



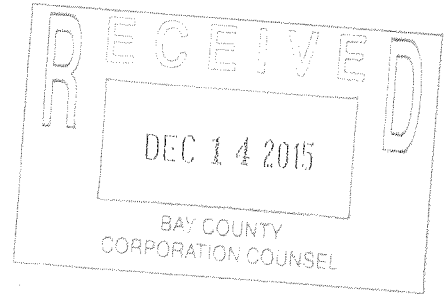
## BOMMARITO LAW OFFICES, PLLC

180 E Washington Rd | PO Box 189 | Freeland, MI 48623

December 11, 2015

1328

Clerk of the Court  
Bay County Circuit Court  
1230 Washington Ave.  
Bay City, Michigan 48708



Re: Cynthia A. Luczak v Thomas L. Hickner, et al  
Case No.: 15-3583-AW (KS)

Dear Sir/Madam:

Enclosed herewith please find the following which I would appreciate being filed on behalf of Defendants in regards to the above-mentioned matter:

1. Defendants' Response to Plaintiff's Motion for Summary Disposition on Count I – The Appointment of Legal Counsel and Reimbursement of Legal Fees.
- \* Proof of Service box affixed thereto.

If you have any questions regarding this matter, please contact me.

Best regards,

ALEXANDER D. BOMMARITO

e-mail: [adb@freelandlaw.net](mailto:adb@freelandlaw.net)

ADB/lis

Enclosure

cc: The Honorable Paul H. Chamberlain  
Circuit Court Judge  
Matthew T. Smith  
Joseph W. Colaianne  
Attorneys at Law  
Defendants (w/o exhibit)

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,

Case No. 15-3583-AW (KS)

Plaintiff,

HON. PAUL H. CHAMBERLAIN  
(P31682)

-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; 18<sup>th</sup> JUDICIAL  
CIRCUIT COURT; and KIM MEAD,  
Bay County Circuit Court Administrator,

Defendants.

CLARK HILL, PLC

BY: MATTHEW T. SMITH (P46754)  
JOSEPH W. COLAIANNE (P47404)

Attorneys for Plaintiff  
212 E. Grand River Ave.  
Lansing, Michigan 48906  
Telephone: 517-318-3100

BOMMARITO LAW OFFICES, PLLC

BY: ALEXANDER D. BOMMARITO (P62704)

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Freeland, Michigan 48623  
Telephone: 989-573-5300

**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 12-11-15

BY:

U.S. MAIL                      FAX \_\_\_\_\_  
 HAND DELIVERED              OVERNIGHT COURIER \_\_\_\_\_  
 FEDERAL EXPRESS              OTHER \_\_\_\_\_

SIGNATURE: Alex Scribner

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR  
SUMMARY DISPOSITION ON COUNT I – THE APPOINTMENT OF LEGAL  
COUNSEL AND REIMBURSEMENT OF LEGAL FEES**

NOW COME Defendants, 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; 18<sup>th</sup> JUDICIAL CIRCUIT COURT; and KIM MEAD, Bay County Circuit Court Administrator, by and through their attorney ALEXANDER D. BOMMARITO of BOMMARITO LAW OFFICES, PLLC, in opposition to Plaintiff's Motion for Summary Disposition on the issue of appointment of legal counsel and reimbursement of legal fees. As Plaintiff has filed a separate Motion for Summary Disposition on the issue of appointment of legal counsel and reimbursement of legal fees, rather than a Counter-Motion for Summary Disposition, Defendants incorporate their Brief in Support of their Consolidated Motion for Summary Disposition in Lieu of their Answer to the original Complaint, as well as their Brief in Support of their Consolidated Motion for Summary Disposition in Lieu of their Answer to Plaintiff's First Amended Complaint, by reference thereto.

At the outset, Plaintiff's Count I for the appointment of legal counsel and reimbursement of legal fees is not a legal cause of action.

Black's Law Dictionary defines "cause of action" as:

1. A group of operative facts, such as a harmful act, giving rise to one or more rights of action... .

A "right of action" is defined by Black's Law Dictionary as:

1. The right to bring a specific case to court.
2. A right that can be enforced by a legal action; a chose in action.

Simply compiling these allegations as a "count" with the original and Amended Complaints does not create a justifiable cause of action.

