STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

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

Plaintiff,

-vs-

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.

/

Case No. 15-3583-AW (KS)

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PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE FOREGOING INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED ON THE PLEADINGS ON 11-23-15

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DEFENDANTS' BRIEF IN SUPPORT OF THEIR CONSOLIDATED MOTION FOR SUMMARY DISPOSITION IN LIEU OF THEIR ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

FACTS

CYNTHIA A. LUCZAK, Bay County Clerk ("MS. LUCZAK") brought this action against the Bay County Executive, THOMAS L. HICKNER, the BAY COUNTY BOARD OF

COMMISSIONERS and improperly named the Bay County Circuit Court Administrator, KIM MEAD as a Defendant, asking this Court to declare the rights and responsibilities of her duties as Clerk, and rule that the Defendants have not adequately staffed or funded her office. Plaintiff amended her Complaint to add the 18th Judicial Circuit Court as a party, but has chosen to improperly maintain the Bay County Circuit Court Administrator, KIM MEAD as a Defendant despite Defendants pointing out that MR. MEAD is an improper party to this lawsuit. MS. LUCZAK also seeks injunctive relief preventing the Bay County Executive and Board of Commissioners from interfering or impairing the office of the County Clerk, apparently due to alleged insufficient funding. MS. LUCZAK further seeks this Court's Order appointing legal counsel on her behalf and requiring Bay County to pay for her attorney fees incurred both pre and post litigation. As set forth below, each of these claims should be dismissed, and in particular, MR. MEAD should be dismissed as an improper party.

APPLICABLE STANDARD OF REVIEW

A Trial Court properly dismisses a claim under MCR 2.116(C)(4) when it lacks jurisdiction of the subject matter involved. *Thomai v MIBA Hydramechanica Corporation*, 303 Mich App 196, 206-207; 842 NW2d 417 (2013), reversed on other grounds, Michigan Supreme Court, June 18, 2014.

Where summary disposition is sought pursuant to MCR 2.116(C)(8), the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the nonmoving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

A Motion under MCR 2.116(C)(10) tests the factual sufficiency of the Complaint. In evaluating the Motion for Summary Disposition brought under this sub-section, a Trial Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the Motion. (MCR 2.116(G)(5)). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

The reviewing court should evaluate a Motion for Summary Disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the Motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at Trial. A mere promise is insufficient under the Michigan Court Rules. *Maiden v Rozwood*, 461 Mich 109 (1999).

> In presenting a Motion for Summary Disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Insurance Company*, 460 Mich 446, 455 (1999), citing *Quinto v Cross & Peters Company*, 451 Mich 358, 362-363 (1996) (internal citations omitted).

DISCUSSION

A. This Court Lacks Jurisdiction to Address MS. LUCZAK's Funding Claims.

As the County Clerk, it is undisputed that MS. LUCZAK has a variety of both constitutional and statutorily mandated obligations. She has sought additional staffing and/or funding from the Board County Board of Commissioners since at least 2011. Due to the nature

of the economic situations of the County and MS. LUCZAK's refusal to provide any factual support for those increases despite repeated requests for that information, no additional personnel has been provided.

1. The Court of Appeals has sole jurisdiction of MS. LUCZAK'S Funding/Staffing Claims

Although MS. LUCZAK has the ability to bring a lawsuit seeking redress regarding appropriations for her office, the sole jurisdiction for any such action involving the issue of funding is limited to the Michigan Court of Appeals. Both MCL 141.436 and MCL 141.438 allow for an elected official to bring suit against a legislative body of his or her County concerning a general appropriations act, including any challenge as to serviceable levels of funding for that branch of County government. However, MCL 141.438(10) requires that any suit regarding funding must be filed with the Court of Appeals. MCL 141.438 specifically states that jurisdiction of a suit brought pursuant to MCL 141.438(6) or MCL 141.436(9) is exclusive to the Court of Appeals, and any judicial duties inherent in that jurisdiction shall not be transferred to any other Court.

