

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JESSICA FLINTOFT, as Clerk of Scio
Township,

Plaintiff,

Civil Action No. 22-000414-CZ

vs.

Hon. Timothy P. Connors

SCIO TOWNSHIP BOARD OF TRUSTEES,

Defendant.

Mark J. Magyar (P75090)
DYKEMA GOSSETT PLLC
Attorneys for Plaintiff
201 Townsend St., #900
Lansing, Michigan 48933
(616) 776-7523
mmagyar@dykema.com

Michael Homier (P60318)
Laura J. Genovich (P72278)
Foster Swift Collins & Smith PC
Attorneys for Defendant
1700 East Beltline, N.E., Suite 200
Grand Rapids, MI 49525-7044
Phone: 616.726.2238
mhomier@fosterswift.com
lgenovich@fosterswift.com

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR
SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) AND TO STRIKE EXHIBITS 1
AND 7 TO THE VERIFIED FIRST AMENDED COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

APPLICABLE LEGAL STANDARDS 1

STATEMENT OF FACTS 2

Statement of Facts Pertinent to Count I 2

 I. The August 17, 2021 Resolution 2021-31 and February 22, 2022
 Resolution 2022-05 2

 II. May 2022 Appointments and Interference with the Clerk’s Statutory
 Duties 3

Statement of Facts Pertinent to Count II 5

 I. Insufficient and Undertrained Finance Staff 5

 II. Administrator Rowley Resigns in Protest of the Board’s Refusal to Act 5

ARGUMENT 6

 I. The Clerk Stated a Claim for the Board’s Interference with her Statutory
 Duties 6

 II. The Clerk Stated a Claim for The Board’s Failure to Fund/Staff Her
 Position 10

 III. Plaintiff Should be Awarded Fees and Costs 13

 IV. The Board Failed to Meet its Burden that any Exhibit Should be
 “Stricken,” but its Position Shows that its Attorney Should be Disqualified 13

CONCLUSION 20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Avink v SMG</i> , 282 Mich App 110; 761 NW2d 826 (2009)	20
<i>Charter Twp of Royal Oak v Brinkley</i> , 2017 Mich App LEXIS 842 (Mich Ct App May 18, 2017).....	10
<i>Herald Co, Inc v Ann Arbor Pub Schs</i> , 224 Mich App 266; 568 NW2d 411 (1997).....	15
<i>Howe v Detroit Free Press, Inc</i> , 440 Mich 203; 487 NW2d 374 (1992)	19
<i>Kubiak v Hurr</i> , 143 Mich App 465; 372 NW2d 341 (1985)	20
<i>McKim v Green Oak Township Bd</i> , 158 Mich App 200 (1987).....	passim
<i>Soergel v Preston</i> , 141 Mich App 585 (1985).....	9
<i>Wade v Dep't of Corrs</i> , 439 Mich 158; 483 NW2d 26 (1992).....	1, 2
<i>Wayne County Prosecutor v Wayne County Board of Commissioners</i> , 93 Mich App 114 (1979).....	1, 10, 11, 12
RULES	
MCR 2.115(B)	14
MCR 2.116(I)(5).....	2
MCR 2.116(C)(8).....	1, 2, 10, 16, 20
MRPC 1.4	20
MRPC 3.7	20

STATUTES

MCL 41.3a13
MCL 41.65 passim
MCL 41.698, 11
MCL 41.75a3, 13

OTHER

Black’s Law Dictionary (rev 4th ed) (“Paper”)7
Verburg, Kenneth: Managing the Modern Michigan Township (1990).....1, 11, 12
Webster’s Seventh Collegiate Dictionary (1972) (“Custody”).....7

INTRODUCTION

Defendant Scio Township Board of Trustees (the “Board”) argues that this is really just a “policy” or “political” dispute in which this Court may not involve itself and must defer to the “ballot box.” (Motion pp. 1-3.) But Plaintiff Jessica M. Flintoft, as the duly elected Clerk of Scio Township (the “Clerk”), established that the Board’s interference with the Clerk’s statutory duties and intentional starvation of resources for the Clerk’s office *are squarely within the jurisdiction for this Court under established Michigan law*. The Board conspicuously focuses on and mischaracterizes irrelevant events pre-dating the amended complaint. (Motion pp. 1-3.) The Board also conflates the claims stated separately in Counts I (interference with statutory duties) and II (starvation of resources) regarding different legal issues and facts. The allegations of the Verified First Amended Complaint (“VFAC”) with respect to these claims easily satisfy Michigan’s notice pleading standards. *See McKim v Green Oak Township Bd*, 158 Mich App 200, 201 (1987); *Wayne County Prosecutor v Wayne County Board of Commissioners*, 93 Mich App 114, 121 (1979); *see also* *Managing the Modern Michigan Township* (1990), by Kenneth VerBurg, at pp. 42-44 (Excerpt, **Exhibit 1**).

Finally, the Board’s throw-in argument seeking to “strike” two exhibits from the Clerk’s pleading is meritless. The Board failed to provide *any* legal authority to support the request. The exhibits are not subject to any privilege, and the Board’s request to shield information which is dispositive in the Clerk’s favor by an attorney who is the same person now taking positions contrary to his opinion serves only to demonstrate the conflict of interest. (VFAC ¶17.)

APPLICABLE LEGAL STANDARDS

Under MCR 2.116(C)(8), this Court “tests the legal sufficiency of the complaint[.]” *Wade v Dep’t of Corrs*, 439 Mich 158, 162; 483 NW2d 26 (1992). The well-pleaded allegations are

accepted as true and construed most favorably to the non-moving party. *Id* at 162-63. “A court may only grant a motion pursuant to MCR 2.116(C)(8) where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id*. The Clerk meets Michigan’s notice pleading standards for each claim. If the Court disagrees, the Clerk requests leave to amend any such claim under MCR 2.116(D)(5).

STATEMENT OF FACTS¹

Statement of Facts Pertinent to Count I

I. The August 17, 2021 Resolution 2021-31 and February 22, 2022 Resolution 2022-05.

As the Clerk alleged, the Board redefined and expanded the job descriptions of the Supervisor and Administrator under illegal Resolutions 2021-31 (August 17, 2021) and 2022-05 (February 22, 2022) in ways that improperly delegated duties that statutorily belong to the Clerk under MCL 41.65 without her consent and over her steadfast objections. In responding to questions from the Clerk, the Township’s attorneys both agree that this was a violation of law.

On August 12, 2021, the Clerk received a written opinion from Township Attorney James Fink that the Clerk is the person responsible to prepare and maintain ledgers (and other financial records) and has the authority to grant/deny access to manipulate (user read/write functions) the records. (*Id.* ¶9 & VFAC Ex. 1 (Fink Opinion).) Mr. Fink added that “as the responsible party, [the Clerk] must be able to limit the ability of others to ENTER or REMOVE financial data.” (*Id.* (emphasis in original).) Yet, the Supervisor called a Special Meeting for August 17, 2021 regarding *new* job descriptions for the Supervisor and Township Administrator. Before the meeting, Mr. Fink met alone with the Supervisor and the Clerk. (VFAC ¶10.) Mr. Fink explained that the Township could not reduce staffing to a point where the Clerk could no longer carry out

¹ The Clerk fully incorporates the VFAC, and presents some of the salient well-pleaded facts.

her statutory duties related to finance. (*Id.*) Then, during the August 17, 2021 meeting, Mr. Fink said: “So... who is responsible for Finance in a Township, and I will repeat what I have said before is that that is clearly and soundly to me the responsibility of the Clerk who is responsible for the general ledger and the books and records, and in conjunction with the work that the Treasurer does, there’s the checks and balances that are there.” (VFAC ¶11; VFAC Ex. 2.) Mr. Fink reiterated, “the Administrator cannot usurp the Clerk’s authority.” (VFAC Ex. 2, p. 5.)

The Supervisor, who called this special meeting and proposed the new job description of the Administrator, assured the Board that the proposed job description was simply a matter of “interpretation,” and that the Board could later clarify that its “intent” was not to “conflict with a, you know, statute.” (VFAC Ex. 2, pp. 58-59.) The Board then adopted Resolution 2021-31 to “Delegate Authority and Set Jobs for Supervisor and Administrator,” (VFAC Ex. 3), over the Clerk’s objections and concerns over potential conflict of interest, and contrary to Mr. Fink’s opinion. (*See Minutes*, VFAC Ex. 4.) The Clerk fervently advised the Board that it would be unethical and likely illegal to delegate authority to the Supervisor and Administrator in the manner proposed by the Supervisor. (VFAC Ex. 2, pp. 82-91, 119-123, 130-134.)

On February 22, 2022, the Board passed Resolution 2022-05, “Updating the Township Administrator Job Description and Authority and Designating FOIA Coordinator,” (VFAC Ex. 5), over the Clerk’s stated objection under MCL 41.75a. The Clerk again urged the Board to reject this affront to the separation of powers. (VFAC ¶18; VFAC Ex. 6 (*Minutes*).)

