constitutional authority. It also follows that she has the inherent authority to hire legal counsel, at county expense, under certain circumstances regardless of county policy.

C. A Public Official’s Legal Fees in Connection with Asserting or Defending the Performance of Her Constitutional and Statutory Duties are Reimbursable Upon Showing of Exigent Circumstances.

Generally, “attorney fees may be awarded only when authorized by statute or court rule.” *McKim v Green Oak Township Board*, 158 Mich App 200, 207; 404 NW2d 658 (1987); *citing*, e.g. *State Farm Mutual Automobile Ins Co v Allen*, 50 Mich App 71; 212 NW2d 821 (1973). “Under certain circumstances, however, the appellate courts ... have recognized an exception to

this general rule when a public official incurs attorney fees in connection with asserting or defending the performance of his or her legal duties. *Id.* at 207-208; citing e.g., *Smedley v City of Grand Haven*, 125 Mich 424; 84 NW 626 (1900); *Exeter Twp Clerk v Exeter Twp Board*, 108 Mich App 262; 310 NW 2d 357 (1981), and *City of Warren v Dannis*, 136 Mich App 651; 357 NW2d 731 (1984).

The case of *Smedley v Grand Haven*, *supra* at 426, involved a dispute over legal fees that were incurred by an executive official without legislative approval. In particular, the Mayor of Grand Haven hired a private attorney to defend him in a *mandamus* action filed by the city council. *Id.* at 427. The issue in the *mandamus* action was whether the Mayor could properly cast a vote on an issue that involved the Mayor's own pecuniary issues. *Id.* at 426-27. The circuit court ultimately held for the city council and set aside the Mayor's vote. *Id.* at 427. Despite that fact, the Mayor's private attorney believed that the city should be responsible for his legal fees since his defense as the Mayor served the public's interest. *See Id.* at 428-29. Accordingly, the attorney filed an action of *assumpsit* against the city based on an implied contract. *See Id.* at 425.

In considering the attorney's equitable claim, the Supreme Court acknowledged that the city charter gave the city council complete discretion to allocate funds. *Id.* at 428. Nevertheless, the Court concluded that executive officials have inherent authority to incur expenses in certain circumstances, such as "where an emergency or exigency might arise which would compel the mayor to act without the sanction of the council in order to protect the rights of the city." *Id.* In reaching that conclusion, the Court discussed a Kentucky case holding that the Mayor of Louisville was justified in hiring a private attorney in order to prevent perceived illegal actions by the legislative body:

In *City of Louisville v. Murphy*, 86 Ky. 53 (5 S.W. 194), an action was brought by the mayor of the city to restrain the collection of a claimed illegal tax. The council did not move in the matter, and the city attorney took no steps in it. In this emergency the mayor employed counsel, and the court sustained her claim. It was held that the mayor had the right to do this, under such circumstances, and that the city was liable for the expenses of counsel and attorney fees. [*Id.* at 430.]

Based on the foregoing, the *Smedley* Court remanded the case to the circuit court to determine whether exigent circumstances justified the Mayor's hiring decision. *Id.* at 431. If exigent circumstances existed, then equity would require the city to pay the attorney's legal fees. *Id.*

The case, *McKim v Green Oak Township Board*, *supra*, involved a dispute between the township clerk and the township board over who, within the township government, is responsible for processing township mail and invoices, as well as a dispute over the township board's restrictions on record keeping. 158 Mich App at 201-203. Specifically, the township board had adopted resolutions requiring the general secretary of the township to process the township mail and bills instead of the township clerk. *Id.* at 202. In addition, the township board adopted a resolution prohibiting the removal of township records from the township hall for longer than eighteen hours. *Id.* at 203. The township clerk vigorously opposed the resolutions and also complained that the board had limited the funding for the clerk's office by removing a clerical position and limiting the salary allocated for a deputy clerk. *Id.* The township clerk filed suit alleging that the resolutions "impeded her ability to perform her statutory duties" and sought injunctive relief, a writ of mandamus ordering sufficient funding and reimbursement of attorney fees. *Id.* Following a motion for summary judgment and hearing, the trial court entered an order for injunctive relief (vacating the township board resolutions and eighteen-hour restriction regarding the removal of township records), and awarded the township clerk her attorney fees. On the issue of funding, the trial court found that the "pool" type of operation for secretarial assistance "was well-suited to the needs of the township and refused to order that a secretary be

assigned exclusively” to the township clerk “so long as sufficient secretarial help was available” to assist the clerk in performing her legal duties. *Id.* at 203-204.

