

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY**

CYNTHIA A. LUCZAK, BAY COUNTY
CLERK,

Plaintiff,

Bay County Case No.
15-3583-AW

v

Hon. Paul H. Chamberlain

THOMAS L. HICKER, Bay County
Executive, BAY COUNTY BOARD OF
COMMISSIONERS, 18th JUDICIAL
CIRCUIT COURT, and KIM MEAD, Bay
County Circuit Court Administrator,

Defendants.

FILED

FEB 05 2016

ISABELLA COUNTY CLERK
MT. PLEASANT, MICH.

**OPINION AND ORDER
ON DEFENDANTS' CONSOLIDATED MOTION FOR SUMMARY DISPOSITION AND
PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION ON COUNT I**

I. FACTS

Plaintiff filed this action against defendants in the Bay County Circuit Court. Due to a disqualification of the judges of the Bay County Circuit Court, the action was assigned to Judge Paul H. Chamberlain, Chief Judge of the Isabella County Trial Court, by the State Court Administrative Office. Plaintiff, the Bay County Clerk, requests this court to declare the rights and responsibilities of her duties as County Clerk, and rule that defendants have not adequately funded her office. Plaintiff also seeks injunctive relief preventing the Bay County Executive and Board of Commissioners from interfering with or impairing the office of the County Clerk. Additionally, plaintiff seeks a court order appointing legal counsel on her behalf and requiring Bay County to pay for her attorney fees.

In 2004, plaintiff was appointed and then subsequently elected to the office of Bay County Clerk. Plaintiff alleges that since that time, there has been a systematic, methodical and deliberate effort by the County Executive and the County Board of Commissioners to interfere with, deny, and marginalize plaintiff and her office.

In her position as Bay County Clerk, plaintiff performs the duties of the clerk of the Circuit Court, clerk to the County Board of Commissioners, Registrar of Vital Statistics and Chief Election Official for Bay County. Effective December 1, 2015, the Concealed Weapons Licensing Boards in Michigan are eliminated and the County Clerk is responsible for storing and maintaining all records related to the issuance of concealed weapons licenses; the issuance of licenses to carry a concealed pistol; the issuance of notices of statutory disqualification, notices

of suspensions, notices of denials, and notices of revocations; the issuance of emergency licenses in the event that an individual has obtained a personal protection order; and the retention and destruction of concealed pistol records at the direction of the Michigan State Police. MCL 28.425a; MCL 28.425b.

In order to carry out the functions and duties of the County Clerk, plaintiff requires experienced and trained staff. Currently, plaintiff's staff consists of only 2 full-time employees: her chief deputy and a file clerk. Plaintiff's staff was reduced from four full-time employees in 2011. Plaintiff's request to utilize the Circuit Court clerks to assist in carrying out plaintiff's mandated statutory functions has been denied by defendant Kim Mead, the Bay County Circuit Court Administrator. Additionally, plaintiff claims that the County Executive and Board of Commissioners have repeatedly denied plaintiff's requests for additional staff assistance. To meet the demands of the public and fulfill the County Clerk's statutory and constitutional duties, plaintiff alleges that she and her staff have had to work after hours and have incurred significant delays in processing service requests from taxpayers.

Plaintiff also claims that the County Executive and County Board of Commissioners have permitted the restoration, reclassification, and hiring of personnel by other county-wide elected officials (such as the Sheriff, County Register of Deeds, and Treasurer) and permitted budget amendments to accommodate their employment demands without a study of office and functions. However, plaintiff claims that the County Executive is arbitrarily requiring a study of the County Clerk's office and functions before taking any action to improve the office. Plaintiff argues that the County Executive, Board of Commissioners, and Court Administrator have made it virtually impossible for her to adequately perform her constitutional and statutory responsibilities at a serviceable level. Plaintiff's counsel states that these issues have existed for at least five years.

On June 8, 2015, plaintiff requested permission to hire independent legal counsel at the expense of Bay County to investigate and define the legal issues in this action. On June 18, 2015, Bay County's corporation counsel denied plaintiff's request for independent legal counsel and indicated that the County's corporation counsel would be retaining outside legal counsel to determine whether plaintiff's legal claims had any merit. Corporation counsel also indicated that the County's outside legal counsel would confer with plaintiff, but that there would exist no attorney-client privilege between plaintiff and the outside counsel retained by the County's corporation counsel. Plaintiff subsequently retained counsel and, on July 13, 2015, plaintiff's counsel notified Bay County's corporation counsel of plaintiff's retention of counsel. In a letter dated July 20, 2015, the Bay County corporation counsel acknowledged plaintiff's retention of counsel and stated that the County has not and will not authorize the retention of counsel and payment of fees incurred by plaintiff.