II. May 2022 Appointments and Interference with the Clerk’s Statutory Duties.

On May 12, the Clerk learned that the Supervisor instructed newly appointed interim Administrator James Merte to immediately gain access to BS&A² to provide Sandra Egeler

² In its brief, the Board is imprecise when describing BS&A. BS&A is an enterprise management system designed for local units of governments, particularly those in Michigan. Scio Township

(Deputy Treasurer and Deputy Supervisor) the ability to manipulate the General Ledger. (VFAC ¶31.) The Clerk objected. (*Id.*; VFAC Ex. 7.) On May 13, auditor David Helisek confirmed that the Clerk should not allow permission to manipulate the General Ledger. (VFAC ¶32.)

But after 5:00pm on Friday May 13, at the direction of the Supervisor to NetSmart (the Township’s I.T. Managed Services Provider), James Merte received his own permissions to, and extended permission to Ms. Egeler, to manipulate the General Ledger module within BS&A, which are a portion of the current journals and ledgers of the Township, in contravention of MCL 41.65. (VFAC ¶33-34.) That evening, the Clerk restored Ms. Egeler’s regular access to view the General Ledger, restricted so that she could not manipulate it. (*Id.*) By Saturday morning, May 14, Mr. Merte had revoked the Clerk’s necessary Administrator access, removing any ability for her to control who enters what into the journals and ledgers of the Township. (*Id.*) The Clerk could not see what changes Mr. Merte or others may have made to the journals and ledgers, or if other unauthorized people had access. (*Id.*) The Clerk demanded access be restored. (*Id.*; VFAC Ex. 7.) The Board relied upon illegal Resolutions 2021-31 and 2022-05 to illegally grant the interim administrator ultimate overwrite authority, to revoke authority and access of the Clerk to the Township’s records, and to grant illegal access to Ms. Egeler to manipulate the township’s journals and ledgers, in clear and direct violation of MCL 41.65.

On May 18, Mr. Homier, another of the Township’s attorneys hired in December 2021, ***agreed with the Clerk*** that any such access by Ms. Egeler should “READ” access only, and that

started using its first BS&A module in 2001, continually adding modules through 2021. Today, Scio Township relies on 12 BS&A modules. The Township’s Tax Rolls are contained within the modules of Tax and Delinquent Personal Property. The Township’s Assessment Rolls are contained within modules of Assessing and Special Assessments. At issue in this case are the records of MCL41.65 which are contained within the eight financial management suite modules of BS&A: Accounts Payable, Cash Receipts, Fixed Assets, General Ledger, Miscellaneous Receivables, Payroll, Purchase Orders, and Utility Billing. Under MCL41.65, it is the Clerk who must have custody of these accounts and journals and ledgers.

it was his further understanding that the Clerk would maintain read/write access to the journals and ledgers. As of the Clerk's filing of the VFAC, the Clerk's demands for restored access and authority were still denied by the Board. (VFAC ¶35.)

Statement of Facts Pertinent to Count II

I. Insufficient and Undertrained Finance Staff.

For decades, the Township has had only two finance staff positions, fewer than is recommended by The Woodhill Group ("WHG") (VFAC Ex. 8) and former Township Administrator David Rowley. (VFAC Ex. 9.) The two finance positions have been the Finance Director and Finance Manager, but the Finance Director position has remained vacant since November 9, 2021. (VFAC ¶37.) Administrator Rowley summarized the Township's insufficient finance team with his proposal to the Board for the April 12 meeting. (VFAC ¶¶38-39; VFAC Ex. 10.) He explained: "While a typical sized jurisdiction will generally have four (4) to five (5) full time employees in the finance department of varying skills, abilities and certifications, the Township of Scio has one (1)." (*Id.*) Such positions must be filled with qualified personnel for the Clerk to perform her statutory duties. (VFAC ¶41.)

Auditors have found many errors and failures to follow regulations by the Township. (VFAC ¶¶42-48; VFAC Exs. 13, 14.) Mr. Rowley advised the Board: "Let's just cut to the chase. We don't have any plan." (*Id.*) Referring to Scio's unusually affluent tax base, "It's the only reason your doors are still open. If this was a normal general law township you would have been bankrupt a long time ago. If that sounds harsh, I'm sorry. You've asked for my professional opinion and I'm giving it. You need additional financial staff." (VFAC ¶44; VFAC Exs. 11, 12.)

II. Administrator Rowley Resigns in Protest of the Board's Refusal to Act.

Mr. Rowley put forth several proposals to address the emergency and longer-term

requirements for qualified financial staff, but the Board rejected them all. (VFAC ¶49; *see also* VFAC Exs. 9, 10, 12.) On April 12, Rowley announced his resignation in protest over the Board’s refusal to implement finance staffing required for responsible controls. (VFAC ¶51; VFAC Ex. 12.) Rowley pleaded: “I do call on the Board of Trustees to fill the vacant Finance Director position with an experienced individual who holds a Master of Business Administration degree or who is a Certified Public Accountant and to conduct a three (3) to five (5) year internal audit to fully understand the status of township finances.” (*Id.*)

ARGUMENT

I. The Clerk Stated a Claim for the Board’s Interference with her Statutory Duties.

The Board incorrectly asserts that, “[i]n Count I, Plaintiff demands broad and exclusive control over the Township’s finances, records, and staffing decisions, and she insists on direct supervisory authority of any finance staff hired by the Township.” (Motion p. 5.) The Board’s self-serving mischaracterization of the Clerk’s pleading is incorrect. Count I of the Clerk’s VFAC very clearly states that two specific Resolutions, adopted on August 17, 2021 and February 22, 2022, illegally interfered with the Clerk’s statutory duties and provided others with authority over her duties without her consent. Rather than paraphrase and summarize, as the Board did (Motion pp. 6-7), the Clerk’s primary statutory duties are set forth in MCL 41.65:

The township clerk of each township shall have *custody of all the records, books, and papers of the township*, when no other provision for custody is made by law. The township clerk shall file and safely keep all certificates of oaths and other papers required by law to be filed in his or her office, and shall record those items required by law to be recorded. *These records, books, and papers shall not be kept where they will be exposed to an unusual hazard of fire or theft.* The township clerk shall deliver the records, books, and papers on demand to his or her successor in office. The township *clerk shall also open and keep an account with the treasurer of the township*, and *shall charge the treasurer* with all funds that come into the treasurer’s hands by virtue of his or her office, and *shall credit him or her* with all money paid out by the treasurer on the order of the proper authorities of the township, and *shall enter the date and amount of all vouchers*

in a book kept by the township clerk in the office. ***The township clerk shall also open and keep a separate account with each fund*** belonging to the township, ***and shall credit each fund*** with the amounts that properly belong to it, ***and shall charge*** each fund with warrants drawn on the township treasurer and payable from that fund. ***The township clerk shall be responsible for the detailed accounting records of the township*** utilizing the uniform chart of accounts prescribed by the state treasurer. ***The township clerk shall prepare and maintain the journals and ledgers necessary to reflect the assets, liabilities, fund equities, revenues, and expenditures for each fund of the township.***

(emphasis added); *see also McKim*, 158 Mich App at 204-205. “Custody” means “immediate ***charge and control*** exercised by a person or an authority.” *McKim*, 158 Mich App at 205 (emphasis added) (citing Webster’s Seventh Collegiate Dictionary (1972)). “Paper” means “any writing or printed document, including letters, memoranda, legal or business documents, and books of account” *Id.* (citing Black’s Law Dictionary (rev 4th ed)). Therefore, MCL 41.65 “bestows a township clerk with the responsibility to ***exercise control over*** all township papers, [], unless otherwise provided for by law.” *Id.* (emphasis added). As the Clerk alleged, the August 2021 Resolution, titled “Adopting Job Descriptions for Supervisor, Township Administrator,” and the February 2022 Resolution, which “Updated” the “Township Administrator Job Description and Authority,” contain illegal provisions that must be vacated because, in redefining and expanding the authorities of those positions, they usurped the Clerk’s statutory authority over the township’s books and records. *See, eg, McKim*, 158 Mich App at 204-205.

Most recently (and most egregiously), in May 2022, the Supervisor instructed Interim Administrator James Merte to ***gain control*** over who enters what into the journals and ledgers of the Township, ***to revoke*** the Clerk’s necessary administrator access, and ***to grant Ms. Egeler read/write access*** over the General Ledger module. (VFAC ¶31; VFAC Ex. 15.) This was an astounding violation of MCL 41.65. The Board’s attorneys agree that under no circumstances should Ms. Egeler have the power to manipulate the general ledger. (*See* VFAC Exs. 1 and 7.)

The Clerk more than adequately alleged these recent blatant usurpations of the Clerk’s custody and control of the journals and ledgers. These violations establish the *illegality* of the enabling provisions of Resolutions 2021-31 and 2022-05. (VFAC ¶¶12-15, 20-23, 28, 30, 53-68; VFAC Exs. 3, 5, 15.) Besides these most recent violations with regard to Mr. Merte’s taking control of the journals and ledgers and Ms. Egeler’s manipulation of the general ledger under the auspices of the subject Resolutions, the Clerk more than adequately alleged in detail many other provisions of the Resolutions that should be vacated for interfering with the Clerk’s duties. (*See, e.g.*, VFAC pp. 22-24; VFAC ¶¶13, 14, 15; VFAC Ex. 2, pp. 56-49, 85-85, 119-120, 122.)

