

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
the County of Bay, 18TH JUDICIAL CIRCUIT
COURT, and KIM MEAD, Bay County
Circuit Court Administrator,

Defendants.

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**PLAINTIFF’S RESPONSE AND BRIEF IN OPPOSITION TO THE DEFENDANTS’
CONSOLIDATED MOTION FOR SUMMARY DISPOSITION IN LIEU OF THEIR
ANSWER TO PLAINTIFF’S FIRST AMENDED COMPLAINT**

Plaintiff Cynthia A. Luczak, Bay County Clerk, in her capacity as an elected official, (“Luczak”), by and through her attorneys Clark Hill PLC, for her Response in Opposition to the Defendants’ Consolidated Motion for Summary Disposition in Lieu of Their Answer to Plaintiff’s First Amended Complaint, states as follows:

PRELIMINARY STATEMENT AND INTRODUCTION

On November 2, 2015 Plaintiff filed her First Amended Complaint in this matter. Plaintiff has no other remedy but to seek the courts assistance to protect and enforce her

constitutional and statutory duties as elected by the people of Bay County. This action by Plaintiff is first and foremost an action for her right to counsel and right to choose her attorney to protect her elected office. These are fundamental rights. Sadly, she has been forced to expend personal monies to fund her attorney fees as she has been stonewalled at every step by the Defendants. The proposed 2016 budget makes it more apparent that she will need counsel to enforce her serviceable level arguments at the Court of Appeals. (See Appendix – Bay County Board of Commissioner, December 8, 2015 Agenda, Resolution No. 2015-276, General Appropriation Budget Act Resolution - 2016 Bay County Budget). Therefore, first and foremost this Court needs to grant her Motion for Summary Disposition for the appointment of Clark Hill PLC as counsel, and require the county to pay for her counsel to protect the Constitutional and statutory functions she was entrusted to perform by the People of Bay County. The people did not elect the Administrators, commissioners and in house-attorneys of Bay County to perform Plaintiff's legal duties. Without an attorney and funding for an attorney, Plaintiff will be defeated by means of fiscal attrition and the Administrators, Commissioners and in-house attorneys continue to call the shots in an arbitrary and discriminatory fashion prejudicing an elected official.

Next, contrary to Defendants' assertions, Plaintiff's First Amended Complaint does not seek additional funding for her office. Rather, Luczak maintains that there has been a systematic, methodical and deliberate effort 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 minimize the power vested in the office of the County Clerk in violation of Section 4(4) of Michigan Public Act 139 of the Public Acts of 1973, as amended,

MCL 45.551 et seq. (“Act 139”) and the Michigan Constitution. Luczak maintains that she has a duty to defend and assert the performance of her legal duties.

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.

Defendants’ contend that this case is about “serviceable level of funding” and that Plaintiff’s First Amended Complaint is using semantics to assert a claim that should be brought in the Michigan Court of Appeals. See e.g. MCL 141.438 (amending the Uniform Budgeting and Accounting Act to provide the Court of Appeals with exclusive jurisdiction over legal challenges

by an elected official as to the serviceable level of funding). This is not the case, and as more fully set forth below, Plaintiff maintains that the complaint filed in this matter is well-grounded in fact and is warranted by existing law. Indeed, to clarify this point, prior to Defendants' filing this Motion for Summary Disposition, on November 20, 2015 Plaintiff's counsel e-mailed Defendants' counsel indicating that the Plaintiff "was not seeking enforcement of the county's general appropriations act challenging the serviceable level of funding." (Attached hereto as Exhibit A, is copy of an e-mail correspondence between parties' counsel dated November 20, 2015). In addition, Plaintiff's counsel also agreed to dismiss without prejudice Defendant Mead, the Court Administrator. Defendants' counsel indicated that he would forward the e-mail (Exhibit A) to the Defendants, and would advise accordingly. Defendants' counsel did not respond or advise. Instead, on Wednesday, November 25, Plaintiff counsel received Defendants' Motion, which among other things, seeks sanctions against Plaintiff's counsel for filing claims relating to funding of Luczak's office and claims alleged against Defendant Mead. By agreeing to stipulate that Plaintiff was not seeking enforcement of the county's general appropriation act challenging the serviceable level funding, and to the dismissal of Defendant Mead, it was Plaintiff intent to narrow the issues and bring this litigation to possible resolution. Thus, Plaintiff is puzzled that Defendants would pursue the course of action set forth in their motion, increasing the costs to all parties involved.

