

STATE OF MICHIGAN

THIRTEENTH CIRCUIT COURT (ANTRIM COUNTY)

WILLIAM BAILEY,

Plaintiff,

Case No. 20-9238-CZ

v.

ANTRIM COUNTY,

Defendant,

SECRETARY OF STATE JOCELYN BENSON,

Intervenor-Defendant.

-----/

ORAL DECISION

(VIA ZOOM)

Before the Honorable KEVIN A. ELSENHEIMER, Circuit Judge

Bellaire, Michigan - Tuesday, May 18th, 2021.

APPEARANCES:

For the Plaintiff: MR. MATTHEW S. DEPERNO (P52622)
Deperno Law Office, PLLC
951 West Milham Avenue
P.O. Box 1595
Portage, Michigan 49081
(269) 321-5064

For the Defendant: MR. ALLAN VANDER LAAN (P33893)
Cummings McClorey Davis & Acho, PLC
2851 Charlevoix Drive SE
Suite 327
Grand Rapids, Michigan 49546
(616) 975-7470

Reported By: Ms. Jessica L. Jaynes, CSR 7597, RPR
Official Court Reporter
(231) 922-4576

APPEARANCES CONTINUED:
For Intervenor-Defendant:

MR. ERIK A. GRILL (P64713)
Assistant Attorneys General
P.O. Box 30736
Lansing, Michigan 48909
(517) 335-7659

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(None)

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Bellaire, Michigan

Tuesday, May 18, 2021 - 1:31 PM.

(Court, counsel, and plaintiff present)

THE COURT: Okay. Let's go ahead and call the matter of Bailey versus Antrim County. File Antrim 20-9238-CZ. It's the 18th of May. The parties may be able to hear that the Court has -- frankly, I've had no voice for about the past four days. We had a trial last week, I lost my voice during the trial; that, and hay fever, I think, contributed. Had it -- it was gone over the weekend. Yesterday I canceled some of my hearings to try to preserve it for today, and I'm running at about 50 percent, so hopefully we'll be able to get through this.

Let's go ahead and start with appearances, beginning with plaintiff, please.

MR. DEPERNO: Matthew Deperno on behalf of plaintiff, William Bailey, who's also present.

THE COURT: All right. Thank you, both.

And let's go to defense, beginning with Antrim County.

MR. VANDER LAAN: Allan Vander Laan on behalf of Antrim County, your Honor. Good afternoon.

THE COURT: All right. Thank you. Good afternoon.

1 And on behalf of the Secretary of State?

2 MR. GRILL: Good afternoon, your Honor.

3 Erik Grill, Assistant Attorney General on behalf of
4 Secretary Benson.

5 THE COURT: All right. Thank you.

6 We have -- pardon me, several matters that
7 have been set for hearing today. I'm going to start
8 with continuation of the motion for summary
9 disposition that was filed some time ago, argued a
10 week ago -- a little over a week ago, and I indicated
11 that I would be providing an oral opinion today. I'm
12 prepared to do so.

13 This is, as I indicated, file 20-9238-CZ and
14 we are here today to receive the Court's opinion on
15 the defendants' joint motion for summary disposition,
16 pursuant to 2.116 (C)(4) and (C)(8). Now, we heard
17 argument on this motion on May 10th, and the Court
18 today provides its decision, after taking this matter
19 under advisement over the last week.

20 We are on Zoom, and I recognize that there
21 are likely a large number of people who are watching
22 this decision today. It's important, therefore, I
23 think, to discuss exactly what we are addressing here
24 in court today, and, perhaps maybe even more
25 importantly, what we are not addressing. So I'll try

1 to do so in nonlegalese, and then proceed to my
2 decision.

3 This motion tests the legal sufficiency of
4 the claims that have been brought by Mr. Bailey. It
5 is not a test of the facts. The parties, through
6 their lawyers, can bring a variety of claims to court,
7 but the claims must meet certain legal criteria.
8 Circuit Courts don't give advisory opinions.

9 We do not answer questions -- even good
10 questions, even important questions, simply because
11 they've been asked. If we did, then there could be a
12 difference of opinion between each and every circuit
13 judge around the state as to what is an important
14 question. That's chaotic. There must be a legal
15 basis, therefore, that allows the Court to decide
16 issues presented to it.

17 If a complaint asks the Court to resolve an
18 issue, the Court must have the power to do so; and
19 that power would emanate from the Constitution, from
20 state statutes, or from prior decisions of the
21 appellate courts. Today I am deciding whether there
22 is a legal basis for the claims that have been made in
23 Mr. Bailey's complaint.

24 A motion for summary disposition that's
25 filed pursuant to 2.116 (C) (4) asserts that the Court

1 lacks jurisdiction with regard to the subject matter.
2 Whether subject matter jurisdiction -- pardon me,
3 jurisdiction exists, is always a question of law. And
4 that's Feyz versus Mercy Memorial Hospital, 475 Mich.
5 663 from 2006. When reviewing a (C)(4) motion, I must
6 determine whether the pleadings demonstrate that the
7 defendant is entitled to judgment as a matter of law,
8 or whether the affidavits and other proofs show there
9 was no genuine issue of material fact. Also from
10 Feyz.