The clerk in *McKim* “vigorously opposed the resolutions” at issue there because they were “an unreasonable restraint on her ability to perform her statutory duties as township clerk under MCL 41.65.” 158 Mich App at 203. After independent legal opinions failed to persuade the board, the clerk filed suit in the circuit court alleging that the board’s actions impeded her ability to perform her statutory duties, and sought injunctive relief. *Id.* The clerk moved for summary disposition in the circuit court. *Id.* Following argument and taking the matter under advisement, the circuit court “entered a written opinion granting plaintiff injunctive relief by vacating the resolutions and the eighteen-hour restriction.” *Id.* at 203-204.

The Court of Appeals affirmed the circuit court. As the *McKim* court concluded, “[i]t follows that the board’s resolutions entrusting *control* of township mail and bills *to the general township secretary is in contravention* of MCL 41.65.” *Id.* (emphasis added). The *McKim* court recognized that “this result is consistent with MCL 41.69 [], which requires *the clerk* -- not the general township secretary -- to file a bond ‘especially for the safekeeping of the records, books, and papers of the township in the manner required by law’” *Id.* (emphasis added). “*A clerk without custody or control of township papers can hardly fulfill her duty of safekeeping those*

records.” *Id.* (emphasis added). The *McKim* court affirmed the vacating of the township board’s two resolutions interfering with the clerk’s statutory duties. *Id.* The *McKim* court further affirmed the trial court’s conclusion that the board’s “eighteen-hour restriction” was an “illegal attempt to restrain [the clerk’s] right to custody of the Township records.” *Id.* at 205-206.

In rejecting the township’s opposition to injunctive relief and continuing jurisdiction of the circuit court, the *McKim* court explained that injunctive relief is proper and available “where, as here, the plaintiff has established a continuous interference by the defendant.” *Id.* at 206, citing *Soergel v Preston*, 141 Mich App 585, 590 (1985). Contrary to the township’s argument, such an “injunction and order of continuing jurisdiction” is not a violation of “the doctrine of separation of powers” because the plaintiff was not asking the court to assume “budget and personnel responsibilities” or substitute its “judgment for the judgment of the township officers.” *Id.* Rather, the circuit court “simply rule[d] on questions of law.” *Id.*

McKim is on all fours. Instead of funneling mail and bills through the secretary notwithstanding the clerk having statutory control over those papers, as occurred in *McKim*, the Board is funneling control of and access to the township’s papers and financial records, including but not limited to the journals and ledgers, through the administrator position. Resolutions 2021-31 and 2022-05 revised the job description and duties of the Township Supervisor and Administrator positions to engulf the Clerk’s statutory duties and give the administrator control over critical aspects of the township’s finances and records.

The Township’s attempt to escape *McKim* is meritless. (Motion p. 15.) Contrary to its assertion, *McKim* was not limited to its facts regarding custody of township *mail*. The *McKim* court was clear that a township board cannot place *any* “impermissible restraint on [the clerk’s] authority as township clerk,” including the clerk’s “right to custody of the Township *records*”

and “*papers*” in “contravention of MCL 41.65.” 158 Mich App at 205-06 (emphasis added).

The Township also claims that the Court of Appeals’ unpublished decision in *Charter Twp of Royal Oak v Brinkley*, 2017 Mich App LEXIS 842 (Mich Ct App May 18, 2017), somehow undercuts *McKim*. It does not. In *Brinkley*, the clerk *also prevailed over the township at summary disposition*. The trial court granted summary disposition for the clerk, and the only issues on appeal concerned whether *the township’s* pleadings and briefs were frivolous and in bad faith. *McKim* was applied, further demonstrating its binding precedence as to this Court.

Instead of contending with the undisputed and properly alleged facts of its interference with the Clerk’s statutory duties, the Board instead focuses on the “13 declarations” the Clerk seeks. (Motion pp. 7-14.) The Clerk’s *prayer for relief* is not the same as the *underlying facts stating a claim against the Board*, which the Board concedes by silence. The Clerk’s prayer for relief meticulously (instead of vaguely or generally) detailed the provisions of the offending Resolutions 2021-31 and 2022-05 that must be vacated because they interfere with the Clerk’s duties, among other appropriate relief. The Board’s focus on the prayers for relief does nothing to diminish the underlying claims based on the Board’s undeniable interference with the Clerk’s statutory duties in violation of statutory law, which the Clerk has easily stated under (C)(8). Thus, under *McKim*, *Wayne County Prosecutor*, and the constitutional and statutory obligations of the Board and Clerk, the *remedies* are for this Court to declare invalid and enjoin the Board’s violations, vacate the offending portions of the Resolutions, and the Court may retain continuing jurisdiction to ensure the Clerk is not prevented from doing her job.

II. The Clerk Stated a Claim for The Board’s Failure to Fund/Staff Her Position.

The Board has refused to provide the reasonable and necessary resources for the Clerk to perform her statutory functions. (VFAC Count II.) This is not a “minimum staffing” issue, as the

Board reframes it; it is the Board’s intentional starvation of the resources available to the Clerk to make her job impossible. “A clerk or treasurer may be fair game in the political arena, but not to the point these officials cannot carry out their statutory responsibilities.” (Ex. 1 at p. 44.)

As more than adequately alleged by the Clerk, the Township is understaffed on the finance team by any objective measure, and under the written opinions of multiple experts to the extreme detriment of the Clerk’s ability to do her job. Yet, a majority of the Board – who has no finance expertise – has tabled or rejected multiple proposals to hire qualified staff, and instead continued to understaff the finance team on a patchwork basis with temporary employees who have no pertinent educational experience, degrees, or practical experience, as amply alleged in the VFAC. The Board’s actions have been arbitrary and capricious, to the detriment of the Clerk’s ability to perform her statutory duties. As in *McKim*, where the clerk showed that the board limited the funding for the clerk’s office by removing a clerical position and limiting the salary allocated for a deputy clerk, this Court should, at minimum, “retain[] continuing jurisdiction” to “ensure that [the clerk] [is] provided with adequate” finance staffing to “permit plaintiff to perform her job.” *McKim*, 158 Mich App at 203-204.

But the Court is not limited to merely retaining continuing jurisdiction to monitor the Board’s finance staffing necessary to adequately fund the Clerk’s office. Under these circumstances, this Court may and should order performance. Appropriations decisions of a public body are not exempt or immune from judicial review. *Wayne County Prosecutor*, 93 Mich App at 121. “Whenever a board fails to perform duties imposed by the state Legislature or constitution, ***the courts will not hesitate to order performance.***” *Id.* (emphasis added)

Township Clerks and Township Treasurers are personally responsible and liable for carrying out their statutory duties, MCL 41.69, so the local funding unit must provide the

reasonable and necessary funding for a Township Clerk or Township Treasurer to perform their statutory functions. *See Wayne County Prosecutor*, 93 Mich App at 121; *see also* Ex. 1. The leading treatise on township governance, *Managing the Modern Michigan Township* (1990), by Kenneth VerBurg, addresses this issue under a section entitled, “**PROTECTION FOR CLERK AND TREASURERS.**” (Ex. 1 (excerpt), emphasis in original.) Short of “gross improprieties” by the Clerk or Treasurer, “others in the township hall may not interfere in the performance of their tasks.” *Id.* pp. 42-43. The treatise notes that, in view of court rulings applicable to counties which have parallels to townships, such as *Wayne County Prosecutor*, 93 Mich App at 121, a “township board [can] set minimum qualifications and establish working conditions for employees in the offices of elected officials” where “*the officer concurs, but boards that do so in the face of opposition by the clerk or treasurer may be treading on thin ice.*” *Id.* p. 43 (emphasis added). “In the matter of budget appropriations, the township board *must* exercise some care.” *Id.* (emphasis added). Discussing the *Wayne County* case, the treatise notes that “elected officers were mandated to provide certain services and the board of county commissioners *was obligated to appropriate funds sufficient to carry out those duties.*” *Id.* (emphasis added).

Certainly, Boards are not required to “give whatever elected officials ask for,” but “cuts cannot be so severe as to render the office unable to perform the constitutionally and statutorily mandated functions.” *Id.* “Because township officers *have constitutional* and statutory duties, the principles of this [*Wayne County*] decision may apply to township boards as well.” *Id.* p. 44 (emphasis added). “A clerk or treasurer may be fair game in the political arena, but not to the point these officials cannot carry out their statutory responsibilities.” *Id.*

The principles of *Wayne County* can and do apply to townships. The Clerk has constitutional and statutory duties. The Board’s arbitrary and capricious limitation of the finance

staff to a single Finance Manager who is dealing with family medical issues is woefully insufficient to support the Clerk. The Board's refusal to fill the Finance Director position with a qualified person while also refusing to contract outside vendors like WHG or Rehmann to assist is irresponsible to say the least. Thus, contrary to the Board's red herring argument, this is not about "minimum staffing requirements," which are precluded under MCL 41.3a. Rather, this is about permitting the Clerk, a township officer who has constitutional and statutory duties for which she is personally liable, to perform her statutory duties. MCL 41.75a permits the Board to hire employees "*as are necessary*," yet the Board has left the Finance Director vacant for many months while hiring completely *unnecessary* and unqualified part time and full time employees over the Clerk's objections while refusing to hire the necessary employees as advised by those who have the expertise in the area, including the Clerk, former administrator Rowley, Plante Moran, Rehmann Robson, and The WoodHill Group. The Board's refusal to support the Clerk with qualified staff is arbitrary and capricious. Count II is more than adequately pleaded.