As stated above, this action is part of larger effort by 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. It is about control. Luczak maintains that she is being subjected to interference and a different set of rules by the Defendants. Plaintiff maintains that 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.

STATEMENT OF FACTS

In an effort to avoid repetition, Plaintiff incorporates by reference the Statement of Facts set forth in Plaintiff's Motion for Summary Disposition on Count I – The Appointment of Counsel and Reimbursement of Legal Fees filed in this matter including the Exhibits attached thereto. In addition, Plaintiff further supports her Response in Opposition to Defendant's Motion for Summary disposition with the attached Exhibits.

ARGUMENT

I. DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4), MCR 2.116(C)(8) AND MCR 2.116(C)(10) SHOULD BE DENIED WHERE THIS COURT HAS JURISDICTION OVER THE SUBJECT MATTER CONCERNING PLAINTIFF'S CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF, AND THE APPOINTMENT OF COUNSEL, WHERE DEFENDANTS IMPEDED, MINIMIZED AND/OR INTERFERED WITH PLAINTIFF'S ABILITY TO PERFORM HER CONSTITUTIONAL AND STATUTORY DUTIES.

A. Standard of Review.

“Jurisdiction over the subject matter is the right of the court to exercise judicial power over the class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending.” *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992); *citing, Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938); *In re Waite*, 188 Mich App 189, 199; 468 NW2d 912 (1991). “Jurisdiction always depends on the allegations and never upon the facts. When a party appears before a judicial tribunal and alleges that a certain right is denied him, and the law has given the tribunal the power to enforce that right, if the adversary has been notified, the tribunal must proceed to determine the truth or

falsity of the allegations.” *Id.* at 472. When a trial court lacks subject matter jurisdiction, dismissal is proper. MCR 2.116(C)(4).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone, and the motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could justify a right to recovery. *Lane v Kindercare Learning Ctrs., Inc.*, 231 Mich App 689, 692; 588 NW2d 715 (1998); *citing, Jackson v Oliver*, 204 Mich App 122, 125; 514 NW2d 195 (1994). All factual allegations of plaintiff, including any reasonable inferences which may be drawn therefrom must be accepted as true. *Id.*

MCR 2.116(C)(10) tests if there is factual support for a claim or defense and requires an examination of whether there is a genuine issue of material fact for trial. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The Court considers affidavits, pleadings, depositions, admissions, and documentary evidence. *Id.* The Court must look at all the evidence in a light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt. *See, Atlas Valley Golf & Country Club, Inc v Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1997). Summary disposition is inappropriate if the non-moving party sets forth questions of fact. *Maiden*, 461 Mich at 119. The trial court shall be liberal in finding a question of material fact. *Andrews v K Mart Corp*, 181 Mich App 666, 668; 450 NW2d 27 (1989). “The motion must not be granted unless the court is satisfied that it is impossible to support the claim because of some deficiency which cannot be overcome.” *Id.* “As a general rule, a grant of summary disposition is premature if granted before discovery on a disputed issue is complete.” *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000); *quoting, Dep’t of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989).

B. This Court has Jurisdiction Over the Subject Matter Concerning Luczak's Claims for Injunctive and Declaratory Relief, and the Appointment of Counsel Where Luczak is Asserting and Defending the Performance of Her Constitutional Duties.

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. [Emphasis added]. "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)].

Luczak brings this action in connection with asserting and defending the performance of her constitutional and statutory duties. As set forth in her affidavit (attached to her First Amended Complaint, and attached hereto as Exhibit B) and her Complaint, Luczak details the

variety and time consuming duties and functions performed by her office which the Defendants concede. (Defendants' Br., p 3). As noted, all of these functions require specific training and understanding of almost 600 different Michigan statutes to ensure proper compliance with the law. 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, Defendant Board of Commissioners with direction from Defendant County Executive, eliminated two (2) full-time employees from the Clerk's non-circuit court staff; a reduction of approximately 50%. (Exhibit B, para 18). No other county-wide elected official observed a reduction in staff to the same extent as Luczak. 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 Defendant County Executive staff, that before authorizing the restoration and/or increasing staffing levels, or the creation of new positions of her office, that the Clerk's Office would be required to undergo a study of her operations. (Exhibit B, 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 in order to control and interfere

with the office of the Clerk in fulfilling its responsibilities to the people under the Constitution. There are other examples as well.