On January 6, 2016, this court heard oral argument on defendants' consolidated motion for summary disposition pursuant to MCR 2.116(C)(4), (C)(8), and (C)(10), and plaintiff's motion for summary disposition on Count I, the appointment of legal counsel and reimbursement of legal fees, pursuant to MCR 2.116(C)(10). Defendants request this court to dismiss this action in its entirety. Plaintiff requests this court to grant her request to retain the law firm of Clark Hill, PLC and to have all legal fees accrued and legal fees to be accrued in this action reimbursed and paid by Bay County.

II. ANALYSIS

First, defendants argue that this court lacks jurisdiction to address plaintiff's claims. MCR 2.116(C)(4) permits summary disposition when the court "lacks jurisdiction of the subject matter." 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." *Allman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). The grounds listed in MCR 2.116(C)(4) may be raised at any time. MCR 2.116(D)(3).

As part of the Uniform Budgeting and Accounting Act, MCL 141.438(6) states 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..." Additionally, MCL 141.436(9) states that "an elected official who heads a branch of county government...has standing to bring a suit against the legislative body of that county concerning a general appropriations act, including any challenge as to serviceable levels of funding for that branch of county government..." MCL 141.438(10) provides that the Court of Appeals has exclusive jurisdiction over a suit brought under MCL 141.438(6) or MCL 141.436(9). As used in the Uniform Budgeting and Accounting Act, "general appropriations act" means "the budget as adopted by the legislative body..." MCL 141.422c.

Essentially, under the Uniform Budgeting and Accounting Act, the Court of Appeals has exclusive jurisdiction of a suit concerning a county's budget brought by an elected official who heads a branch of county government against the chief administrative officer or legislative body of that county. Defendants argue that this entire action concerns either Bay County's budget or the enforcement of Bay County's budget, and so claim that the Court of Appeals has exclusive jurisdiction over this action pursuant to MCL 141.438(10). Plaintiff argues that her action is actually about defendants' alleged interference with plaintiff's constitutional duties, and so is within the jurisdiction of this court.

First, Count II clearly is not a claim addressed by the Uniform Budgeting and Accounting Act. Count II is a claim against the 18th Judicial Circuit Court and Kim Mead, the Circuit Court Administrator, requesting a declaratory ruling on plaintiff's duties as clerk of the circuit court. This claim is not related to the County's budget, nor is it a suit against the legislative body of the County or the chief administrative officer of the County. The parties have not shown that this court does not have jurisdiction over the claim set forth in Count II. Therefore, defendants' motion for summary disposition under MCR 2.116(C)(4) is denied as to Count II.

Count III requests this court to order the County Executive and Board of Commissioners to allocate from existing resources to meet a serviceable level. This is a claim addressed by MCL 141.438(6) and MCL 141.436(9). It is a claim brought against the legislative body of Bay County and the chief administrative officer of Bay County. The claim clearly concerns Bay County's budget. In fact, MCL 141.436(9) specifically covers "any challenge as to serviceable levels of funding," which is precisely what plaintiff is arguing in Count III. Therefore, Count III falls under the exclusive jurisdiction of the Court of Appeals pursuant to MCL 141.438(10), and so defendants' (C)(4) motion for summary disposition is granted as to Count III.

Count IV requests injunctive relief preventing the County Executive and Board of Commissioners from interfering with or impairing the office of the County Clerk. Plaintiff

argues that these defendants are interfering with her ability to perform her constitutionally and statutorily mandated duties. Plaintiff claims that the defendants are accomplishing such interference by arbitrarily requiring her to undergo unnecessary procedures before increasing plaintiff's budget. Plaintiff's claim set forth in Count IV clearly concerns Bay County's budget. This claim is also brought against the legislative body of Bay County and the chief administrative officer of Bay County. Count IV consists of a claim that is addressed by MCL 141.438(6) and MCL 141.436(9), and so it falls under the exclusive jurisdiction of the Court of Appeals pursuant to MCL 141.438(10). Defendants' (C)(4) motion for summary disposition is granted as to Count IV.