III. Plaintiff Should be Awarded Fees and Costs.

Attorneys fees are available "when a public official incurs attorney fees in connection with asserting or defending the performance of his or her legal duties." *McKim*, 158 Mich App at 207-208 (awarding fees to clerk who prevailed on summary disposition in defending her statutory duties). That is the entire basis of this lawsuit, for which the Clerk, a public servant and parent of two small children, is expending many thousands of dollars of personal funds for this necessary protection of the Clerk's office, the separation of powers, and the protection of the Township's public funds. The Clerk should be awarded fees and costs pursuant to *McKim*.

IV. The Board Failed to Meet its Burden that any Exhibit Should be "Stricken," but its Position Shows that its Attorney Should be Disqualified.

The Board says that Exhibits 1 and 7 to the Clerk's amended complaint should be

“stricken,” purportedly because they divulge privileged information belonging to the Board. The Board’s assertions are incorrect for multiple reasons. The relief its seeks is not available, the exhibits are not privileged, and the Board’s attorneys’ attempts to shield their own admissions that are at odds with their positions taken in this lawsuit serve only to underscore the conflict of interest requiring disqualification that the Clerk, by counsel, expressly raised to the Board’s counsel on April 29, 2022, *with no response*, and alleged in the Clerk’s VFAC at paragraph 17.

Initially, the Board fails to meet its burden for the relief it seeks because it cites *no authority*. MCR 2.115(B) (not cited by the Board) is the court rule regarding striking “from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter,” or “all or part of a pleading not drawn in conformity with these rules.” The Board fails to explain how, or provide any authority suggesting that, the exhibits it complains about are subject to the rule, which they are not. Nothing in the exhibits is “redundant, immaterial, impertinent, scandalous, or indecent,” nor are they “not drawn in conformity with” the Michigan Court Rules. Having provided no legal authority for its request, the Board’s request to “strike” should be denied on that basis alone.

In addition, the Board fails to show it has any right to preclude the disclosure. The Board cites only one case, which has nothing to do with striking pleadings or exhibits or a Township Board’s privilege vis-à-vis the elected officials comprising the Board, but rather stands only for the general proposition that the “privilege is personal to the client, who alone can waive it.” (Motion p. 19.) The Board does not extrapolate on its position or address the fact that Plaintiff, as the elected Clerk, *is a member of the Board*, and that it is regular practice for any one of the seven elected Township officials to reach out directly to Mr. Homier and other township attorneys for advice. Yet, the Board objects to only these two communications at issue here that were *solicited by the Clerk alone*, not any other single officer, and not by the Board.

In any event, the exhibits are not privileged. “The scope of the [attorney-client] privilege is narrow: it attaches only to confidential communications *by the client* to its advisor that are made for the purpose of obtaining legal advice.” *Herald Co, Inc v Ann Arbor Pub Schs*, 224 Mich App 266, 279; 568 NW2d 411 (1997) (emphasis added). “The purpose of the privilege is to enable a client to confide in an attorney, secure in the knowledge that the communication will not be disclosed.” *Id.* In both exhibits (Exhibits 1 and 7), the *only person asking for legal questions to be answered was the Clerk*. The Board cannot have it both ways. Either the Clerk is “the client” in these communications with authority to waive the privilege, or the communications do not involve any privilege belonging to the Board, as the Board did not solicit any legal advice in either document. Either way, there is nothing improper about attaching and considering them. The purpose of the privilege is not at risk, either. Whereas the Board seeks to shield this information that is dispositive of Count I against it, the Clerk, as the only official asking for these questions to be answered, is advocating for full disclosure and transparency.

Exhibit 1 to the VFAC is attorney Fink’s response *directly to* “Madam Clerk” in response to two questions *that she personally posed to Mr. Fink*. (VFAC Ex. 1.) Mr. Fink recited in the first line of his response to the Clerk, “You asked me two questions –” (*Id.*, emphasis added). Mr. Fink recited the Clerk’s question to him: “May the Clerk, as the person responsible to prepare and maintain ledgers (and other financial records) have the authority to grant/deny access to manipulate (use read/write functions) the records?” (*Id.*) Mr. Fink concluded, “the answer must be YES. The clerk, as the responsible party, must be able to limit the ability of others to ENTER or REMOVE financial data.” (*Id.*) Mr. Fink then *publicly shared this same opinion* at the August 17, 2021 township meeting. (VFAC Ex. 2, pp. 56-59.)

The Board has no right to control this correspondence, which was not a request for legal

advice generated by the Board. The Clerk detailed this fact in her Affidavit submitted in support of her separately pending motion for summary disposition, a copy of which (without exhibits) is attached as **Exhibit 2**.³ (Ex. 2, Affidavit ¶7.) The Clerk explained: “I personally solicited as Clerk” the “August 12, 2021 Opinion” of Mr. Fink. (*Id.*) This is not unlike the legal opinions the clerk obtained in *McKim* which supported the relief the court granted for the clerk in that case. The court noted that the clerk “obtained various independent legal opinions supporting her position” and “forwarded them to the board.” *See McKim*, 158 Mich App at 203. There was no question in *McKim* that such legal advice obtained directly by the clerk in a position adversarial to the Board was properly considered in the case.

The same applies to Exhibit 7 to the Clerk’s amended pleading. The email chain spanned three days, from May 15 to May 18, and reflects just some of the Clerk’s failed efforts to regain custody and control of the records that had been taken from her on May 13. It is the Clerk, as custodian of these records under MCL 41.65, who is responsible ensuring these records “not be kept where they will be exposed to an unusual hazard of fire or theft.” Today, they still remain out of the Clerk’s custody and control, and are exposed to unusual hazards, including potential mutilation or destruction. The Board and its interim administrator have continued to retain and hold possession of these records despite the Clerk’s multiple demands.

On May 10, the Board began illegally restricting the Clerk’s access to the township’s books, papers and records for which she is the custodian, and illegally granted exclusive overwrite authority to the journals and ledgers to interim administrator Jim Merte, who illegally granted read/write authority to Sandra Egeler and Nancy Colasanti, in direct conflict with Mr. Fink’s opinion discussed above and Michigan statutory law. The emails in question are not

³ The Clerk submits Exhibits 2 and 3 only in response to the Board’s “strike” request, and not with regard to any argument or position under MCR 2.116(C)(8).

privileged or controlled by the Board. The emails began on May 15 between the Clerk and non-Board member, interim employee James Merte, regarding these access issues, without any involvement of counsel. (VFAC Ex. 7.) Mr. Merte copied the Supervisor, Treasurer and the Deputy Treasurer & Deputy Supervisor, Ms. Egeler, on the emails. (*Id.*) Mr. Merte was relying on the illegal Resolutions as support for his actions. (*Id.*)

It was again ***the Clerk who*** disagreed with Mr. Merte and therefore brought Mr. Fink and the township’s outside auditor into the correspondence. (*Id.*) It was ***the Clerk who asked Mr. Merte to provide legal support*** for his two invalid actions, asking “what legal authority is it that you believe you have to allow people, without my authorization, to manipulate the General Ledger?” and “What legal authority is it you think you have to have removed by [my] Enterprise Administrator access?” (*Id.*) Two days later, when Mr. Merte had not responded, ***it was the Clerk*** who followed up again on May 17 asking, “[d]o you have answers to ***my*** questions.” (*Id.*, emphasis added.) Finally, Mr. Merte – a non-Board member employee of the township serving at the pleasure of the Board – looped Mr. Homier into the correspondence ***to answer the Clerk’s questions***. (*Id.*) He invited ***the Clerk*** to “discuss the legality” with Mr. Homier. On May 18, Mr. Homier, copying non-Board member Mr. Merte, provided answers to ***the Clerk’s questions***:

“it is my further understanding that ***the Clerk will maintain read/write access*** to the journals and ledgers. With regard to Ms. Colasanti and Ms. Egeler, ***I agree with the Clerk that they should only have read access***. With read access, both can still document journal and ledger entries that should be added or corrected and ***pass those on to the Clerk who has the statutory obligation to ‘prepare and maintain the journals and ledgers necessary to reflect the assets, liabilities, fund equities, revenues, and expenditures for each fund of the township.’*** MCL 41.65.”

(*Id.*, emphasis added). Like the Clerk’s independent request for an opinion from Mr. Fink discussed above, it was the Clerk who solicited and obtained Mr. Homier’s opinion when non-Board-member employee Mr. Merte could not answer her questions. Indeed, Mr. Merte

“referred” the Clerk to him. Again, either this is not the Board’s privilege under the Board’s position that the Clerk is not the client (as she was the only one seeking answers, not the Board), or the Clerk, as a member of the Board, has the authority to waive it.

In any event, Mr. Homier’s supportive opinion of May 18 is admissible. The Board never heeded Mr. Homier’s opinion which was predicated on his “further understanding that the Clerk will maintain read/write access to the journals and ledgers.” Mr. Merte responded to Mr. Homier, that he had no intention of restoring—much less “maintaining”—the Clerk’s read/write access to the journals and ledgers, and would only restrict Ms. Egeler’s ability to post entries directly to the general ledger. The Board has not yet restored the necessary access the Clerk previously had and is required to have so that she may control who may enter what into the journals and ledgers.