Within her Amended Complaint, MS. LUCZAK has modified her claims to avert using the "serviceable funding" language from Count II of the First Amended Complaint. Despite this semantic modification, it is clear that MS. LUCZAK is seeking additional funding for her office. MCL 141.438 is clear that an elected official who heads a branch of County government has standing to bring suit against the Chief Administrative Officer of that County concerning an action relating to the enforcement of a general Appropriations Act for that branch of County government. Moreover, that jurisdiction of the Court of Appeals over a suit brought under subsection (6) or [MCL 141.436(9)] as exclusive in that jurisdiction or any judicial duties inherent in that jurisdiction shall not be transferred to any other Court. (MCL 141.438(10)).

Additionally, within Count III of her Amended Complaint, MS. LUCZAK alleges that mandumus is appropriate to compel the County Executive and Board to make immediate action [sic] allocate existing resources within the current 2014-2015 budget in order to assist the County Clerk in meeting her constitutional and statutory duties. (See Plaintiff's First Amended Complaint at paragraph 109). It is clear that Plaintiff claims relate to "serviceable" levels of funding, as the title of Count III of the Amended Complaint states:

COUNT III – WRIT OF MANDAMUS ORDERING COUNTY EXECUTIVE AND BOARD OF COMMISSIONER TO ALLOCATE FROM EXISTING RESOURCES TO MEET SERVICEABLE LEVEL.

As such, Count III of the Complaint must also be dismissed as this Court has no jurisdiction to adjudicate this funding claim.

Based upon the foregoing, Plaintiff's claims within Count II and Count III of the First Amended Complaint must be dismissed for lack of jurisdiction pursuant to MCR 2.116(C)(4).

2. Defendants are entitled to costs and attorney fees incurred as a result of Defending this action in Circuit Court.

a. Standards for Relief under MCR 2.114(D), (E) and (F).

The Michigan Court Rules require that attorneys and parties who avail themselves of our legal system file pleadings that are meritorious. Attorneys filing pleadings must also certify that their pleadings are meritorious. An affirmative duty is imposed on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *Attorney General v Harkins*, 257 Mich App 564; 669 NW2d 296 (2003). Michigan Court Rule 2.114 provides, in pertinent part:

> (D) Effect of Signature: The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that:
>
> (1) he or she has read the pleading;

> (2) to the best of his or her knowledge, information and belief formed after reasonable inquiry, the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the pleading is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Additionally, the Court Rules mandate sanctions against an attorney and/or party who signs a pleading which is not meritorious, otherwise proper, or is frivolous:

> (E) Sanctions for Violation. If a pleading is signed in violation of the rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees. The court may not assess punitive damages.
>
> (F) Sanctions for frivolous Claims and Defenses. In addition to sanctions under this rule, the party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

Michigan Court Rule 2.114(E) clearly deals with parties and/or attorneys who have signed the offending frivolous document with the Court. An attorney or a party who signs a pleading certifies that to the best of his knowledge, information and belief (formed after reasonable inquiry) the document is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Sanctions may be imposed upon the attorney, client, or both for a violation of this standard. *John J. Fannon Co v Fannon Products, LLC*, 269 Mich App 162; 712 NW2d 721 (2005). In addition, the reasonableness of the inquiry is determined by an objective standard, and the attorney's subjective good faith is irrelevant. The focus is upon the efforts taken to investigate a claim

before filing suit, and a determination of reasonable inquiry depends on the facts and circumstances of the case. *Harkins, supra.*