Defendants request this court to grant summary disposition in their favor as to Count I, the appointment of legal counsel and reimbursement of legal fees. Plaintiff also filed a motion requesting this court to grant summary disposition in her favor as to Count I. Plaintiff asks this court to grant her request to retain the law firm of Clark Hill, PLC and to have all legal fees accrued and legal fees to be accrued in this action reimbursed and paid by Bay County.

In Count I, plaintiff is essentially seeking an order from this court requiring the Bay County Board of Commissioners to use funds from the Bay County budget to pay for plaintiff's counsel. Therefore, Count I, a claim against the legislative body of the County concerning the County's budget, also falls under the exclusive jurisdiction of the Court of Appeals pursuant to MCL 141.438(10). Under MCR 2.116(C)(4), this court grants defendants' motion for summary disposition as to Count I. Due to this court's lack of jurisdiction over the claim set forth in Count I, plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) as to Count I is now moot.

This court finds that it does not have jurisdiction over plaintiff's claim for attorney fees, and so cannot make a ruling on this issue. Count I is within the exclusive jurisdiction of the Court of Appeals. However, the court carefully reviewed the law and arguments submitted by the parties and now addresses this issue by way of dicta.

The Michigan Court of Appeals has recognized, under certain circumstances, an exception to the general rule that attorney fees may be awarded only when authorized by statute or court rule. *McKim v Green Oak Tp Bd*, 158 Mich App 200, 207; 404 NW2d 658 (1987). *McKim* is the seminal case on this issue, expanding prior existing law to establish this exception. Such exception exists "when a public official incurs attorney fees in connection with asserting or defending the performance of his or her legal duties." *Id.* The decision to award attorney fees is discretionary in the trial court. *Id.*

Defendants argue that this action does not fall under the *McKim* exception because three cases cited as examples in *McKim* emphasize exigency as an important factor for the court to consider in determining whether a public official should be awarded attorney fees. *Smedley v City of Grand Haven*, 125 Mich 424, 84 N.W. 626 (1900); *Exeter Twp Clerk v Exeter Twp Bd*, 108 Mich App 262, 310 NW2d 357 (1981); *City of Warren v Dannis*, 136 Mich App 651, 357 NW2d 731 (1984). Defendants argue that such exigency does not exist in this case because, by plaintiff's counsel's own admission, the issues raised in this case have been in existence for at least the last five years. However, in *McKim*, the Court of Appeals expands on *Smedley*, *Exeter*, and *Dannis*. *McKim* does not establish an exigency requirement. Further, the cases cited in *McKim* do not deal with the issue of separation of powers, which is a predominant issue in this case.

Plaintiff argues that she has inherent authority to hire legal counsel at Bay County's

expense in order to preserve, protect, and assert her constitutional authority. Plaintiff cites Michigan case law establishing that “each branch of government has inherent power to preserve its constitutional authority.” *Employees & Judge of Second Judicial Dist Court, Second Div v Hillsdale Co*, 423 Mich 705, 717; 378 NW2d 744 (1985). One branch of government cannot prevent another branch from doing so without violating the doctrine of separation of powers.

Michigan’s Constitution specifically addresses the doctrine of separation of powers:

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

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.” *Hillsdale*, 423 Mich at 717. The County Clerk is an executive officer, and the County Board of Commissioners is a part of the legislative branch. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 162; 665 NW2d 452 (2003). Under the doctrine of separation of powers, one cannot prevent the other from fulfilling its responsibilities under the Constitution. As stated above, this court seemingly does not have jurisdiction to make a ruling on this issue. Addressing this issue by way of dicta, this court comments that in order for one branch of government to exercise its inherent powers to protect its constitutional authority, it must have the ability to retain counsel. The court feels compelled to mention this because plaintiff still has a cause of action, and jurisdiction to decide the funding issue lies in the Court of Appeals. In the meantime, it would seem to this court that plaintiff should be entitled to prosecute her claim and to do so with some predictability as to the ruling of this court on the issue of whether the County has an obligation to fund an attorney in order to allow plaintiff to protect the constitutional authority of the County Clerk.