Both of the Township’s attorneys, Messrs. Fink and Homier, agree with one of the foundational bases for the Clerk’s claim in Count I – that read/write access and ultimate authority over the township’s journals and ledgers could not properly be granted to someone other than the Clerk without interfering with the Clerk’s statutory duties, yet that is exactly what the Board indisputably did under the auspices of the illegal Resolutions. Thus, even if there was a privilege belonging to the Board with respect to Mr. Homier’s email (there is not), it would still be admissible as an exception to the normal confidentiality for attorney-client privileged communications. Mr. Homier’s admission that the Board violated the Clerk’s statutory duty to have custody and control over the Township’s journals and ledgers establishes the Clerk’s claim in Count I, so her interest in disclosure manifestly outweighs maintaining its confidentiality. Further, as discussed above, the general protective purpose of the privilege is not in any way served here in a dispute between the Board (the entity claiming the privilege) and one of its sitting elected members who is always privy to such communications.

In *Howe v Detroit Free Press, Inc*, 440 Mich 203, 222 & 226; 487 NW2d 374 (1992), the Michigan Supreme Court adopted the balancing test used in some federal courts for when the privilege should “yield” in civil cases to the more important needs of the opposing party. Under *Howe*, Michigan courts apply a balancing test in “carefully weighing the interests involved, balancing the importance of the privilege asserted against the defending party’s need for the information,” because “the privilege should yield” where the information is needed for the opponent’s case and the “assertion of the privilege [] bears little or no relationship to its protective purpose.” *Id.* Here, the emails at Exhibit 7 are not privileged for all of the reasons discussed above but, even if they were, under *Howe* they should not be stricken because the relevance outweighs any relationship to the protective purpose of the privilege.

The Board’s counsel should be disqualified. Much more troubling than the Clerk’s inclusion of these uncontested facts is the conflict of interest that pervades this action. The Clerk’s counsel notified the Township’s counsel of this conflict via letter dated April 29, 2022, and requested a response, including any explanation why there would not be a conflict. **(Exhibit 3.) The Clerk’s counsel received no response.** The Clerk also alleged the conflict in paragraph 17 of the VFAC. Mr. Homier authored the May 18 email *supporting* the Clerk, but now he is trying to shield that opinion while *opposing* the Clerk on behalf of the Board. He signed the Board’s motion for summary disposition seeking *dismissal* of the Clerk’s claims even though he knows, based on his own opinion, that the Board did not and continues not to heed his advice and interfered with the Clerk’s custody and control over the Township’s journals and ledgers, including under his opinion that the Clerk should maintain read/write authority over journals and ledgers, and that Ms. Egeler cannot have read/write access over them. In counsel’s own words, his client in this case has violated the Clerk’s “statutory obligation to ‘prepare and maintain the

journals and ledgers necessary to reflect the assets, liabilities, fund equities, revenues, and expenditures for each fund of the township.’ MCL 41.65.” (VFAC Ex. 7.) Nevertheless, he seeks to shield this conclusion from the Court and to dismiss the Clerk’s claim he knows to be valid.

Mr. Homier will necessarily be a witness regarding the adoption of the illegal Resolution 2022-05 as well as the illegal taking of the journals and ledgers. (*E.g.*, VFAC ¶¶16-19, 24.) In his role, Mr. Homier has obtained confidential information he seeks to use against the Clerk, and he will necessarily be a witness at trial. *See id.*; *see also* MRPC 3.7 (Lawyer as Witness); *see also* *Kubiak v Hurr*, 143 Mich App 465, 471; 372 NW2d 341 (1985) (lawyer as witness); *see also* *Avink v SMG*, 282 Mich App 110, 115; 761 NW2d 826 (2009) (use of confidential information). Moreover, Since the Clerk’s original filing of this case on April 11, ***the Board of Trustees has not once consulted with Mr. Homier regarding this pending litigation***, in either open or closed session. This is extraordinary. Either the consultation is improperly happening in private with the Supervisor alone, or the Board’s counsel is making decisions and submitting filings to this Court on behalf of the Board without any input or knowledge by the Board, *see* MRPC 1.4 (Communication), and invoicing the Township taxpayers for legal representation of its Board. This conflict should not continue, and counsel should be disqualified.⁴

CONCLUSION

Plaintiff respectfully requests that the Court: (1) DENY Defendant’s motion under MCR 2.116(C)(8); (2) DENY Defendant’s request to strike exhibits 1 and 7 to the VFAC; (3) disqualify Defendant’s counsel; and (4) grant such other relief as this Court deems just.

⁴ The Clerk has already been forced to devote several pages of this brief, which is supposed to be aimed at responding to the (C)(8) issues, because the Board cursorily asserted a request to “strike” on the last ½ page of its brief without citing any authority, which also implicates the disqualification issue. The Clerk expressly reserves and does not waive the right to subsequently file a standalone motion to disqualify to more fully brief this issue, if necessary.

Dated: August 18, 2022

Respectfully submitted,
By: /s/ Mark J. Magyar
Dykema Gossett PLLC
Attorneys for Plaintiff
201 Townsend St., #900
Lansing, Michigan 48933
(616) 776-7523
mmagyar@dykema.com

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JESSICA FLINTOFT, as Clerk of Scio
Township,

Plaintiff,

Civil Action No. 22-000414-CZ

vs.

Hon. Timothy P. Connors

SCIO TOWNSHIP BOARD OF TRUSTEES,

Defendant.

Mark J. Magyar (P75090)
DYKEMA GOSSETT PLLC
Attorneys for Plaintiff
201 Townsend St., #900
Lansing, Michigan 48933
(616) 776-7523
mmagyar@dykema.com

Michael Homier (P60318)
Laura J. Genovich (P72278)
Foster Swift Collins & Smith PC
Attorneys for Defendant
1700 East Beltline, N.E., Suite 200
Grand Rapids, MI 49525-7044
Phone: 616.726.2238
mhomier@fosterswift.com
lgenovich@fosterswift.com

**INDEX TO EXHIBITS TO PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)
AND TO STRIKE EXHIBITS 1 AND 7 TO THE VERIFIED FIRST AMENDED
COMPLAINT**

Exhibit	Description
1	Managing the Modern Michigan Township (1990), by Kenneth VerBurg (Excerpt)
2	Affidavit of Jessica M. Flintoft, Scio Township Clerk
3	April 29, 2022 Letter to Michael D. Homier

EXHIBIT 1

Managing the Modern Michigan Township

Third Edition

*by
Kenneth VerBurg*

Published by:

Michigan State University Extension Service

and

Department of Resource Development
Michigan State University
East Lansing, Michigan
2002

FOREWORD

Today's Michigan townships face an increasingly complex and challenging task as they seek to meet citizens' needs. Today's townships face many of the same issues as Michigan's cities; and smaller townships are confronted with many of the same issues as larger ones. They need to promote economic development while at the same time managing growth and change. They must meet the demands for greater levels of municipal services while confronting citizen opposition to increases in taxes. They must respond to a myriad of demands to protect the environment, improve roads, "cut government waste," and provide public safety services, to name only a few. In the face of these challenges, the Michigan Townships Association and Michigan State University Extension have cooperated to produce this third edition of *Managing the Modern Michigan Township*.

Once again, Kenneth VerBurg, recently retired Professor from the Department of Resource Development at Michigan State University, was called upon to apply his many years of experience in state and local government to the development of this book. Professor VerBurg has remained on the leading edge of developments in local government law and practice. This edition incorporates the significant changes in township governance that have taken place since the release of the previous edition in 1991. It is intended to provide a survey of township operations that will prove useful to all township officials and personnel. Although it provides detail on current legal and administrative practices, it provides sufficient general principles to help township officials understand the workings of township government, and the policy issues and problems they may face. As with all of Professor VerBurg's publications, this edition is written in a straightforward, readable style with valuable practical advice.

G. Lawrence Merrill
Executive Director
Michigan Townships Association

Gary D. Taylor, J.D.
Extension Specialist, State & Local Government Programs
Michigan State University

Donald Z. Thall
Kalamazoo Charter Township Clerk (Kalamazoo County)

AUTHOR'S PREFACE

The roots of this book go back a couple of decades now. The first edition came about in 1981 at the request of Robert Robinson who was then Executive Director of the Michigan Townships Association. A few years earlier, he had asked if I would write a manual for township board members and township employees. I was then a professor in the Institute for Community Development at Michigan State University. I wrote the book that was then published under a joint copyright of the Michigan Townships Association and the University.

Some years later interest in the book continued and so I wrote the second edition. And, I had thought that I would complete a revision and publish the third edition before I retired. That did not quite work out and so I am now writing the book as a professor emeritus, a title universities award to retired professors.

