

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.

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

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

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

Plaintiff Cynthia A. Luczak, Bay County Clerk, in her capacity as an elected official, (“Luczak”), by and through her attorneys Clark Hill PLC, for her Reply to Defendants’ Response to Plaintiff’s Motion for Summary Disposition on Count I – the Appointment of Legal Counsel and Reimbursement of Legal Fees, states as follows:

Defendants contend that the appointment of legal counsel and reimbursement of Plaintiff's legal fees in this matter is not a legal cause of action. Luczak disagrees. Defendant has already lost this argument in the past when the Bay County Executive sued the County Board of Commissioners concerning very similar issues in the past. Plaintiff maintains that as a constitutional officer and co-equal branch of county government, she has inherent authority to engage legal counsel in order to protect and defend the Constitutional and statutory functions and duties she was entrusted to perform by the People of Bay County. *See, e.g. Employees & Judge of Second Judicial Dist. Court, Second Div. v Hillsdale County*, 423 Mich 705, 717; 378 NW2d 744 (1985) ("Each branch of government has inherent authority to preserve its constitutional authority."). This requires legal counsel independent of the influences of the other branches of government, including Defendants, County Executive and Board of Commissioners. *See e.g., Bay County Executive v Bay County Board of Commissioners*, 129 Mich App 707; 342 NW2d 96 (1983) (Holding that the Department of Corporation Counsel is a county department under the County Executive's supervision and control). Indeed, the *Bay County Executive* case is important for two reasons: it is an example where the county executive sued the county board of commissioners to make available funds to permit the county executive to carry out its constitutionally mandated and statutory responsibilities and to insure county executive's continued existence as part of a co-equal, independent branch of government; and secondly, for the proposition that Bay County's department of corporation counsel is under the direct supervision and control of the county executive presenting a clear conflict of interest in its ability to represent Luczak in this matter. *See*, 129 Mich App at 712; 715.

The facts of the *Bay County Executive* case are relevant to case before this Court. *Bay County Executive* involved a complaint filed by the county executive against the county board of

commissioners for mandamus, preliminary injunction relief and declaratory judgment where the county executive and county board were unable to resolve a political impasse over which “entity” of county government should select and control civil counsel (i.e. corporation counsel) for the county. *Id.* at 709-712. The issue of control over legal counsel, arose in the course of a different lawsuit filed against both the county executive and board of commissioners by the circuit and probate courts, and prosecutor over the Bay County’s 1982 budget. *Id.* at 711. In the 1982 budget lawsuit, the county executive and the board of commissioners were represented by different legal counsel. *Id.* In response to this situation, the board adopted a resolution “concerning the county attorney/civil counsel’s role, including one that ‘civil counsel shall serve at the pleasure of the Board of Commissioners.’” *Id.* Subsequently the board adopted another resolution pursuant to MCL 49.71 indicating that the board of commissioners would be responsible for employing an attorney to represent certain elected county official including the county executive, in civil matters, “‘when neither the prosecuting attorney or county corporation counsel is able to represent the particular officer’”. *Id.* In response to this resolution, the county executive filed a lawsuit against the board of commissioners, alleging:

... that the county executive required counsel independent of "the influences of the other branches of government"; that, under the optional unified form of county government, any Department of Corporation Counsel must be subject to plaintiff's authority and could not be established under the "legislative branch of government" (defendant); and that defendant had attempted and continued to attempt to "thwart the County Executive in its attempts to carry out executive responsibilities" by refusing to provide plaintiff with "necessary legal counsel" or "necessary funding" for such civil counsel.” [*Id.* at 712]

The county executive requested the trial court to, among other things:

A. Issue an order of mandamus against the defendant commission directing it to appropriate, provide or make available funds to permit the plaintiff to carry out its constitutionally mandated and statutory responsibilities and to insure plaintiff's continued existence as part of a co-equal, independent branch of government.

"B. Order the defendant Bay County Board of Commissioners to pay plaintiff's counsel for services rendered and expenses incurred in connection with this litigation. * * *

"F. Enter a judgment declaring the rights and other legal relations of the plaintiff and defendant, and such other declaratory relief as is required by law. [*Id.*].

In response to the county executive's lawsuit, the county board adopted "a policy statement that directed county employees to submit any requests for legal assistance to the county board selected civil counsel. *Id.* at 712-713. The county executive vetoed the resolution; the board of commissioners then filed an answer and counterclaim to the county executive's lawsuit. *Id.* at 713. In its counterclaim, the board of commissioners requested the trial court to declare the rights and obligations of the parties, including the county board's rights under the unified form of county government to continue to employ civil counsel under the board's control, the obligation of the board of commissioners "to pay for legal services performed by" the county executive's attorney, and the right of county executive and his counsel "to represent and bind defendant in any legal action." *Id.* at 713. Ultimately, the trial court held, and affirmed by the court of appeals, that the Department of Corporation Counsel is county department under the County Executive's supervision and control. *Id.* at 716.