In the case at hand MS. LUCZAK'S attorneys improperly filed a Complaint with the Circuit Court when the sole and exclusive jurisdiction for such claims is governed by MCL 141.438(10). This jurisdictional statute took effect in November, 2013, just shy of two years ago, and would have been immediately discovered through a simple internet search. In addition, MS. LUCZAK's attorneys were informed by the County's Corporation Counsel on multiple occasions that the Court of Appeals has exclusive jurisdiction over these funding claims. Plaintiff's counsel was most recently informed of this jurisdictional error in the Defendants' Motion for Summary Disposition in Lieu of their Answer to Complaint. Despite clearly setting forth the legal analysis demonstrating that this Court does not have subject matter jurisdiction over these funding claims, Plaintiff failed to remove these claims from the First Amended Complaint. Defendants are also entitled to an award of costs and attorney fees pursuant to MCR 2.114(E) against MS. LUCZAK's attorneys. As set forth in MCR 2.114(F), a frivolous claim is subject to costs as provided in MCR 2.625(A)(2), which provides that if the court finds on motion of a party that an action was frivolous, costs shall be awarded as provided by MCL 600.2591. That statute reads:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action **shall** award to the prevailing party the costs and fees incurred by the party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this sanction shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or court rule, including court costs and reasonable attorney fees.

MCL 600.2591 (emphasis added).

Michigan courts have held that where, as here, a litigant has filed a frivolous cause of action, sanctions under MCR 2.114 are mandatory. *In re Goehring*, 184 Mich 360; 457 NW2d 375 (1990); *Contel Systems Corp v Gores*, 183 Mich App 706; 455 NW2d 398 (1990). A claim is frivolous (1) if the plaintiffs' primary purpose for bringing the suit was to harass, embarrass, or injure the other party; (2) if the plaintiffs have no reasonable basis to believe the underlying facts are true; or (3) if the plaintiffs' legal position is without arguable legal merit. *Meagher v Wayne State Univ*, 222 Mich App 700; 565 NW2d 401 (1997).

b. Plaintiff's funding Claims as filed in this Court are Frivolous, Without Legal Merit and are Subject to Sanctions.

Despite the very clear language of MCL 141.438(10), MS. LUCZAK's attorneys nevertheless proceeded to file a Complaint alleging insufficient funding in the Circuit Court with full knowledge of the fact that the Court of Appeals has exclusive jurisdiction of those claims. The attorneys not only failed to make any reasonable inquiry with regard to filing these claims in Circuit Court, but any potential argument that they *could* be filed in the Circuit Court, rather than the Court of Appeals, is not well grounded in fact nor warranted by existing law or the good faith argument for the extension, modification, or reversal of existing law. MCR 2.114(D). Bay County is entitled to payment of its costs and attorney fees incurred as a result of MS. LUCZAK's attorneys' actions.

B. Circuit Court Administrator KIM MEAD is an Improper Party.

Within her Amended Complaint, MS. LUCZAK has added the 18th Judicial Circuit Court as a party to this matter, while maintaining her claims against KIM MEAD, the Bay County Circuit Court Administrator. MR. MEAD is solely an employee of Bay County, who works at the direction of the Chief Judge, currently Judge Kenneth W. Schmidt. As set forth within the

Affidavit of the KIM MEAD, he was hired as the Bay County Circuit Court Administrator as of December, 2004. (See Affidavit of the KIM MEAD, attached as ***Exhibit A***). His duties are to manage the Bay County Circuit Court, including staffing, budgeting, docket management, developing and implementing court policies and procedures, and jury management. *Id.* MR. MEAD is an at will employee of the Bay County Circuit Court. *Id.*

Although MR. MEAD interacts with the Deputy Circuit Court Clerks who are technically under the umbrella of the Bay County Clerk's Office, he does not have the ability nor the authority to prevent MS. LUCZAK from operating the Court Clerk's Office in any manner. MS. LUCZAK asserts in her Complaint that MR. MEAD has denied her the ability to utilize and share employees as necessary in order to meet serviceable levels of her non-Circuit Court functions. (See Complaint at paragraph 60 and MS. LUCZAK'S Affidavit attached to the Complaint at paragraph 52). Moreover, Plaintiff alleges that the Circuit Court Administrator has not included her in training regarding the Circuit Court's e-filing system. (See Complaint at paragraph 61 and MS. LUCZAK'S Affidavit at paragraph 53). MS. LUCZAK further alleges that many of her administrative duties associated with the safekeeping of all Circuit Court records and making those records available to Circuit Court, collecting the Court Ordered fees and serving as the Clerk of the Jury Board, have been assumed by the Circuit Court Administrator, absent an agreement with MS. LUCZAK. (See Complaint at paragraph 62 and MS. LUCZAK'S Affidavit at paragraph 54).[1]