On appeal the township board raised several allegations asserting that the trial court erred by granting injunctive relief and the award of attorney fees. *Id.* at 204. The Court of Appeals held that the township board’s allegations were “all without merit”. *Id.* at 206. It further stated:

As for defendants’ claims regarding injunctive relief, the cases cited by the defendants are either inappropriate or fail to recognize that such relief is available where, as here, the plaintiff has established a continuous interference by the defendant. See, e.g., *Soergel v Preston*, 141 Mich App 585, 590; 367 NW2d 366 (1985) [*Id.* at 207] [Emphasis added]

On the issue of awarding attorney fees to the township clerk, the Court of Appeals noted:

As a general rule, attorney fees may be awarded only when authorized by statute or court rule. See, e.g., *State Farm Mutual Automobile Ins Co v Allen*, 50 Mich App 71; 212 NW2d 821 (1973). Under certain circumstances, however, the appellate courts of this state have recognized an exception to this general rule when a public official incurs attorney fees in connection with asserting or defending the performance of his or her legal duties. See, e.g., *Smedley v City of Grand Haven*, 125 Mich 424; 84 NW 626 (1900), *Exeter Twp Clerk v Exeter Twp Bd*, 108 Mich App 262; 310 NW2d 357 (1981), and *City of Warren v Dannis*, 136 Mich App 651; 357 NW2d 731 (1984), lv den 422 Mich 932 (1985). The decision to award attorney fees is discretionary in the trial court. [*Id.* at 207-208]

The Court of Appeals then affirmed the award of attorney fees noting that the defendants had not provided the court with a transcript of the hearing at which the trial court had ruled that the township clerk was entitled to her attorney fees, and in so doing, abandoned the issue on appeal. *Id.* at 208.

In *Wayne Co Sheriff v Wayne Co Board of Comm’rs*, the Michigan Court of Appeals considered whether an elected county sheriff was justified in hiring outside counsel to defend against a prisoners’ civil-rights suit. 196 Mich App 498, 500 (1992). The county board of commissioners acknowledged that it was statutorily required to provide counsel, but insisted that he consult with corporation counsel instead of a private attorney. *Id.* at 504; *see also* MCL 49.73

(“The board of commissioners of a county shall employ an attorney to represent elected county officers . . . in civil matters, as a defendant . . .”). Believing that corporation counsel had a conflict of interest and inadequate resources to represent him, the sheriff hired a private attorney and filed an equitable action to recover legal fees. *Wayne Co Sheriff*, 196 Mich App at 503, 510. On appeal, the Court held that the sheriff was authorized to hire a private attorney without board approval if exigent circumstances existed. *Id* at 509. As in *Smedley*, the authority to hire outside counsel derived from the inherent powers of the sheriff’s public office, not from any specific statute or ordinance. *See Id.*, citing *Smedley*.

D. There Is No Genuine Issue of Material Fact as to Whether There Are Exigent Circumstances Necessitating the County Clerk’s Hiring of Outside Legal Counsel for the Purpose of Asserting and Defending Her Constitutional and Statutory Duties.

As stated above, Luczak brings this Motion for the appointment of legal counsel and reimbursement of legal fees in connection with asserting and defending the performance of her constitutional and statutory duties. As a constitutional officer, Luczak has inherent authority and responsibility to preserve, protect and assert her constitutional authority which she maintains is in jeopardy. As set forth in her affidavit (attached to her First Amended Complaint), Luczak details the significant variety and time consuming duties and functions performed by her office. As noted, Luczak is responsible for maintaining all vital records of county residents (*i.e.* birth, death and marriage records); is required to serve as the Clerk for the 18th Circuit Court, responsible for maintaining all court files; is the chief election officer responsible for maintaining and administering all election related information, including the qualified voter file, election equipment and election records; is responsible for securing military discharge records, and verification of public notary applications; and is the statutory member of the county’s plat board, concealed weapons licensing board, board of canvassers, apportionment committee,

election commission, and clerk for the County Board of Commissioners. All of these functions require specific training and understanding of almost 600 different Michigan statutes to ensure proper compliance with the law, as well as time to attend and prepare. It is without question that in order to carry out the functions and duties on behalf of a county the size of Bay, experienced and trained staff, along with sufficient time to carry out these functions is vital and necessary.