This court finds that it does not have jurisdiction over plaintiff’s claims against the Bay County Board of Commissioners and the Bay County Executive set forth in Counts I, III, and IV. Under MCL 141.438(10), the Court of Appeals has exclusive jurisdiction over these claims concerning Bay County’s budget and budget enforcement brought against the chief administrative officer and legislative body of Bay County. However, in this court’s opinion, the constitutionality of MCL 141.438(10) is in question. This issue was not raised by the parties, and so, despite this question, the court is not making a ruling regarding the statute’s constitutionality at this time, but the court will outline its concerns with the statute’s constitutionality.

The Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24, states that “no law shall embrace more than one object, which shall be expressed in its title.” The “object” of a law is its general purpose. *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 388; 803 NW2d 698 (2010). The Title-Object Clause is intended to ensure “that legislators and the public receive proper notice of legislative content.” *Pohutski v Allen Park*, 465 Mich 675, 691; 641 NW2d 219 (2002). The clause also prevents deceit and subterfuge. *Id.* The title of an act is not required to refer to every detail of the act. Instead, “it is sufficient that the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose.” *Gen Motors*, 290 Mich App at 388-89.

MCL 141.438(10) is part of the Uniform Budgeting and Accounting Act. The title of this act states that it is:

An act to provide for the formulation and establishment of uniform charts of accounts and reports in local units of government; to define local units of government; to provide for the examination of the books and accounts of local units of government; to provide for annual financial reports from local units of government; to provide for the administration of this act; to prescribe the powers and duties of the state treasurer, the attorney general, the library of Michigan and depository libraries, and other officers and entities; to provide penalties for violation of certain requirements of this act; to provide for meeting the expenses authorized by this act; to provide a uniform budgeting system for local units; and to prohibit deficit spending by a local unit of government.

The title of the Uniform Budgeting and Accounting Act provides no notice that MCL 141.438(10) expands the jurisdiction of the Court of Appeals. Jurisdiction is not mentioned at all in the title. As a result, the act's title does not do anything to provide legislators and the public with proper notice of MCL 141.438(10)'s legislative content. In order to provide appropriate notice, a provision expanding the jurisdiction of the Court of Appeals would perhaps be better placed in the Revised Judicature Act, MCL 600.101, *et seq.* The title of the Revised Judicature Act states, in pertinent part, that it is "an act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state..."

The Court of Appeals may or may not have jurisdiction to rule on the constitutional issue. As the court has previously stated, this issue has not been raised or briefed by either plaintiff or defendants, and so the court is not making a ruling on this issue. The court shall take a more in depth look at this issue should either party deem it appropriate to file a motion in this court. Should either party file such a motion, this court would want briefs addressing which court, the Court of Appeals or this court, has jurisdiction to decide the constitutional issue.

As this court finds that it does not have jurisdiction over plaintiff's claims against the Bay County Board of Commissioners and the Bay County Executive set forth in Counts I, III, and IV, the remainder of defendants' motion for summary disposition will be considered as to the claims against the 18th Judicial Circuit Court and Court Administrator Kim Mead set forth in Count II only.

Defendants claim that Circuit Court Administrator Kim Mead is an improper party to this action. Plaintiff alleges that Mr. Mead has denied plaintiff the ability to utilize and share employees as necessary, that Mr. Mead has not included plaintiff in training regarding the Circuit Court's e-filing system, and that many of plaintiff's duties have been assumed by Mr. Mead without agreement by plaintiff. Defendants argue that, as the Circuit Court Administrator, Mr. Mead's involvement with plaintiff is solely within the scope of his employment with the 18th Circuit Court. Defendants state that Mr. Mead serves at the direction of the Bay County Circuit Court, not independently. Therefore, defendants assert that the 18th Circuit Court, not Mr. Mead, is the proper party to this action, and Mr. Mead should be dismissed pursuant to MCR 2.116(C)(8).

MCR 2.116(C)(8) permits summary disposition when "the opposing party has failed to state a claim upon which relief can be granted." MCR 2.116(C)(8). A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case and the

court must accept as true all well-pleaded facts. MCR 2.116(C)(8). Finally, the court should grant summary disposition for failure to state a claim only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and thus justify recovery. *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

Prior to defendants' filing their motion for summary disposition, plaintiff informed defendants that she would agree to dismiss Mr. Mead without prejudice. However, no agreement was reached, and plaintiff maintains that the dismissal of Mr. Mead would be premature at this time. Discovery in this action is not yet complete, and plaintiff argues that factual development may establish either that Mr. Mead acted on his own accord or with direction from the Circuit Court with respect to the allegations in plaintiff's complaint. Accordingly, defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) as to the claims against Mr. Mead is premature at this time.