Members of the MTA staff, township officers, and ordinary people are not fully aware of how important they are to the writing of this book. Some, of course, are aware of part of their contributions because they have read and reviewed the manuscript and suggested changes. MTA Executive Director G. Larry Merrill, Education Director Debra McGuire, Evelyn David, Director of MTA Membership Information, MTA Legal Counsel, John H. Bauckham, Donald Z. Thall, Clerk of Kalamazoo Charter Township, Past President and member of MTA Board of Directors, Jennifer Fiedler, Communications Specialist, and Jennifer Gorchow, Communications Coordinator all made time in their schedules to help make this a better and more accurate source of information for township officials. (Donald Thall also reviewed the first edition.)

How did township officers and ordinary people contribute? In a very important way. Over the years they called or wrote me and asked questions. Writing a book of this nature depends to a very great degree on knowing what questions potential readers have. Those telephone calls and letters helped me learn what matters I had to address in the book. Researching the law and judicial decisions, applying principles of government, and questioning practitioners of township government provided me information with which to respond.

The book thus covers a broad spectrum of topics on which township officers, township employees, and residents will want information. Some township officers, new to township government and perhaps to government in

Michigan, will find reading the book a useful way of getting an overview of township government in our state. Those who are more experienced may not have time or need to sit down and read the book from cover to cover. I hope that they, however, will still find the book useful as they search out questions of law and practice in their roles as township officers.

I have tried not only to write in a style that would provide an overview of township government but one that would provide a ready resource for those people who need some technical background or context for situations they are encountering. For that reason, I have provided a large number of statutory and judicial citations that provide a basis for many of the statements in the book. In addition, the footnotes provide a source for your own further research in pursuit of solutions to particular conditions.

To assist in these reading and research efforts, I have tried to provide comprehensive access to the book. Part of these access tools is the table of contents. It provides chapter titles and also several levels of section headings. This somewhat detailed table of contents will help the reader seek out the desired topics. It will also serve as a tool to access the book topics because they are hot-linked to the respective pages on the CD Rom version. In addition, we have provided a detailed index that will help readers access various topics directly.

In addition to the persons mentioned above who helped to bring this book to completion, I would like to add the name of Tracy Brummel who prepared the pages of the book for presentation to the publisher. I am grateful for her excellent skills and assistance over the years. I am grateful to all those who have helped bring the book to completion. At the same time, it is appropriate that I acknowledge that I am responsible for any errors that somehow managed to persist through all the reviews and changes.

I hope you will find the book useful in your township government service and to the residents of your township.

Kenneth VerBurg

substantial sums on hand. The attorney general, however, held that township treasurers have no statutory obligation to “invest tax collections or to maximize investment income on such tax collections.”⁴⁷ At the same time, residents would be disappointed if treasurers left the township cash reserves lie idle in the township checking account. But they would be even more disappointed if they placed the reserves into high-risk instruments that ended the loss not only of interest but of principal as well. Treasurers, thus, should make policy choices that fall between these two extremes.

TAX COLLECTION

The big task of the township treasurer, of course, is collecting and disbursing property tax receipts. State law defines this responsibility in detail, but treasurers have some discretionary authority, both in terms of the general public and working in the office.

The general public is probably in its worst mood when it gets the property tax bill. Townships get a great deal of the blame for high tax bills, even though they are responsible for only a very small portion of the total. The public generally knows that but often forgets.

Treasurers cannot make paying taxes pleasant but they can at least adopt a policy to inform citizens about taxes. Treasurers can consider whether the tax bill itself is understandable and whether a statement about property tax receipts – how they are distributed and how property assessment increases are limited to the lesser of the rate of inflation or 5 percent – might be helpful. How treasurers view their responsibilities in these respects are policy matters that treasurers themselves can decide.

Other policy matters relating to tax collecting concern office hours during tax time, equipment to be used, control procedures in the office, security arrangements, and the frequency of disbursements to schools and other agencies for whom taxes are collected. State law specifies some minimum requirements on these questions, but treasurers have some flexibility within these rules. For example, some townships place bar codes on the tax bill to expedite the collection and reconciliation process. Others have made arrangements for residents to make payments to the township by credit card.

Township treasurers have particular responsibilities to collect delinquent taxes on personal property – responsibilities discussed in detail in Chapter 5. Again, state law demands certain levels of performance, but in many cases, the treasurer’s policy and judgment determine how the requirements will be carried out.

PROTECTION FOR CLERKS AND TREASURERS

As elected officials, clerks and treasurer hold a special trust that other board members and citizens sometimes overlook. Sometimes citizens and township board members are inclined to view clerks and treasurers as township employees which, of course, they are not. They are chosen by election for the purpose of carrying out certain state and township responsibilities. The law holds these officers directly responsible for these duties. And short of gross improprieties, others in the

township hall may not interfere in the performance of their tasks.

The law referred to here has developed in connection with county officials, but an appeals court decision also addresses the matter with respect to townships. The case involved a township board resolution forbidding the township clerk to remove township records from the office for more than 18 hours at a time. The board also sought to direct the township secretary, rather than the clerk, to receive all incoming mail and bills. The clerk sued and ultimately the Michigan Court of Appeals ruled that the board action was improper because it interfered with the clerk's duties.⁴⁸

County law is not entirely applicable to township clerks and treasurers but some parallels may apply. A 1986 Michigan Supreme Court decision held that the elected county officers were "co-employers" with the board of commissioners.⁴⁹ This means that county officers are parties to collective bargaining agreements that affect employees in their respective offices. Consistent with this decision, an earlier attorney general opinion ruled that boards of commissioners could not impose a personnel policy on the employees of the county officials. As desirable and reasonable as such a personnel policy may be, the law does not allow the county board to "interfere" in this way.⁵⁰

As a result of that decision, county officers have the legal authority to refuse to sign a labor-management agreement if they were not pleased with the way the proposed contract affected the employees in their offices.

In view of these rulings, can the township board set minimum qualifications and establish working conditions for employees in the offices of elected officials? Certainly it can, if the officer concurs, but boards that do so in the face of opposition by the clerk or treasurer may be treading on thin ice. This general rule applies especially to chief deputies – employees who are appointed to act on behalf of clerks and treasurers. A special trust relationship should exist between the elected official and the chief deputy. Thus, clerks and treasurers are free to select, at a minimum, their chief deputies. At the same time, it is important to note that the major difference between county officers and those in townships is that county officers are not members of the policy board and this court decision gave them a direct voice in the contractual arrangements. Township officers, on the other hand, are members of the policy board and therefore have a voice in the contract. Hence, the precedents for county officers may not be applicable to township officers.

Similarly, in the matter of budget appropriations, the township board must exercise some care. In a Wayne County case, a circuit judge ruled that the county board could not make an across-the-board funding cut of 15 percent for all county departments. The board appealed and the appeals court, while affirming the county board's budgetary authority, ruled that the elected officers were mandated to provide certain services and the board of county commissioners was obligated to appropriate funds sufficient to carry out those duties.⁵¹

The judge did not say boards must give whatever elected officials ask for. But cuts cannot be so severe as to render the office unable to perform the constitutionally and statutorily mandated functions. Because township officers have constitutional

and statutory duties, the principles of this decision may apply to township boards as well.

We do not state these principles to encourage clerks and treasurers to flaunt their special status. Fundamentally, they need to work at cooperating rather than at being independent. As members of the board that makes those decisions, clerks and treasurers are well advised to try to shape board policies during the debate and thereafter to live as best they can with the results. Our purpose is to address other board members who may inadvertently interfere with the statutory duties of these township officials. A clerk or treasurer may be fair game in the political arena, but not to the point these officials cannot carry out their statutory responsibilities.

THE ROLE OF DEPUTIES

Clerks and treasurers must each name a person to work a deputy with the authority to act for them in all respects except for their membership on the township board. At one time, the attorney general held that deputies also were permitted to vote in the clerk's or treasurer's absence.⁵² But in 1982 the legislature clarified this point – deputies may not vote on issues before the board.⁵³

These deputies must file an oath of office and a fidelity bond. In many townships, of course, these deputies function as employees of the township with a special designation and are paid on a salary basis. They are not required to have a full-time, salaried employment arrangement with the township, however. The legislature's concern was to have a person authorized to take the place of the clerk or treasurer in the event of absence, illness, disability, or death of the clerk or treasurer. Hence, the law permits the township board to make the decision as to how the deputy is to be compensated.⁵⁴ For deputies who are salaried and full time, it is probably appropriate to continue the person's salary at its regular rate. On the other hand, if the deputy is "standing in" for an extended period, it may be appropriate to provide a temporary increase.

In the past, supervisors did not have deputies, at least officially. Now the statute permits them to appoint a deputy if they wish, but one is not required as is the case with clerks and treasurers.⁵⁵ The statute states that the supervisor's deputy serves at the pleasure of the supervisor and is paid on a salary or other basis as the township board determines. The act also states that the deputy possesses the powers and must perform the duties of the supervisor, and, of course, does not have a vote on the board. May the supervisor's deputy chair the annual meetings of the township? The answer is no because another statute directs the clerk to serve in that capacity until members in attendance chose a moderator.⁵⁶ What about regular meetings of the board? This issue is resolved by a statute designating the clerk to preside until the members present select a person to chair the meeting. Because it is not likely that the supervisor will be absent very often, it may be wise to incorporate such a provision in the board's bylaws. The bylaws could also provide for the designation of a chair pro tempore at the organizational meeting each year. A member, then, would be elected by the members to serve as temporary chair whenever the supervisor is absent. In the event both members are absent, the board could then revert to the specifics of the statute. However, these are matters that the board arranges for in its bylaws.