As set forth in the Affidavit of KIM MEAD, he serves at the direction of the Bay County Circuit Court, not independently. Any actions taken by him are at the direction of the Bay

[1] As discussed *infra*, these claims must fail as a matter of law even if the correct party were named as a Defendant, as the Circuit Court has the sole authority to dictate the non-custodial, ministerial functions of the Deputy Circuit Court Clerks.

County Circuit Court. *Id.* His involvement with MS. LUCZAK is solely within his scope of employment, such that, even if MS. LUCZAK had a viable claim (which she does not), the 18th Circuit is the proper party to this action, not MR. MEAD individually. Accordingly, Defendant KIM MEAD should be dismissed from this lawsuit pursuant to MCR 2.116(C)(8).

C. Defendants have not Interfered with or Impaired the Office of the County Clerk.

MS. LUCZAK seeks declaratory and injunctive relief from this Court, claiming that MR. MEAD, the 18th Circuit Court, the County Executive and Board of Commissioners have all interfered with or impaired her ability to operate her office. She further alleges that Defendants County Executive and the Board of Commissioners have acted arbitrarily and capriciously in dealing with her office. However, as shown below, the County Executive and Board of Commissioners have acted consistently in the best interest of the County, and any request for a declaratory judgment regarding the direction and control of the Deputy Circuit Court Clerks is clearly contrary to Michigan Law.

MS. LUCZAK first asks this Court to declare that she has the ability to move employees that work as Deputy Circuit Court Clerks in the courthouse facility to utilize them for non-Circuit Court functions as she deems necessary. Such a declaration would be void on its face because it violates the separation of powers doctrine of the Michigan Constitution. In addition, moving employees in such a fashion would pose a variety of practical and legal liabilities to the County serious enough to preclude such movement.

The Deputy Circuit Court Clerks have operated organizationally under the Office of the County Clerk, but functionally under the operation of the Circuit Court since the Circuit Court facilities were moved 18 years ago from the County Building on Center Avenue to the current courthouse on Washington Avenue. The County Clerk's Office remained at the Bay County

Building, less than half a mile away from the new Circuit Court facility. The Deputy Circuit Court Clerks operate under the provisions of Bay County Circuit Court's Local Administrative Order 2007-14 ("LOA 2007-14"), which directs that the Deputy Court Clerks be located in the courthouse facility under the day-to-day supervision of the Circuit Court Administrator. LOA 2007-14 took effect on January 1, 2007, is the Court's most recent LAO governing Deputy Circuit Court Clerk duties, and was implemented to revise all prior Circuit Court Administrative Orders. (See Bay County Circuit Court Administrative Order 2007-14; attached as ***Exhibit C***).

The Deputy District Court Clerks are compensated through the Circuit Court's budget, not the Clerk's budget. (See Affidavit of the KIM MEAD, attached as ***Exhibit A***). Moreover, those Deputy Circuit Court Clerks are represented by a different union (and are therefore subject to a different collective bargaining unit) than the employees working in the County Clerk's Office at the County Building, who are covered by their own separate collective bargaining agreement. (See Affidavit of Bay County Personnel and Employee Relations Director, Tim Quinn, attached as ***Exhibit B***). At no time has MS. LUCZAK objected to this organization plan until the filing of her Complaint. (See Affidavit of the KIM MEAD, attached as ***Exhibit A***).