Prior to 2011, there were five (5) employees that comprised of the county clerk staff that carried out the Clerk's non-circuit court mandated duties for the 107,000 county residents. In 2011, however, Luczak's non-circuit court staff lost two (2) full-time employees, a reduction of approximately 50%. (Luczak Affidavit, para 18). No other county-wide elected official observed a reduction in staff to the same extent as Luczak. Since at least 2011, Luczak has made repeated requests for assistance, including presenting extensive information of the services provided by her office to the County Executive and the Board, only to be summarily denied. Yet, since 2011 the County Executive and County Board of Commissioners have authorized restoration, re-classification, and/or increases in staffing levels, and/or created "new positions," for the County Executive administrative staff, Sheriff, Treasurer and Register of Deeds. Luczak has been informed by the County Executive staff that before authorizing the restoration and/or increasing staffing levels, or the creation of new positions, that her office would be required to undergo a study of her operations. (Luczak Affidavit, para 21-22). Luczak submits that no other county-wide elected official has been required to undergo a study of their operations before receiving assistance in carrying out their mandated and non-mandated duties. This is one example of the disparate and arbitrary practice exhibited upon the Clerk by Defendant County Executive, a process completely under the control of the County Executive staff, to control and interfere with the office of the Clerk in fulfilling its responsibilities to the people under the Constitution.

Today, the Clerk's non-circuit court mandated duties and/or functions are carried out by three (3) people: (1) Luczak; (2) her chief deputy; and (3) a file clerk. As a result, in order to meet the demands of the public and fulfill her statutory and constitutional duties, Luczak and her staff work afterhours or have incurred significant delays in processing service requests from taxpayers. (Luczak Affidavit, para 27, 32). Luczak personally works the counter of the County Clerk's office assisting with service requests from taxpayers, and working afterhours, sometimes 10-12 hour days in order fulfill her statutory duties. (Luczak Affidavit, para 33). It is not uncommon for Luczak to leave work between 10:00 P.M. - 11:00 P.M., and even then, her statutory responsibilities, such as preparing and filing of minutes of the Concealed Weapons Licensing Board, filings with the State of Michigan, and other responsibilities associated with vital statistics (*i.e.* birth certificates, death certificates, and marriage certificates) have been delayed, remain incomplete or are set aside completely because there is simply insufficient time to do the work required. (Luczak Affidavit, para 27 -33).

Currently, Luczak is the sole person responding and completing electronic (*i.e.* on-line through the county website) requests for birth, death and marriage certificates. Absent Luczak personally working 10-12 hour days, often coming in before the office is open and/or staying as late 11:00 P.M., filling online orders would not get done and/or would be delayed. (Luczak Affidavit, para 26-27).

In addition, the permanent minutes of the Concealed Weapons Licensing Board from November 2014, April 2015, May 2015, June 2015, July 2015, and August 2015, have not been completed. (Luczak Affidavit, para 38). As secretary to the Concealed Weapons Licensing Board, Luczak is responsible for timely notifying permit holders when a permit has been revoked or suspended but Luczak has not been able to issue the notifications because the lack of available

time and resources. (Luczak Affidavit, para 39). This presents a dire public safety issue if she cannot timely issue suspensions or revocations of concealed weapon permits. Adding to the urgent situation is the fact that the process for issuing, suspending, and revoking CPL permits, will change on December 1, 2015. On that date, the Concealed Weapons Licensing Board will be eliminated, and an entirely new process and forms for the issuance of concealed weapon permits must be in place in order to comply with new requirements pursuant to Michigan Public Act 3 of the Public Acts of 2015. Luczak maintains there is an immediate and serious concern that she will not be able to comply with Act 3 with the current non-circuit court staff, absent assistance from Defendants. (Luczak Affidavit, para 40).