Similarly, Count I of Plaintiff's First Amended Complaint involves Luczak's inherent right to right to counsel and the right to choose her attorney in order to protect and defend her elected office. As the department of corporation counsel falls under the complete control of the county executive, there is an inherent conflict of interest of the department of corporation counsel in representing the interests of Luczak in this matter. To date, Luczak has been forced to expend personal monies to fund her attorney fees in in order to declare and protect the constitutional and statutory functions and duties that she was entrusted and elected to perform by the People of Bay County. As noted in Luczak's Response to Defendant's Consolidated Motion

for Summary Disposition in Lieu of Filing Their Answer to Plaintiff's First Amended Complaint, without an attorney and funding for an attorney, Luczak will be defeated by means of fiscal attrition and the Administrators, Commissioners and in-house attorneys that continue to call the shots in an arbitrary and discriminatory fashion prejudicing an elected official. Luczak is entitled to independent legal counsel in order to assert and defend her elected functions and duties. There is no other remedy. 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 in order to permit her to defend and protect her constitutional and statutory functions and duties.

Next, contrary to Defendant's claims, there are exigent circumstances necessitating the hiring of outside legal counsel. These exigent circumstances are set forth in Luczak's original brief filed in this matter, as well as her Response to Defendant's Consolidated Motion for Summary Disposition in Lieu of Filing Their Answer to Plaintiff's First Amended Complaint, which argument is incorporated herein. However, and without limiting her argument, as noted in Luczak's Response to Defendant's Consolidated Motion for Summary Disposition in Lieu of Filing Their Answer to Plaintiff's First Amended Complaint, as well as her original Brief filed in this matter, this case 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. No other county-wide elected official has experienced a 50% reduction in their staff; is required to be submit to an operational study before receiving assistance; or, can be found working before and after hours on a consistent basis, in order to meet their mandated duties. No other county-wide elected official is required to seek assistance and

approval of additional staff from the county executive to fill vacancies due to sickness, vacations or other absences.

Moreover, as noted in Luczak's original Brief, Luczak herself 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 these online orders would not get done and/or would be delayed.

In addition, as previously indicated as of December 1, 2015 the Concealed Weapons Licensing Board under state law was eliminated, and now involves an entirely new process and forms for the issuance of concealed weapon permits. These new requirements became responsibility of Luczak. Pursuant to Michigan Public Act 3 of the Public Acts of 2015 the funding for this 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 A). The permit fees are supposed to go directly to fund this new activity. However, Luczak maintains that Defendants intend to use these funds to offset what is currently funded by county general funds in funding her department (in essence robbing "Peter to pay Paul"). Moreover, she maintains that 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 had previously proposed the hiring temporary help to work 18-20 per week to funded by

the CPL permit fees. (See Exhibit A). On information and belief, as of the date of filing the First Amended Complaint in this matter, Defendants had not acted on Luczak's request.

Also presenting exigent circumstances is the fact that the microfilming of certain circuit court records remains in an indeterminate state. She maintains that over 10 years of records that are required to be indexed and filed, remain in an indeterminate state and not readily accessible. 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.

Finally, Defendants assert that the appointment and retention of counsel should not be allowed because Luczak failed comply with Bay County's policy for retaining outside counsel. Plaintiff followed the policy and the county unilaterally and arbitrarily denied her request despite a patent conflict of interest. The county corporation counsel with a patent conflict could not then evaluate and decide whether counsel was appropriate. It was biased from the beginning due to conflict. As noted above, Luczak maintains that she has inherent authority to engage legal counsel in order to protect and defend the Constitutional and statutory functions and duties she was entrusted to perform by the People of Bay County regardless of the policy adopted by the county. Moreover, the county policy gives unilateral and broad authority to a non-elected county department, under the jurisdiction of the county executive, over the decision on whether to permit a separate branch of county government to hire outside legal counsel to assert and defend its constitutional and statutory duties and functions. (See Defendant's Exhibit A, Section 2, and 4). What happens if the a county-wide elected official disagrees with Corporation Counsel and/or the Board of Commissioners has not provided funding available in the department's budget? There is no remedy than to seek the assistance of this Court. Indeed, in this case, Luczak made a

written request to Corporation Counsel expressing concerns regarding the situation with her office. The response was to hire an independent counsel to review her claims but without any attorney-client privilege. Defendants' policy is simply another example of one branch of government controlling a co-equal branch of government, and designed to deprive a co-equal branch of government the ability to defend its constitutional and statutory authority. This is simply unacceptable.