1. <u>The authority to direct the ministerial duties of the Circuit Court Clerks lies exclusively with the Courts, not with MS. LUCZAK.</u>

It is well-settled that

> the judiciary is vested with the constitutional authority to direct the circuit court clerk to perform noncustodial ministerial duties pertaining to court administration ***as the Court sees fit.*** This authority includes the discretion to create duties, abolish duties, or divide duties between the clerk and other court personnel, as well as the right to dictate the scope and form of the performance of such noncustodial ministerial duties. . . . [p]rescribing the duties that arise under the clerk's noncustodial ministerial function is a matter of court procedure and administration. . . . [and] the Constitution grants [the Supreme] Court the exclusive authority to determine, as a matter of court administration, which duties comprise the noncustodial ministerial functions of the circuit court clerk and how those duties are to be performed.

Lapeer Cnty Clerk v Lapeer Circuit Court, 469 Mich 146, 164 (2003) (emphasis added). The Supreme Court determines these duties through its orders, the Michigan Court Rules of 1985, and through the State Court Administrator's actions, such as reviewing and approving various circuit court LAOs, as was done here with LOA 2007-14. Pursuant to MCR 8.110(C)(3), the Chief Judge is the director of the administration of the Court, and

> shall have administrative superintending power and control over the judges of the court and **all court personnel** with authority and responsibility to:
> * * *
> (c) determine the hours of the court and the judges; coordinate and determine the number of judges and court personnel required to be present at any one time to perform necessary judicial and administrative work of the court, **and require their presence to perform that work.**"

MCR 8.110(C)(3)(c)(emphasis added). Further, 8.112(B) establishes the right of the Circuit Court Chief Judge to issue administrative orders governing the internal management of the courts, which, again, was exactly what was done with the issuance (and approval by the State Court Administrator) of LOA 2007-14.

MS. LUCZAK is requesting this Court enter a declaratory order that she, rather than the 18th Judicial Circuit Court Chief Judge, has the authority to direct, at will, the non-custodial, ministerial duties of the Circuit Court Clerks, who are subject to LOA 2007-15. However, as noted by the Michigan Supreme Court *Lapeer County Clerk, supra,*

> [t]he power of the judiciary to direct its ministerial operations has been noted for well over a century. . . . circuit court clerks "are officers of the court, and subject to its direction in all things necessary to proper administration of the law during its sessions." . . . the clerk of the circuit court, although also an executive officer, is subject to all legitimate court orders.

Lapeer County Clerk at 163 (quoting *Whallon v Circuit Judge for Ingham Co*, 51 Mich 503, 508 (1883))(internal citations omitted). Clearly, MS. LUCZAK is prohibited, as a matter of law, from directing these Deputy Circuit Court Clerks to do non-court related work in contravention

of the Chief Judge's direction (either directly, through the LAO or through the Court's employee, MR. MEAD). To grant her request would violate the separation of powers doctrine of Article 3, Sec. 2 of the Michigan Constitution. The judicial powers of rulemaking, supervision and administration of the courts have been conferred by the Constitution on the COURTS, not MS. LUCZAK, and "may not be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization." *In re 1976 PA 267,* 400 Mich 660, 663 (1977). Accordingly, MS. LUCZAK'S request that his Court declare she (rather than the 18th Judicial Circuit Court) has the power to direct the ministerial duties and activities of these designated court personnel must be rejected out of hand.

2. MS. LUCZAK'S request to direct the ministerial duties of the Deputy Circuit Court Clerks is a practical impossibility and MR. MEAD/the 18th Judicial Circuit Court owes no legal duty to the Clerk to provide her with personnel.

Not only would moving employees in the manner as suggested by MS. LUCZAK constitute a violation of the separation of powers, it would also pose a variety of practical and legal liabilities to the County serious enough to preclude such a plan. As noted above, the Deputy District Court Clerks and the County Clerk's employees belong to different unions and are members of different bargaining units. Requiring one member of the Circuit Court's bargaining unit to perform the job functions of the County Clerk employee's bargaining unit would certainly result in a grievance or other complaint being filed by the employees or their union representatives and would subject the County to untold liability and unfair labor practice claims. (See Affidavit of Tim Quinn, attached as ***Exhibit B***).