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. In order to accommodate the vacations, sick leave or other absences of her two staffers, the Clerk must answer to the County Executive. No assistance is provided without providing dates when staff are on leave in order to receive assistance which is usually in the form of untrained temporary help (See Exhibit C). Its highly doubtful, that any other county-wide elected and constitutional officer is subjected to the same practice. But then again, the other constitutional officers have available staff: the Treasurer with seven (7) employees, Register of Deeds with five employees (5), and Sheriff with over 70 employees. (See Exhibit D).

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. (Exhibit B, 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. (Exhibit B, 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. (Exhibit B, 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. (Exhibit B, 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. (Exhibit B, 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. (Exhibit B, 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, has changed effective December 1, 2015. On this date, the Concealed Weapons Licensing Board was eliminated, and an entirely new process and forms for the issuance of concealed weapon permits are to be in place in order to comply with new requirements pursuant to Michigan Public Act 3 of the Public Acts of 2015. In 2015, Luczak has made the County Executive and Board of Commissioner aware of the new responsibilities associated with Public Act 3, including the fact that the fees collected must be placed in concealed pistol licensing fund. See MCL 28.425x. (Exhibit E). This new fund was created by the legislature with the sole purpose of funding the costs of the county clerk and includes: Staffing requirements attributable to CPL administration, technological upgrades, office supplies and document storage and retrieval systems and system upgrades. MCL 28.425x. The estimated revenue derived from processing CPL permits would generate approximately \$2,800 per month (or 107 permits per month x \$26.00) according to Defendant County Executive's Director of Personnel and Employee Relations. (See Exhibit F).

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 some kind of assistance from Defendants. Luczak proposed the hiring of temporary help to work 18-20 hours per week funded by the CPL permit fees (Exhibit B, para 40; and Exhibit F). On information and belief, as of the date of filing the First Amended Complaint in this matter, Defendants had not acted on Plaintiff's request.

Another example of the direct interference with her office is the County Executive and Board of Commissioners tabling for almost a year, Luczak's request to purchase and the 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). (Exhibit B, 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. (Exhibit B, para 45). In or about November 2014, Luczak presented her request to the Board of Commissioners for their approval. On December 2, 2014 the Board of Commissioners approved every item on their agenda, except for Luczak's request and instead, directed that her requests be reviewed by the County Executive. (Exhibit B, 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 was 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. (Exhibit B, para 47).

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. (Exhibit B, 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. (Exhibit B, para 48).

Defendants' assertion that Luczak is seeking to utilize circuit court clerks to perform functions performed by non-circuit court clerks is simply not true. (Defendants' Brf. p 10). That is, Luczak is not seeking to direct, at will, the non-custodial, ministerial duties of the Circuit Court Clerk. (Defendants' Brf. p 12). The authority to direct ministerial duties of circuit court clerks lies with circuit court. *Lapeer County Clerk v Lapeer Circuit Court (In re Lapeer County Clerk*, 469 Mich 146, 164; 665 NW2d 452 (2003). However, Luczak is responsible for the care and custody of circuit court records, and the Circuit Court cannot interfere with her constitutional obligation to perform this function. *Id.* at 158. 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 court records on file. (Exhibit B, para 29). However, since 2004 the County Clerk's non-circuit

court staff have been unable to comply with the mandated State of Michigan record retention requirements by reviewing, verifying, organizing and filing microfilm images of *circuit court proceedings and orders*. [Emphasis added]. As a result, over 10 years of circuit court records that are required to be indexed and filed, remain in an indeterminate state and not readily accessible. (Exhibit B, para 30). Much of this circuit court record keeping could be brought up to date if Luczak were allowed to utilize circuit court clerks from time-to-time which has been denied by Defendant, Kim Mead and/or 18th Circuit Court. (Exhibit B, para 52). The 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. (Exhibit B, 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. (Exhibit B, para 54).