EXHIBIT 2

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JESSICA FLINTOFT, as Clerk of Scio
Township,

Plaintiff,

Civil Action No. 22-000414-CZ

vs.

Hon. Timothy P. Connors

SCIO TOWNSHIP BOARD OF TRUSTEES,

Defendant.

Mark J. Magyar (P75090)
DYKEMA GOSSETT PLLC
Attorneys for Plaintiff
201 Townsend St., #900
Lansing, Michigan 48933
(616) 776-7523
mmagyar@dykema.com

Michael Homier (P60318)
Laura J. Genovich (P72278)
Foster Swift Collins & Smith PC
Attorneys for Defendant
1700 East Beltline, N.E., Suite 200
Grand Rapids, MI 49525-7044
Phone: 616.726.2238
mhomier@fosterswift.com
lgenovich@fosterswift.com

AFFIDAVIT OF JESSICA FLINTOFT

I, Jessica Flintoft, being first duly sworn, depose and state as follows:

1. I am the duly elected Clerk of Scio Township and the Plaintiff in this action.
2. This Affidavit is based upon my personal knowledge. I can competently testify to the facts contained herein if called upon to do so.
3. I fully adopt, attest to, and incorporate as though fully reproduced and set forth herein all allegations of my Verified First Amended Complaint, filed May 19, 2022. I verified my pleading with the intention that it be a sworn document with the same effect as an affidavit, but I incorporate herein out of an abundance of caution and to the extent required to consider such evidence with my motion for summary disposition under MCR 2.116.

BACKGROUND

4. In 2017, then-Clerk of Scio Township, Nancy J.C. Hedberg, appointed me as Deputy Clerk. When Hedberg retired as Clerk, I pursued the appointment to Clerk by the Board.

5. The Board unanimously appointed me as Clerk on May 28, 2019, effective June 1, 2019. I ran unopposed for Clerk in 2020, and chose not to run as part of either local political slate. I earned 8,842 votes from Scio voters, the most votes that any Scio Township official has ever earned.

6. I graduated with honors from Cornell University in 1999, and earned my Master's degree in Public Policy from the U.C. Berkeley Goldman School of Public Policy in 2004. I have worked for and with local governments since 2000, earning accolades for my public service.

EXHIBITS

7. The following attached exhibits, of which I have personal knowledge through my personal involvement and/or through my position as Clerk, as custodian of Scio Township's books, records, and papers, are true and correct copies of:

Exhibit 1. August 12, 2021 Opinion of Township Attorney James A. Fink, which I personally solicited as Clerk.

Exhibit 2. Excerpts of Transcript of August 17, 2021 Board Meeting

Exhibit 3. August 17, 2021 Board Resolution 2021-31

Exhibit 4. Minutes of August 17, 2021 Board Meeting

Exhibit 5. February 22, 2022 Board Resolution 2022-05

Exhibit 6. Minutes of February 22, 2022 Board Meeting

Exhibit 7. May 15 – May 18, 2022 Correspondence re access to financial information

Exhibit 8. May 12, 2022 Recommendation by the WoodHill Group re Finance

Staffing

- Exhibit 9.** May 15, 2022 Finance Staffing Recommendations of David Rowley
- Exhibit 10.** April 12, 2022 Finance Staffing Analysis By Administrator David Rowley
- Exhibit 11.** Administrator David Rowley's April 12, 2022 Resignation Letter
- Exhibit 12.** April 26, 2022 Treasurer Report to Board
- Exhibit 13.** Balance Sheet and Account Balances for Fire Fund from FYE09 through FYE23
- Exhibit 14.** Text Messages May 12, 2022 between Clerk, David Rowley, and James Merte
- Exhibit 15.** NetSmart Company Service Report p. 1 and p. 11-12
- Exhibit 16.** Screenshot by Clerk on May 13, 2022 of James Merte's provision of access to financial records to Sandra Egeler.
- Exhibit 17.** BS&A Audit Summary Reports as of June 9, 2022: James Merte's Changes to Sandra Egeler's Access to General Ledger module; James Merte's Changes to Sandra Egeler's Access to Accounts Payable module; James Merte's Changes to Nancy Colasanti's Access to Accounts Payable module.
- Exhibit 18.** Item G2. Cottontail Court. May 24, 2022 meeting.
- Exhibit 19.** Minutes of May 24, 2022 Board of Trustees Meeting

AUGUST 17, 2021 SPECIAL MEETING

8. Immediately before the start of the August 17, 2021 Special Meeting of the Board called by Supervisor Will Hathaway, Attorney Fink met alone with the Supervisor and me in the Meeting Hall. Attorney Fink advised both the Supervisor and me that the Township Board could not reduce staffing to a point where I could no longer carry out my statutory duties related to finance.

MAY 10-26, 2022

9. I was not at the May 10, 2022 Board meeting due to illness. The Board knew that I was ill and that my illness was the reason I was not in attendance. At this meeting, the Board appointed James Merte as interim administrator; and the Supervisor appointed Sandra Egeler (the current Deputy Treasurer) as additionally a Deputy Supervisor, an action with which the Board concurred.

10. On May 12, I held a meeting with newly appointed interim Administrator Merte. Mr. Merte told me that he and Supervisor Hathaway had agreed to his temporary appointment about two weeks earlier, and that Hathaway had instructed Merte not to discuss it with other members of the Board of Trustees, a condition to which Merte agreed. Merte told me that the Supervisor had expressly instructed him to immediately gain required access to BS&A to provide Sandra Egeler the ability to manipulate the General Ledger. I condemned the plan, and directed Merte not to proceed, citing my office of Clerk and MCL 41.65. I encouraged Mr. Merte to reach out to Township Attorney James A. Fink, for counsel, and that he speak with the then still current Administrator David Rowley with whom Merte had as of yet not conferred about any aspect of the Administrator position. I followed up this conversation in writing via text message to both Rowley and Merte. (See Exhibit 14.)

11. On the afternoon of May 13, I held a direct call with auditor David Helisek of Plante Moran and confirmed his concurrence with my determination that in an effort to maintain integrity of the Township's journals and ledgers I would not allow the Deputy Treasurer & Deputy Supervisor, Sandra Egeler, permission to manipulate the General Ledger module of BS&A. Auditor Helisek said that if in fact Egeler or other person working under the direction of the Treasurer or Supervisor were instructed to propose any journal entries, that those should be done on paper only, to maintain a most basic internal control for the Township.

12. Instead of going through typical Township procedures to onboard new employees, the Supervisor himself contacted NetSmart, the Township's I.T. Managed Services Provider, directly on Wednesday May 11, 2022 with a request regarding "Urgent Steps for Township Administrator Transition." Sean Goldman, the Chief Information Officer assigned by NetSmart for the Township, noted his concern about the unusual contact from the Supervisor. At 4:55pm on Friday May 13, 2022, after being directed twice by Supervisor Hathaway, Mr. Goldman remoted into James Merte's computer, and provided him with "Enterprise Administrator" access to all BS&A modules. (Exhibit 16, NetSmart Company Service Report p. 1 and p. 11-12.)

13. At some point between 4:55pm and around 7:00pm on Friday May 13, Mr. Merte granted Ms. Egeler privileges over the General Ledger module allowing her to manipulate the general journal and ledger which are a portion of the current journals and ledgers of the Township, in contravention of MCL 41.65. (Ex. 16.)

14. Upon discovering around 7:00pm on Friday May 13, 2022, I restored Sandra Egeler's long standing level of access to view the General Ledger, restricted so that she could not manipulate it. At that time, I saw that Mr. Merte had been granted "Enterprise Administrator" access, and I chose not to disable that access, instead trusting that we would discuss and resolve the issue on Monday. Instead, on Saturday morning, Mr. Merte chose to revoke my "Enterprise Administrator" access, removing any ability for me to control who enters what into the journals and ledgers of the Township. Further, I could not even see what changes Mr. Merte or others may have made to any of the journals and ledgers, or if other unauthorized people had been granted access. I demanded my full access be restored, and for legal authority under which these actions were taken.

15. In fact, Mr. Merte had—against my express direction—extended permissions to Egeler to manipulate both the General Ledger and Accounts Payable module. On Saturday May

14, he added Nancy Colasanti—someone Mr. Merte claims he had the authority to hire on behalf of the Township—and provided Ms. Colasanti with permissions to manipulate the Accounts Payable module. Instead of answering my demands that he return control of these public records to me, Mr. Merte provided Mr. Egeler with additional high-level permissions within the General Ledger on May 18th. That same day, Attorney Homier advised me and Mr. Merte that per MCL41.65, Ms. Egeler and Ms. Colasanti should have only read access. It wasn't until May 24th mid-day that I compelled Mr. Merte to end read/write access to Ms. Egeler for the General Ledger module. It was on May 26th that Mr. Merte disabled permissions for Ms. Egeler to unlock and re-adopt prior year budgets, records that are my statutory responsibility to keep.