In addition, MS. LUCZAK would be utilizing Court designated funds to perform County related services if she used the Deputy Circuit Clerks as suggested, thereby depleting the Circuit Court's budget. Even if MS. LUCZAK had the additional funds in her own budget to cover such

intermittent use of the Deputy Circuit Court Clerks, it would be incredibly time consuming and cumbersome (if not impossible) to track the time utilized by each employees for different services for different offices in order to appropriately account and bill time assessed against each office's budget. It should finally be noted that the Circuit Court, who fully funds the Deputy Circuit Court Clerk positions, owes no legal duty to MS. LUCZAK to provide funding or personnel to the County Clerk's Office.

MS. LUCZAK also claims that the MR. MEAD, the Circuit Court Administrator (although he is an improper party, as set forth above), has interfered with her ability to participate in the implementation of the electronic filing process within the Circuit Court. However, as noted in the Affidavit of Julie Coppens, Bay County Information Technology Manager, *no such implementation has ever taken place.* (See Affidavit of Julie Coppens, attached as ***Exhibit D***). As such, no interference with the Plaintiff's ability to participate in the implementation has occurred, contrary to her allegations. However, once again, it should be noted that the 18th Judicial Circuit Court has no legal obligation whatsoever to include MS. LUCZAK in that implementation, as the administration and delegation of non-custodial ministerial duties rests wholly within the discretion of the courts, NOT the Clerk.

Because the Court has no legal duty to provide funding or personnel for non-custodial, ministerial software training to MS. LUCZAK, she has no legal basis to request this Court to direct the 18th Judicial Circuit Court to provide the same to her, which is effectively the relief she requests in her Complaint. MS. LUCZAK'S request for relief against MR. MEAD (the improper party) should be rejected by this Court.

3. The County Executive and Board of Commissioners have acted in the best interest of the County.

MS. LUCZAK has alleged in her Complaint that the County Executive and the Board of

Commissioners have acted "arbitrarily and capriciously" in dealing with her office. To the contrary, the County Executive and the Board of Commissioners have acted consistently in the best interest of the County as a whole. The County Executive, through the Department of Corporation Counsel, attempted to assist MS. LUCZAK by offering to retain an independent outside consultant, at the County's expense, to compile and present information to the Board regarding the mandated functions of MS. LUCZAK'S office that she alleged she could not serviceably perform due to the alleged lack of staff or funding. Corporation Counsel requested, and the Board of Commissioners approved, retaining that independent expert consultant to conduct an analysis, with the assistance and cooperation of MS. LUCZAK, of the work flow in the County Clerk's office and make a recommendation on the necessary staff needs. MS. LUCZAK refused to work with the consultant or provide any information to the Board of Commissioners or the County Executive as to which of the functions mandated by statute or the Michigan Constitution that she was unable to perform at a serviceable level. Despite the filing of the present Complaint, she still has failed to provide this information to Defendants.

Based on the foregoing, it is clear that the Defendants have not acted in an "arbitrary and capricious" manner. As set forth by the Michigan Supreme Court, the words "arbitrary" and "capricious" have generally accepted meanings: arbitrary is without adequate determining principle, fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance, decisive but unreasoned. Capricious is apt to change suddenly; freakish; whimsical; humor some. *Goolsby v Detroit*, 491 Mich 651, 678; 358 NW2d 856 (1984). Defendants have demonstrated valid and rational reasons for not proceeding as requested by MS. LUCZAK in addressing each of the issues outlined above, as doing so would subject to the County to liability and imprudent expenditures.