As noted above, Defendants contend that the matter before the Court is simply about serviceable level of funding, and therefore the Court lacks subject matter jurisdiction to consider the merits of Plaintiffs' claims. That is not the case. The Defendants, in the exercise of their powers, should not be able to prevent or interfere with the County Clerk in fulfilling her responsibilities to the people under the Constitution. *Employees & Judge of Second Judicial Dist. Court, Second Div., supra* at 717; *See also, McKim v Green Oak Township Board*, 158 Mich App 200, 207; 404 NW2d 658 (1986) (Injunctive relief is available where Township Clerk, in

asserting or defending her legal duties, demonstrated continuous interference by Defendant Township Board). Based on the foregoing, Luczak maintains that this Court has the authority to consider her claims as alleged in her complaint. Accordingly, this Court should deny Defendants' motion pursuant to MCR 2.116(C)(4) and MCR 2.116(C)(8).

C. There are Questions of Material Fact Preventing Summary Disposition Against Plaintiff And Dismissal is Premature When Discovery Has Not Been Completed.

When viewed in the light most favorable to the non-moving party, Defendants have failed to demonstrate that there is no genuine issue of material fact at this time warranting dismissal of Plaintiff's First Amended Complaint pursuant to MCR 2.116(C)(10). In the case before the Court, Defendants have not filed an answer or affirmative defenses to the claims asserted by Luczak in her First Amended Complaint. Thus, it is unclear, at this time, as to what allegations contained in Plaintiff's First Amended Complaint that Defendants' accept as true or contest. Moreover, discovery has not been completed. It would be premature to dismiss this matter at this time. *Village of Dimondale, supra*, 240 Mich App at 566.

At this point in time, Defendants deny that they have acted arbitrarily and capriciously in dealing with Luczak's office; and claim that they have acted consistently in the "best interest of the County as a whole." (Defendants' Brf. p 15). Defendants suggest that the retention of an independent consultant to conduct an analysis of the County Clerk's office exemplifies their rational behavior. (Defendants' Brf. p 15). Luczak maintains that this is just another example by the County Executive and County Board to control the process, control the outcome and control her office. Luczak has worked in the Bay County Clerk's office since 1987, serving first as secretary to the County Clerk (1987-1999); as Chief Deputy County Clerk (1999-2004); and finally as the Bay County Clerk (2004-present). (Exhibit B, para 2). Thus, Luczak has served Bay County for almost 30 years. It is highly doubtful that there is anyone that understands the

functions, duties and needs of the office of the County Clerk, including an outside consultant, better than the Plaintiff. Since at least 2011 she has implemented cost saving measures, such as on-line ordering of vital statistic information, closed down the office during lunch hours, worked before and after hours; and yet, she is being directed to undergo a study. As stated previously, on information and belief, no other county elected official has been subjected to a study of their operations. Why then is the Clerk being singled out? In light of the allegations in Plaintiff's Complaint, the Defendants' contentions that they have acted in the best interest of the County as whole, is a question of material fact.

With regard to Court Administrator, as noted previously, Plaintiff agreed to dismiss this Defendant without prejudice prior to this Defendants filing their motion for summary disposition. It should be noted, however, that no discovery had taken place, and at this time there is question of fact whether Court Administrator acted on his own accord or with direction from the Circuit Court with respect to the allegations contained in the Plaintiff's First Amended Complaint. Accordingly, until discovery has taken place, Luczak maintains that dismissal of Defendant Mead would be premature. Nonetheless, as noted earlier, in an effort to narrow the issues and bring this litigation to a possible resolution Plaintiff has agreed to dismiss Defendant Mead without prejudice at this time.

II. IN FILING THE FIRST AMENDED COMPLAINT AND NAMING THE COURT ADMINISTRATOR AS A DEFENDANT, PLAINTIFF'S COUNSEL HAS NOT VIOLATED MCR 2.114 WHERE THE COMPLAINT FILED IN THIS MATTER IS WELL GROUNDED IN FACT AND IS WARRANTED BY EXISTING LAW.