Michigan law (MCL 445.1 et seq.) requires that a person shall not transact business in this State under an assumed name unless the person files in the office of the Clerk a certificate setting forth the name under which the business is owned is, or is to be, conducted or transacted. This statute also requires the County Clerk to notify business owners of the renewal of the assumed name, but due to limited time and staff, this mandated activity has not been maintained since 2011. (Luczak Affidavit, para 31).

Pursuant to Michigan Law, the County Clerk is required to “flag” missing person vital records with immediate action in the event a child is kidnapped and there is an attempt to obtain an unauthorized record, but due to limited staff, this action has not been addressed since June, 2015. (Luczak Affidavit, para 28).

In or about November 2014, Luczak presented a request to the Board of Commissioners for the approval of the purchase and implementation of a campaign finance indexing and reporting computer software system in order to comply with Michigan Campaign Finance Act (that requires the filing and maintenance of campaign committee statements). (Luczak Affidavit,

para 44). The campaign finance indexing and reporting computer software system was accounted for in the Clerk's budget and thus, did not require a budget amendment. (Luczak Affidavit, para 45). Unfortunately, on December 2, 2014 the Board of Commissioners approved every item on their agenda, except for Luczak's request to purchase an implementation of a campaign finance indexing and reporting computer software system; and instead, directed that her requests be reviewed by the County Executive, where it has remained without further action by the Defendants. (Luczak Affidavit, para 46). See attached Exhibit B, Board of Commissioner Minutes, December 2, 2014). As a result of not implementing the campaign finance indexing and reporting computer software system, along with the lack of available time due to daily operations and administration of her office, Luczak has been unable to notify candidates for local political office regarding the July 2015 filing of quarterly campaign finance disclosure statements in accordance with her mandated responsibilities pursuant to the Michigan Campaign Finance Act. (Luczak Affidavit, para 47).

As the Chief Election officer, Luczak is responsible for accepting candidate filings, programming voting equipment, testing and coding of the ballots and machines, preparing and ordering the printing of all ballots, distributing ballots to all local jurisdictions, maintaining all campaign finance reports, training of all election inspectors, and the tabulation of election results. The looming national and state elections, including a primary in February 2016, all require significant time to prepare and implement, will further imperil the amount of time available for Luczak and her two (2) non-circuit court staff.

Luczak also believes that her purchase requests for goods and/or services to the County Executive and Board of Commissioners have been unusually delayed and/or funding withheld as compared to other county-wide elected officials and county departments even though she has

provided sufficient information to the County Executive and Board. (Luczak Affidavit, para 48). For example, in February, 2015 she submitted purchase requests for the programming services and ballot printing for the May 2015 election, but despite the fact that the State of Michigan would be reimbursing the County for the full cost of this election, the County Executive staff refused to process her purchasing requests, insisting that Luczak submit a sole source letter or new bid request even though since 2005, Bay County has utilized the same vendor and the only vendor, who could service the election equipment, and had just a year before, approved the vendor used for the printing of ballots. (Luczak Affidavit, para 48).

With regard to staffing levels associated with her duties as Clerk of the Circuit Court, Luczak has been denied the ability to utilize circuit court clerk employees to assist with circuit court related duties currently being performed by non-circuit court county clerk employees based on the direction of Defendant, 18th Judicial Circuit and/or Defendant Kim Mead, Court Administrator. (Luczak Affidavit, para 52). Part of her role as custodian of the circuit court records, Luczak and her non-circuit court staff, when not responding to requests for vital statistical information and court information (*e.g.* civil judgments, divorce decrees, conviction records), must also verify information imputed and stored electronically to ensure it accurately reflects the written records on file. (Luczak Affidavit, para 29). However, since 2004 the County Clerk's staff has been unable to comply with the mandated State of Michigan record retention requirements by reviewing, verifying, organizing and filing Circuit Court microfilm images of circuit court proceedings and orders. As a result, over 10 years of records that are required to be indexed and filed, remain in an indeterminate state and not readily accessible. (Luczak Affidavit, para 30).