D. Plaintiff's Claim for Appointment of Legal Counsel is not Based in Law or Policy.

As this Court is aware, the general American rule is that attorney fees are not ordinarily recoverable unless a statute, court rule, or common law exception provides to the contrary. *Smith v Khouri,* 481 Mich 519, 526; 751 NW2d 472 (2008). Within Count I of her Complaint, MS. LUCZAK requests appointment of legal counsel of her choosing, and for said legal counsel to be paid for by Bay County. In doing so, however, MS. LUCZAK fails to present any law or County policy supporting her request. It should also be noted that a request for payment of attorney fees is not, under any circumstances, a justiciable "cause of action" even if it is so labeled as a "Count" in the Complaint.

The case relied upon by Plaintiff in support of her claim for appointment of legal counsel is *McKim v Green Oak Township*, 158 Mich App 200; 404 NW2d 658 (1987). In that action, there was an intra Township dispute over facilitating the Township's mail and bills, as well as maintaining the Township meeting minutes. The Township Clerk filed suit alleging that the Township's resolution regarding handling of the mail and restricting her ability to remove files to complete the meeting minutes impeded her ability to perform her statutory duties. On the issue attorney fees, the Michigan Court of Appeals reiterated as a general rule, attorney fees may be awarded only when authorized by statute or court rule. However, under certain circumstances, Appellate Courts had recognized an exception to the general rule when a public official incurred attorney fees in connection with asserting or defending the performance of his or her legal duties, citing *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; 351 NW2d 731 (1984), lv. den. 422 Mich 932 (1985). The Court of Appeals noted that the decision to award attorney fees was discretionary in the Trial Court. In *McKim*,

the defendants had not provided the Court of Appeals with a transcript of the hearing at which the Trial Court ruled that the clerk was entitled to attorney fees and therefore was impossible for the Court of Appeals to determine whether the Trial Court properly exercised its discretion in making the award. The Court of Appeals determined that the Township Board had abandoned that issue on Appeal. See 158 Mich App 200 at 208.

It is important for the Court to note that *McKim*, and the cases cited therein are distinguishable inasmuch as they deal with situations wherein the governmental official sought reimbursement for legal fees for lawsuits that were brought as a necessary function of their governmental office duties. In the case at present, MS. LUCZAK seeks the appointment of legal counsel and payment of their fees, in an attempt for this Court to determine that her mandated duties in some way have been impaired. This Court should refrain from exercising its discretion in awarding such relief.

In *Smedley*, the Michigan Supreme Court dealt with an intra-City squabble involving the City Clerk and Mayor in the year of 1900 or before. The City Council of Grand Haven attempted to transfer City funds from one account to another by resolution and the Mayor prepared a veto. The City Clerk refused to file the veto, claiming it had been received too late to be effective. Mr. Smedley was the attorney employed to represent the City Mayor in all proceedings. The Supreme Court noted that in the City's charter, it required that if a debt was to be contracted against the City in any way, must come through the power of the common council. However the Court noted that there were certain exceptions to this rule, such as where emergency or exigency existed that may compel the Mayor to act without the sanction of the council in order to protect the rights of the City. The Court concluded that the only issue was whether any exigency existed in *Smedley*, which called upon the Mayor to act without reference

to any formal action by the council. It concluded that it was a question for the jury to determine whether any exigency existed which warranted the Mayor in employing counsel under such circumstances. In comparison to the present case, there exists no such emergency requiring MS. LUCZAK to retain counsel to seek a determination that her claimed limitations exist. Within her own pleadings, Plaintiff has admitted that these issues have existed since at least 2011, and as set forth above, Defendants have attempted to provide her with assistance in determining if such issues exist and the proper manner in resolving any issues. She has failed to cooperate in these attempts. Such failure should not be found to constitute an emergency supporting her ability to have counsel appointment and compensated on her behalf.

Likewise, in *Exeter Twp. Clerk v Exeter Twp. Bd.*, the Michigan Court of Appeals determined where it is factually demonstrated that pressing necessity or emergency conditions warrant a municipal official in employing legal counsel in a matter of official, public concern and legal services are provided without consent of the governing body, the Courts may hold a municipal corporation liable for such legal services. 108 Mich App 262 at 269-270. However in *Exeter*, the clerk needed legal counsel to aid her in certifying nominating petitions, which were required to be certified within three days. The Townships attorney refused to advise her without approval from the entire Township Board. Thus, in *Exeter*, an emergency situation existed which required the assistance of outside legal counsel. Those circumstances do not exist in the present case.