MCR 2.114(D)(2) provides that by signing a document, a party certifies that "to the best of his or her 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." The rule sets the "minimum level" for the

legal and factual sufficiency of a pleading. *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 714 fn5 (1998)(citing the advisory committee comments to the federal counterpart to MCR 2.114). It is not intended to chill an attorney's vigorous defense of his or her client's interests, attempt to challenge or invoke legal precedent, or enthusiasm or creativity in pursuing factual or legal theories. *Id.* Where a party relies on a reasonable interpretation of the applicable law and facts, MCR 2.114 is not offended. *See e.g., Taylor v Grand Trunk Western RR*, 216 Mich App 435 (1996)(trial court's imposition of sanctions reversed where plaintiffs relied on reasonable interpretations of prior case law and non-binding authority to support claim). A pleading does not violate MCR 2.114 simply because the court determines a party's legal position is wrong. *AG v Harkins*, 257 Mich App 564, 576 (2003); *Kitchen v Kitchen*, 465 Mich 654, 663 (2002).

Against this backdrop of legal principals, Luczak honestly and reasonably believes that the First Amended Complaint filed in this matter is well grounded in fact and is warranted by existing laws. As noted above, this action is Luczak's effort to resolve the situation in Bay County over who has the responsibility and decision-making authority over the Office of the Bay County Clerk. It is about control. Luczak maintains that she is being subjected to interference and a different set of rules by the Defendants which impairs here ability to carry out her constitutional and statutory duties.

In preparing the First Amended Complaint in this matter, Luczak relied on the *Employees & Judge of Second Judicial Dist. Court, Second Div., supra* for the proposition that "Each branch of government has inherent authority to preserve its constitutional authority." 423 Mich at 717. In this case, the Defendants in the exercise of their powers, should not be able to prevent another department from fulfilling its responsibilities to the people under the Constitution. *See, Id.* at 717. Luczak also relied on the *McKim, supra* for the proposition that

equitable relief is available in connection with her inherent authority to assert or defend her legal duties from the continuous interference by Defendants County Executive and County Board. 158 Mich App at 207.

The *McKim* case 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. 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 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). The court denied however, plaintiff's relief over the limited funding of the clerk's office, and instead 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]

Relying these cases, as well as the facts received from Luczak, Plaintiff's counsel maintains the claims before the court are well-grounded in fact and warranted by existing law, and therefore he has not violated MCR 2.114. Moreover, as noted, earlier in this response, By this action, Luczak is not challenging the serviceable level of funding as provided in MCL 141.438. Accordingly, this Court should deny Defendants requests for sanctions under MCR 2.114.

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

Defendants contend that Luczak's claim for appointment of counsel and payment of attorney fees is not based in law or policy of the Defendant Board of Commissioners. (Defendants' Br. pp 16-20). Plaintiff maintains that as constitutional officer asserting and defending her legal duties, she has inherent authority to hire outside counsel in exigent circumstances. In response to Defendants' argument, Plaintiff relies on the case law and argument set forth in her Brief in Support of her Motion for Summary Disposition on Count I – the Appointment of Legal Counsel and Reimbursement of Legal Fees filed in this matter. Plaintiff respectfully requests that this Court deny the relief requested by Defendants, and instead, grant summary disposition in favor of the Plaintiff, appointing Clark Hill as Plaintiff's

attorney, and 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.

CONCLUSION

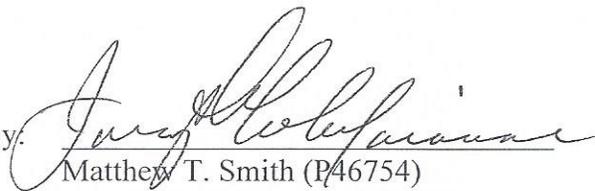
For the reasons stated above, Plaintiff Cynthia A. Luczak respectfully requests that this Honorable Court deny Defendants' Consolidated Motion for Summary Disposition in Lieu of Their Answer, award costs associated in responding to this motion, and enter judgment ordering the Board to appoint Clark Hill as Plaintiff's attorney, 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 as set forth in Plaintiff's Motion for Summary Disposition on Count I of the First Amended Complaint filed in this matter..

Respectfully submitted,

CLARK HILL PLC

Date: December 11, 2015

By:



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