Next, the 18th Judicial Circuit Court and Court Administrator Kim Mead argue that they have not interfered with or impaired the office of the County Clerk, and that summary disposition as to the action in its entirety would be appropriate under MCR 2.116(C)(10). Subsection (C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Thomas v Stubbs*, 218 Mich App 46, 49; 553 NW2d 634 (1996). The court reviewing the motion must consider pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. *Id.* The party responding to a motion for summary disposition must present evidentiary proofs creating a genuine issue of material fact for trial; otherwise, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Finally, the test for an existence of a genuine issue of material fact is whether the record, when looked at in the light most favorable to the non-moving party, leaves open an issue upon which reasonable minds might differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiff claims that she should have the right to utilize and re-deploy Circuit Court Clerk employees to meet the constitutional demands of the office of the County Clerk. Plaintiff also argues that the Court Administrator has assumed some of plaintiff's duties without the agreement of plaintiff, and that the Circuit Court and Court Administrator have not included plaintiff in plans regarding the adoption of e-filing. Defendants claim that they have not interfered with plaintiff's constitutional or statutory duties. Additionally, defendants argue that if plaintiff were to have the ability to utilize Circuit Court employees and use them for non-Circuit Court functions, this would violate the separation of powers doctrine of the Michigan Constitution.

Plaintiff argues that defendants' motion for summary disposition should not be granted because discovery is not yet complete and there exist genuine issues of material fact in this action. Additionally, defendants have not yet filed an answer in this case, as their motion for summary disposition was filed in lieu of an answer. As plaintiff argues, it is unclear precisely which allegations contained in plaintiff's complaint are accepted as true or contested by defendants. Before the court can make a decision on a motion for summary disposition of Count II pursuant to MCR 2.116(C)(10), defendants need to file an answer and discovery needs to progress further. There are too many issues in question at this point, and the facts have not been sufficiently developed by either plaintiff or defendants. Accordingly, this court finds that

defendants' motion for summary disposition as to Count II is premature at this time, and so it is denied without prejudice.

Finally, defendants request this court to order sanctions pursuant to MCR 2.114. Defendants argue that plaintiff's action is frivolous and not warranted by existing law, and so sanctions are appropriate. MCR 2.114(D), (E), (F). 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). The action has not been dismissed in its entirety and is still pending. This court finds that, at this time, a request for sanctions is premature. Defendants' request for sanctions is denied without prejudice.

THEREFORE IT IS ORDERED that defendants' motion for summary disposition pursuant to MCR 2.116(C)(4) is granted as to Counts I, III, and IV, as they are within the exclusive jurisdiction of the Court of Appeals. This court does not have jurisdiction over any of plaintiff's claims against the Bay County Board of Commissioners or the Bay County Executive, and so said defendants are dismissed from this action.

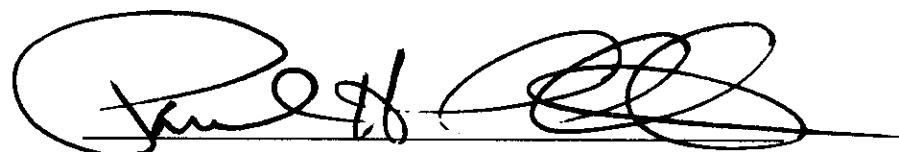
IT IS FURTHER ORDERED that defendants' motion for summary disposition pursuant to MCR 2.116(C)(4) as to Count II is denied. This court retains jurisdiction over the claim set forth in Count II and defendants 18th Judicial Circuit Court and Court Administrator Kim Mead.

IT IS FURTHER ORDERED that plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) as to Count I is denied as moot due to this court's determination that it lacks jurisdiction over Count I.

IT IS FURTHER ORDERED that defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) as to the claim against the Court Administrator Kim Mead, defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), and defendants' request for sanctions are premature at this time, and so are denied without prejudice.

This order does not resolve the last pending claim or close the case.

Date: February 5, 2016



Hon. Paul H. Chamberlain (P31682)
Chief Judge
Isabella County Trial Court