16. During those 11 days, Egeler entered 155 general journal entries all dated within the prior fiscal year ending March 31st, Egeler posted 57 of these to the general ledger. I instructed Merte to ask Egeler to reverse all general journal and general ledger entries. Instead, Ms. Egeler reversed only the 57 general ledger entries. Last fiscal year ending March 31st is not yet closed, because the Township has lacked qualified finance staff to prepare closing adjustments and financial statements.

17. There may be more ongoing and unauthorized access to the 8 financial management modules of BS&A, as well as to the Assessing or Tax Rolls that are within other BS&A modules. Currently, I do not have the necessary permissions to be able to fully verify the integrity or corruption of these Township records. I do now have Administrator permission for the BS&A General Ledger module, but I still have not had restored the Administrator permissions for the BS&A modules of Fixed Assets, Payroll, Accounts Payable, Purchase Orders, Utility Billing, Miscellaneous Receivables, and Cash Receipts. And, as long as Mr. Merte, a staff person working at the direction of a Board of Trustees has “Enterprise

Administrator” access, any of my actions may be overridden without consent or knowledge, ongoing, by the Board of Trustees through its staff person.

Township Finance Staff

18. The Board voted on December 28, 2020 to open an early retirement window for Sandra Egeler, opening negotiations for a voluntary separation agreement so that the Township could hire a replacement Finance Director who could meet the current needs of the Township. The window closed on February 28, 2021 without Ms. Egeler opting in, and she remained in her position as Finance Director continuing to report to me.

19. On March 27, 2021, Supervisor Hathaway and I, after consultation with the Township’s employment attorney, agreed that we would recommend to the Board that the Finance Director should be terminated and a new Finance Director hired. On May 14, 2021, Supervisor Hathaway told me that “circumstances have changed” with respect to his previous agreement that the Finance Director should be replaced. The Supervisor never disclosed to me what had changed, but he suggested that the Finance Director should become the Deputy Treasurer, providing full-time support to the Treasurer, instead of terminating her. Based on my discussions with the Supervisor, I agreed based on the expectation that a replacement Finance Director would be promptly hired, and continue to report to me so that the Township could build out the long needed professional financial capacity required for responsible accounting of public funds. I expected to have a new Finance Director by August 1, 2021.

20. It wasn’t until November 9, 2021 that the Treasurer announced appointment of Ms. Egeler as Deputy Treasurer, thereby vacating the position of Finance Director. As Deputy Treasurer, Ms. Egeler is responsible for handling the cash of the Township, and to maintain appropriate segregation of duties per State Treasury guidelines. I restricted her access to view, but not modify, the General Ledger. The Board of Trustees has gone to extraordinary lengths to

block efforts by former Administrator Rowley and myself to fill the Finance Director position, which remains vacant, or otherwise bring in qualified outside professional financial assistance.

21. In August 2021, Mr. Merte retired as Assessor of Scio Township. Mr. Merte did not have any Township-issued credentials to access BS&A or any other information systems from his retirement in August 2021 until his re-employment on May 10, 2022. In October or November of 2021, Mr. Merte volunteered to assist Treasurer Palmer and newly appointed Deputy Treasurer Egeler to prepare the 2021 Winter Tax Bill, collected within Fiscal Year ending March 31, 2022. This 2021 Winter Tax Bill contained major errors, one of which has been publicly reported by Treasurer Palmer. (*See Exhibit 12.*)

22. When I have separately asked Mr. Merte and Treasurer Palmer to describe how this error happened, each have said that Treasurer Palmer, Deputy Treasurer Egeler, volunteer Mr. Merte, and Assessor Kulkarni were present at Township Hall. Mr. Merte told me he sat at a computer terminal entering data into BS&A Tax module in order to generate the 2021 Winter Tax Bill. Mr. Merte told me that Treasurer Palmer and Deputy Treasurer Egeler provided the data that he entered.

23. The 2021 Winter Tax Bill omitted some millages due to the County, an error within a fiduciary fund which would likely not be evaluated as part of the Township's annual audit of Financial Statements. The week of May 30th I learned of a second error in the 2021 Winter Tax Bill—a missing assessment of one or more Township Special Assessments for neighborhood road improvements. Because these activities are accounted for as governmental funds, any fund in deficit position would certainly be evaluated by the Township Auditor.

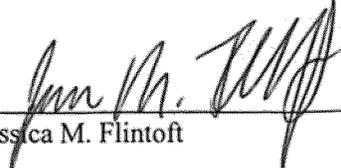
24. The week prior, on the May 24, 2022 Agenda of the Board of Trustees, the Supervisor placed four action items each of which would loan General Fund monies to four Special Assessment Districts assessed by the Township under Act 188. It was unusual for the

Supervisor to place financing issues on a Board agenda, and the language of his proposed motions raised several questions for me. The Board discussed them at length, with Supervisor Hathaway relying heavily on Deputy Treasurer & Deputy Supervisor Egeler to explain to the Board the basis and rationale for Item G10 regarding financing the Cottontail Court SAD. (See Exhibit 18.) In the course of the Board discussion, Deputy Treasurer & Deputy Supervisor Egeler told the Board that passing the proposed motion for Item G10 would authorize the Township staff to backdate a loan from the General Fund to March 31st in the General Ledger, resolving what would otherwise be a fiscal year-end deficit position in that particular Road SAD Fund 410. Deputy Treasurer & Deputy Supervisor Egeler explained that the need for the loan arose from unexpected expenses within the fiscal year. *Never did anyone present who would have had knowledge, state that the position of the fund was in fact due to there being \$0 in revenue. The lack of revenue is due to a second error made in the 2021 Winter Tax Bill—failing to bill this Special Assessment.* The Board voted to table these four items 4 to 1, with only the Supervisor opposing, until there could be further consultation with the Auditor. (See Exhibit 19.) I followed up with Auditor Helisek the following week, discovering the lack of Special Assessment collection. When I asked interim administrator Merte if he knew of any special assessments that had been missed on the 2021 Winter Tax Bill, he said he had been notified some time ago of 'a few' that had been missed.

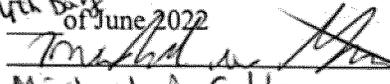
25. The Board has usurped certain of my statutory duties as Clerk, not the least of which is that I currently do not have sole control over manipulation of the township's financial journals and ledgers. Further, the Board refuses to support my office of Clerk with the qualified personnel necessary for me to perform my statutory duties for no reasonable or rational basis that I can discern.

26. I declare under the penalties of perjury that this Affidavit has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

FURTHER AFFIANT SAYETH NAUGHT.



Jessica M. Flintoft

Subscribed and sworn to before me this
14th day of June 2022


Michael A. Gable, Notary Public
Washtenaw County, Michigan
Acting in Washtenaw County, MI.
My commission expires: Feb. 4th, 2028

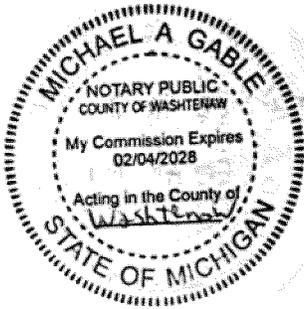


EXHIBIT 3



Dykema Gossett PLLC
Capitol View
201 Townsend Street, Suite 900
Lansing, MI 48933
WWW.DYKEMA.COM
Tel: (517) 374-9100
Fax: (517) 374-9191

Mark J. Magyar
Direct Dial: (616) 776-7523
Direct Fax: (855) 259-7088
Email: MMagyar@dykema.com

April 29, 2022

Michael D. Homier
Attorney
Foster Swift Collins & Smith PC
1700 East Beltline, N.E., Suite 200
Grand Rapids, MI 49525-7044
Phone: 616.726.2230; 517.371.8120
Mobile/Text: 517.285.4251
Fax: 517.367.7120
mhomier@fosterswift.com
www.fosterswift.com

Re: *Flintoft, as Clerk v. Scio Township Board of Trustees*
Case No. 22-000414-CZ,

Dear Mr. Homier:

My client, Jessica Flintoft, Clerk of Scio Township, has serious concerns about your representation of the Board in the above-captioned matter in light of your role as Township counsel since your engagement in December 2021 as well as your involvement in some of the transactions and occurrences giving rise to the Clerk's above-captioned lawsuit. Please be on notice that the Clerk does not waive this conflict, and requests that you and Foster Swift withdraw from your representation of the Board in the above-captioned litigation.

Your engagement with the Township provided that if you "determine that a conflict of interest arises during this engagement, the Firm may take appropriate steps to remedy the conflict, including withdrawal."

The Clerk believes a conflict exists and that yours and Foster Swift's withdrawal is appropriate and required. While the Clerk does not contend that you or Foster Swift represent her personally or individually, as an officer and trustee of the Board, you have provided your representation to her in that capacity, learned confidential information belonging to her and the Board that you are now using or have available in this case for

Michael D. Homier
April 29, 2022
Page 2

only the Board and against her, and, as set forth in the Verified Complaint, you are and will be a witness in the case. See MRPC 1.7, 3.7.

Please confirm the withdrawal at your earliest convenience, or provide your explanation why you do not believe a conflict exists and/or that withdrawal is not appropriate.

Regards,

Dykema Gossett PLLC

A handwritten signature in black ink, appearing to read "Mark J. Magyar", written in a cursive style.

Mark J. Magyar

cc: Jessica Flintoft