In seeking the appointment of legal counsel and reimbursement of her legal fees, Plaintiff has not demonstrated that there is any right to appointment of legal counsel or legal fees pursuant

to Michigan law or Bay County policy that has been violated. Rather, Plaintiff regurgitates the various duties that she has as the Bay County Clerk, as well as alleging that the Defendants have somehow improperly interfered with these duties, in pertinent part by failing to provide proper funding/staffing to her office. As set forth within the Defendants pending Motion for Summary Disposition, this Court has no jurisdiction to hear Plaintiff's claims for funding/staffing, and the action should be dismissed in its entirety.<sup>1</sup>

**A. Plaintiff has not established any right to the appointment of legal counsel or any payment of her legal fees pursuant to Michigan law.**

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.

There is no Michigan statute providing for an elected official bringing a lawsuit to be appointed legal counsel and for said counsel to be compensated by a municipality. The only statute even close to this situation is MCL 49.73, which requires the county to provide an attorney to represent an elected county official when the official is named as a defendant 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 as proceeding as a Plaintiff, as presented herein.

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<sup>1</sup> See MCL 141.436 and 141.438.

Plaintiff cites a variety of cases for the proposition that she is entitled to the appointment of legal counsel and for counsel's fees to be paid. Contrary to the Plaintiff's position, each of these cases is distinguishable and does not provide for the relief she requests.

The initial case she cites is *Wayne County Sheriff v Wayne County Board of Commissioners*, 196 Mich App 498; 494 NW2d 14 (1992). In the *Wayne County Sheriff* case, the plaintiff was seeking the appointment of legal counsel in a civil action where he was named as a defendant, not the county clerk acting as a plaintiff to bring a lawsuit against other county entities as in this case.

The next case relied upon by Plaintiff 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. Contrary to Plaintiff's interpretation of this case, 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. Thus, the Court of Appeals did not substantively rule that the plaintiff in *McKim* was entitled to attorney fee as Plaintiff suggests.

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 this case, 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, allegedly by not being provided with sufficient staffing/funding. 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 an 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. 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.

**B. Plaintiff failed to comply with Bay County's Policy for retaining outside counsel.**

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 as *Exhibit A* are 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, not the county official such as the County Clerk herein. 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 the Court of Appeals noted in *City of Warren v Dannis*, a public official who acts arbitrarily, completely without good faith in a dogmatic, unreasonable manner, clearly contrary to the dictates of his/her official responsibilities under statute, charter or ordinance, certainly should not be able to recover attorney fee reimbursement after he or she loses their lawsuit. See

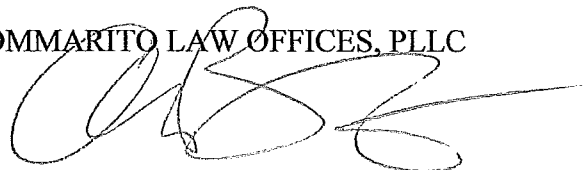


136 Mich App 651 at 662; 357 NW2d 731 (1984). As set forth above, and in Defendants prior Briefing in Support of their Motions for Summary Disposition, Plaintiff has filed this lawsuit improperly with the Circuit Court rather than in the Court of Appeals which has exclusive jurisdiction over this matter. She has clearly failed to comply with the Bay County Policy for retaining outside counsel, nor has she demonstrated any emergency or exigency that supports her request to retain outside counsel independently, without the approval of the Bay County Board of Commissioners and outside of the Bay County Policy for retaining said counsel. Based upon these circumstances, Plaintiff's unreasonable actions in bringing this lawsuit and requesting this Court to appoint legal counsel, at her choosing, and for same to be paid out of the County budget should not be rewarded as noted in *Dannis*.

Based upon the foregoing and as set forth within the Defendants' Briefing in Support of its Motions for Summary Dispositions, Defendants respectfully request this Court deny Plaintiff's Motion for Summary Disposition on Count I – The Appointment of Legal Counsel and Reimbursement of Legal Fees, with prejudice, with costs and attorney fees to be assessed in accordance with MCR 2.114.

Dated this 11th day of December, 2015.

BOMMARITO LAW OFFICES, PLLC



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