Luczak maintains her claims set forth in the First Amended Complaint are well grounded in fact and law. These concerns were presented to the County's corporation counsel who refused to take action on behalf of the Plaintiff. Luczak maintains that she has no other remedy than to seek the assistance from this Court.

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

Respectfully submitted,

CLARK HILL PLC

Date: December 16, 2015

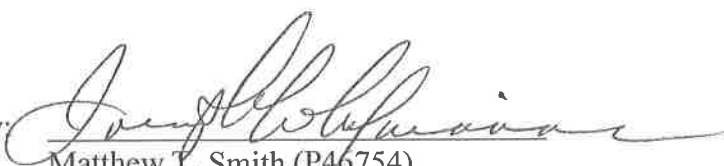
By: 
Matthew T. Smith (P46754)
Joseph W. Colaianne (P47404)
212 E. Grand River Avenue
Lansing, Michigan 48906
(517) 318-3100
Attorneys for Plaintiff

EXHIBIT A

Debra Russell

From: Amber Johnson
Sent: Tuesday, July 07, 2015 2:49 PM
To: Tim Quinn; Tom Hickner
Cc: Crystal Hebert
Subject: RE: FY 2016 budget request: add Painter

Ernie said yes on the 3:00 meeting today

From: Tim Quinn
Sent: Tuesday, July 07, 2015 12:48 PM
To: Tom Hickner
Cc: Crystal Hebert; Amber Johnson; Michele Reilly
Subject: RE: FY 2016 budget request: add Painter

Crystal, Amber and I spent some time talking about this yesterday. There are three personnel-related issues (one is "temporary") pertaining to the Clerk. If we cut a deal with her to give her some additional help, it should tie a bow around all three issues:

1. Cindy has requested "temporary help" to replace Sheila who broke her arm. Apparently Sheila will require extensive treatment and or surgery, so she may or may not return. Plus, Cindy decided after she made the first request that she wanted a secretary instead of a clerk, so we had to send a special note to Deanne yesterday. It's about \$2hr more than what she originally requested.
2. Cindy wants to hire a part time person to help with the extra work caused by the new gun law. She is asking for 18-20 hours a week, which would probably be covered by the \$26/application, given the current rate of deposit of the fund. It generates about \$2.8 K a month. That's the good news. The bad news is that the County will no longer receive the \$26 / per permit and it will go directly to the clerk, so the GF would have to subsidize. There will be extra work, starting in November/December as the gun board's work will be largely done by the County Clerk. It's sort of like an unfunded mandate.
3. Cindy has written a letter to ask for permission to hire outside counsel to sue the County over minimum staffing. That whole issue will probably take a while to unwind but she has been uncooperative with our attempts to determine her "need" for staffing.

Of course, this is the "Reader's Digest" version. On the other hand, none of us has been very successful in trying to reason with her in the past, plus I don't know where Ernie and BOC will be.

Tim Quinn
Director of Personnel and Employee Relations
Bay County
Bay City, MI 48708-5121
(989)895-4096 (office)
(989)493-8319 (cellular)
(989) 895-2076 (fax)
quinn@baycounty.net

To: Cristen Gignac

Subject: FY 2016 budget request: add Painter

Include in your recommended budget?

Not sure if it will fly but

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)

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v

PROOF OF SERVICE

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COURT, and KIM MEAD, Bay County
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212 E. Grand River Avenue
Lansing, Michigan 48906
(517) 318-3100
Attorneys for Plaintiff

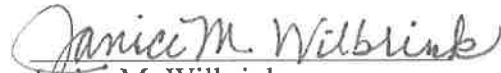
BOMMARITO LAW OFFICES, PLLC
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P.O. Box 189
Freeland, Michigan 48623
(989) 573-5300
Attorney for Defendants

PROOF OF SERVICE

STATE OF MICHIGAN)
)
COUNTY OF INGHAM)

Janice M. Wilbrink, being duly sworn, depose and say that on December 16, 2015, she arranged for service via hand delivery with the Clerk of the Court of the *Plaintiff's Reply to Defendants' Response to Plaintiff's Motion For Summary Disposition on Count I – The Appointment of Legal Counsel and Reimbursement of Legal Fees*, along with a copy of this *Proof of Service*, in the above-captioned proceeding, and also a copy upon the party below via hand delivery:

Mr. Alexander D. Bommarito
BOMMARITO LAW OFFICES, PLLC
180 E. Washington Road
P.O. Box 189
Freeland, Michigan 48623


Janice M. Wilbrink

Subscribed and sworn to before me
this 16th day of December, 2015.