Likewise, the Michigan statute on point, MCL 49.73, requires the County to provide an attorney to represent an elected County official when the official is named as a <u>defendant</u> in a matter related to the performance of that individual's official duties. There is no requirement

under Michigan law, however, for the County to employ an attorney for that official when he or she is contemplating proceeding as a plaintiff, as is the case here.

Going further than Michigan law, Bay County has a policy which may provide for the retention of outside counsel for elected officials as plaintiffs. Attached is ***Exhibit E***, Bay County Civil Counsel Guidelines which potentially provide Bay County elected officials, as plaintiffs, with the opportunity to retain legal counsel at the County's expense and to file suit against another County Entity so long as the requesting official satisfies certain pre-requisites and follows the required procedures. These guidelines set forth the parameters wherein outside counsel may be retained on behalf of an elected official, which is to be retained by Corporation Counsel. These guidelines also provide for instances where County entities are adverse parties, as in the present case. As set forth within these guidelines, any request to Corporation Counsel for retention of outside counsel must:

i. Be submitted in writing;
ii. Be reasonable and necessary;
iii. Explain the need to retain outside legal counsel;
iv. Set forth the reasons why the Department cannot or may not handle the matter;
v. Indicate that the County Entity has verified that there are sufficient funds available in the portion of the Department's budget allocated to retention of outside legal counsel and, if sufficient funds are not available in the Department's budget, that the County Entity requesting the retention has the funds or will have the funds to pay for the outside legal services and shall identify the account from which the outside legal services will be paid.

Absent compliance with the guidelines for retention of outside counsel, the County Entity involved is not authorized to retain outside legal counsel at the County's expense.

Although MS. LUCZAK requested outside legal counsel be retained on her behalf for this matter in writing, it has not been determined or demonstrated that the retention of outside counsel in this matter was reasonable and necessary. Nor has MS. LUCZAK verified that there

were funds in the Corporation Counsel's budget allocated to retain outside counsel, or whether the County Clerk's budget was going to pay for the retention of outside legal counsel.

As set forth above, Plaintiff has failed to establish any basis in Michigan law, or pursuant to the Bay County Civil Counsel Guidelines, that she is entitled to the retention of legal counsel on her behalf in this matter to be paid with Bay County funds. As such, this questionable "claim" should also be dismissed.

CONCLUSION

Based upon the foregoing, the Court can appreciate that Plaintiff's claim for funding is not properly before this Court as jurisdiction is solely vested with the Court of Appeals pursuant to MCL 141.436 and MCL 141.438. Additionally, although the 18th Circuit Court may have been an appropriate party for this action regarding her claims that the Court has somehow interfered with her ability to act as the Clerk for the Circuit Court, the Circuit Court Administrator, KIM MEAD, is not a proper party. Moreover, her claims that her ability to act as the Circuit Court Clerk have been impeded are invalid, as the 18th Circuit Court has the exclusive authority to dictate the non-custodial, ministerial duties of the Circuit Court Clerk and her Deputies and because the Defendants have acted in a rational and reasoned manner as comingling employees from the Circuit Court Clerk's Office to the County Clerk's Office as she deems necessary is a practical and legal impossibility to which she has no legal right or claim. Lastly, her claim for attorney fees is unfounded.

As such, Defendants request this matter be dismissed in its entity, with costs and attorney fees to be assessed, and in particular sanctions be levied against MS. LUCZAK'S attorneys for filing the claims requesting additional funding in Circuit Court as they were, or certainly *should*

have been aware that the jurisdiction of these claims rests solely in the Michigan Court of Appeals.

Dated this 23rd day of November, 2015.

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