In addition, Luczak's custodial and ministerial duties associated with the 18th Circuit Court are supposed to involve the safekeeping of all Circuit Court records and making those records available to the court. However, Luczak maintains that the Court Administrator has not included her in the proceedings involving the transformation of the Circuit Court's e-filing system despite her repeated requests to be included, and even though she has received training from the State Court Administrator's Office. (Luczak Affidavit, para 53). Other ministerial functions, such as the collecting of court ordered fees such as fines, costs and restitution, and transmission of the revenue collected, and serving as the Clerk of the Jury Board, have been assumed by the Court Administrator with no agreement with Luczak in place. (Luczak Affidavit, para 54).

Based on *Smedley supra*, and *McKim, supra*, and the foregoing, Luczak maintains that the circumstances giving rise to this cause of action warrant her invoking her inherent right to employ legal counsel to assist her in defending and asserting her legal duties as the Bay County Clerk. Bay County's corporation counsel's refusal to acknowledge that a conflict exists in this matter resulted in Luczak being denied legal assistance. Luczak has expressed the need of and has utilized the assistance of legal counsel to assist her in defining the legal problems involved, negotiating resolutions of the legal problems involved, and bringing suit to declare the rights of her office and to protect the functions of her office. (Luczak Affidavit, para 47). A legal conflict exists between Luczak's office and Bay County corporation counsel such that the appointment and payment of independent counsel is necessary to define Luczak's rights. This is particularly true when Luczak's inability to fulfill her constitutional and statutory duties is due solely to the seemingly arbitrary or politically motivated efforts to control her office by Defendants, County Executive and/or Board. (Luczak Affidavit, para 50). If Luczak is required to pay for legal services out of her own pocket, the problem giving rise to the need for legal services will be

exacerbated. (Luczak Affidavit, para 51). Indeed, an adverse decision in this matter will have a chilling effect on any other constitutional elected official in asserting and defending his or her duties of office (*i.e.* judges, sheriff, prosecutor, treasurer, register of deeds and county clerk) from interference of another branch or department in county government. The matter before the court is of public interest and benefit to the residents of the County such that appointment and payment of outside counsel is appropriate. (Luczak Affidavit, para 52).

The services provided thus far include, in part, legal research and advice on the constitutional and statutory responsibilities of Luczak's office, meetings to help identify the issues and develop a plan for remediation, identifying the legal issues involved, provided response to legal counsel, communications with County representatives, receiving and reviewing records, minutes, board resolutions, budgets, and related research of employment and staffing issues. Luczak has followed the County's policy for retention of outside counsel by first requesting legal advice and counsel from Bay County corporation counsel but was effectively denied by her failure to acknowledge that a conflict of interest exists. The County's denial of legal assistance combined with the increasing and severe time limitation, and staff resources to service requests, repeated attempts to resolve through budgetary process spanning several years, compelled Luczak to seek the retention of private counsel. Luczak maintains that in performing her statutory responsibilities and carrying out constitutionally mandated services on behalf of the residents of the County that, a situation of necessity exists which required assistance of outside legal counsel, the retention and payment for legal service is required. *Smedley, supra and McKim, supra*. As a constitutional officer, Luczak maintains that she has a constitutional right to counsel of her choosing. Luczak should be able to cause her attorney to be paid a reasonable fee, and that her counsel should be able to submit the invoices for legal services in the normal course

of business and have them paid according to the normal procedure for the payment of bills by the County.

CONCLUSION

For the reasons stated above, Plaintiff Cynthia A. Luczak respectfully requests that this Honorable Court grant summary disposition and enter judgment ordering the Board to pay all outstanding legal fees and all legal fees to be accrued in these proceedings according to the normal procedures for payment of bills by Bay County.

Respectfully submitted,

CLARK HILL PLC

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By: 

Matthew T. Smith (P46754)
Joseph W. Colaianne (P47404)
212 E. Grand River Avenue
Lansing, Michigan 48906
(517) 318-3100
Attorneys for Plaintiff