Tema L. Crowell, Notary Public,
Gratiot County, Michigan.
Acting in Ingham County, Michigan.
My Commission Expires: 11/16/2019.

 *** FAX TX REPORT ***

TRANSMISSION OK

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 DESTINATION ADDRESS 719897727337
 SUBADDRESS
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 ST. TIME 12/16 13:07
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 RESULT OK

CLARK HILL
 P.L.L.C.
 ATTORNEYS AT LAW

212 East Grand River Avenue
 Lansing, Michigan 48906-4328

Telephone (517) 318-3100
 Fax (517) 318-3099

FAX TRANSMITTAL

Fax Only

Today's Date: December 16, 2015

Addressee List May Be Continued on Next Page

Recipient	Company	Fax #	Telephone #
1. Honorable Paul H. Chamberlain Isabella County Trial Court Attn: Jody, Assignment Clerk	County of Isabella	(989) 772-7337	

From: Joseph W. Colaianne **Direct Tel. Line:** (517) 318-3029
No. of Pages Including Cover Sheet: 15

Message: Attached please find a Judge's copy of the *Plaintiff's Reply to Defendants' Response to Plaintiff's Motion For Summary Disposition on Count I – The Appointment of Legal Counsel and Reimbursement of Legal Fees and Proof of Service* in:

18th Judicial Circuit Court, County of Bay, **Docket No. 15-3583-AW (KS)**; Cynthia A. Luczak, Bay County Clerk v Thomas L. Hickner; Bay County Executive; Bay County Board of Commissioners; and Kim Mead, Bay County Circuit Court Administrator.

Assigned to: Honorable Paul H. Chamberlain, Isabella County Trial Court.

Could you please call or email me to verify that you received this Fax:

Janice M. Wilbrink
 Phone: 517.318.3025 (direct)
 Email: jwilbrink@clarkhill.com

Legal Secretary to Joseph W. Colaianne
 CLARK HILL PLC
 212 East Grand River | Lansing, Michigan 48906

CLARK HILL

PLC
ATTORNEYS AT LAW

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Lansing, Michigan 48906-4328

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Fax Only

Today's Date: December 16, 2015

Addressee List May Be Continued on Next Page

Recipient	Company	Fax #	Telephone #
1. Honorable Paul H. Chamberlain Isabella County Trial Court Attn: Jody, Assignment Clerk	County of Isabella	(989) 772-7337	
<hr/>			
From: Joseph W. Colaianne	Direct Tel. Line:	(517) 318-3029	
No. of Pages including Cover Sheet:	15		

Message: Attached please find a Judge's copy of the *Plaintiff's Reply to Defendants' Response to Plaintiff's Motion For Summary Disposition on Count I – The Appointment of Legal Counsel and Reimbursement of Legal Fees and Proof of Service* in:

18th Judicial Circuit Court, Count of Bay, **Docket No. 15-3583-AW (KS)**; Cynthia A. Luczak, Bay County Clerk v Thomas L. Hickner; Bay County Executive; Bay County Board of Commissioners; and Kim Mead, Bay County Circuit Court Administrator.

Assigned to: Honorable Paul H. Chamberlain, Isabella County Trial Court.

Could you please call or email me to verify that you received this Fax:

Janice M. Wilbrink
Phone: 517.318.3025 (direct)
Email: jwilbrink@clarkhill.com

Legal Secretary to Joseph W. Colaianne
CLARK HILL PLC
212 East Grand River | Lansing, Michigan 48906

JWC/jmw

FOR CLARK HILL USE ONLY:
Please Return this Document to:

Attorney

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If there are any problems with this fax, please call Office Services at (517) 318-3100

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December 16, 2015

VIA HAND DELIVERY

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

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

Dear Sir or Madam:

Enclosed for filing, please find originals of *Plaintiff's Reply to Defendants' Response to Plaintiff's Motion For Summary Disposition on Count I – The Appointment of Legal Counsel and Reimbursement of Legal Fees and Proof of Service* in the above-referenced matter.

Judge's copy of the pleadings are being sent via Facsimile.

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

Respectfully submitted,

CLARK HILL PLC



Joseph W. Colaianne

JWC:jmw
Enclosure

cc: Hon. Paul H. Chamberlain via Fax (989) 779-7337 [w/Enclosures]
Mr. Alexander D. Bommarito via Hand-Delivery[w/Enclosures]
Client via US Mail [w/Enclosures]