11 Under the court rules, a determination that
12 there is no genuine issue of material fact can play a
13 part in ruling on a motion for summary disposition
14 pursuant to (C)(4). And this may, out of necessity,
15 involve the evaluation of certain factual elements of
16 the case. And that's Mills versus White Castle, 167
17 Mich. App. 202 (1988). Any evaluation of factual
18 elements in a ruling on a motion for summary
19 disposition based on lack of subject matter
20 jurisdiction must be made by a judge, not a jury.

21 By the way, I think I misquoted earlier by
22 citing to Feyz, when I meant to cite to Eaton County
23 Board of Road Commissioners versus Schultz, 205 Mich.
24 App. 371 (1994). And when I cited to Mills, I meant
25 to cite to Weishuhn -- W-E-I-S-H-U-H-N -- versus

1 Catholic Diocese of Lansing, 279 Mich. App. 150
2 (2008). Those prior citations related to the second
3 basis of the motion for summary disposition, which is
4 2.116(C)(8). That section of our court rules is with
5 regard to failure to state a claim upon which relief
6 can be granted, and it tests the legal sufficiency of
7 a claim. And that is Spiek versus Department of
8 Transportation, 456 Mich. 331 (1998).

9 Only the legal basis of a complaint is
10 examined, and that would be Feyz. The factual
11 allegations from the complaint, in looking at a (C)(8)
12 motion, are accepted as true, along with any
13 inferences that can be reasonably and fairly drawn,
14 therefrom. Also from Feyz. Unless the claim is so
15 clearly unenforceable as a matter of law that no
16 factual development could justify recovery, these
17 motions should typically be denied. And that is Mills
18 versus White Castle.

19 Now, in general, this case, as we know,
20 relates to concerns over the November 3rd, 2020,
21 election in Antrim County. Initial results from the
22 county at the presidential level showed 16,047 votes
23 cast, with 7,769 for President Biden and 4,809 for
24 former President Trump, and 145 votes for third-party
25 candidates, along with 11 write-in votes, for a total

1 of 12,423. The results were recalculated on November
2 5th and showed that there were 17,327 total votes in
3 the presidential election, out of 18,059 votes cast in
4 Antrim County. Out of that total, President Biden
5 received 7,289 votes and former President Trump
6 received 9,783 votes. Prior to certification by the
7 state board of canvassers, a new tally on November
8 21st of '20 showed, in fact, 15,949 total presidential
9 votes, out of 16,044 cast in the county; with 5,960
10 for Biden and 9,748 for Trump. These numbers are laid
11 out in the figure at Item 1 on page 2 of the
12 plaintiff's brief in response. These discrepancies
13 showed up in several downballot races, as well,
14 throughout Antrim County.

15 Now, the county clerk has advised throughout
16 the pendency of this matter that the problem with the
17 reporting of Antrim County's results was due to a
18 failure to update certain software on all precinct
19 tabulators, when a late change was made to two of the
20 township ballots in the county. On the date of the
21 state board of canvassers certification of Michigan's
22 election results, that being November 23rd of '20, the
23 plaintiff filed the instant action.

24 The Bailey complaint consists of six counts
25 against Antrim County. The first is a claim under

1 Article II, Section 4(1)(h) of the 1963 Constitution.
2 It is the audit provision of that section. And Item 2
3 is with regard to the purity of elections clause under
4 Article II, Section 4(2) of that Constitution. Count
5 III relates to violation of Article I, Section 2, that
6 is Michigan's equal protection clause in the Michigan
7 Constitution.

8 Item 4 is a statutory claim pursuant to MCL
9 168.861. Item 5 is a statutory claim, again, under
10 MCL 600.4545. And lastly, there is a statutory claim
11 at Item 6, pursuant to 168.765 -- 5(5). Now,
12 importantly, the plaintiff asks for the following
13 relief:

14 First, that a forensic imaging of precinct
15 tabulators associated with the November 3rd, 2020,
16 election be taken. And further, that there be a
17 nonpartisan audit regarding the November 3rd, 2020,
18 general election. Further, he asks for a protective
19 order to preserve evidence, and such other relief as
20 is equitable and just -- which is a catchall provision
21 made in almost every civil lawsuit in this county and
22 probably in this state. As indicated, these claims
23 were made against the defendant, Antrim County.

24 Now, the Court allowed the Michigan
25 Secretary of State Jocelyn Benson to intervene in the

1 case and it's fair to say that since that
2 intervention, the Secretary of State has taken on the
3 role of the primary litigator with regard to the
4 defendants' defenses and claims in this case. The
5 defendants have today -- pardon me, have filed a joint
6 motion for summary disposition, which argues three
7 main points. First, that the plaintiff's claims are
8 moot, as all requested relief has been granted; and,
9 therefore, this Court lacks jurisdiction to review
10 moot claims. And with regard to Item No. 2, that
11 plaintiff lacks standing to bring its claims into
12 court. And Item 3, that plaintiff has failed to state
13 a claim upon which relief can be granted.

14 We're going to go ahead and visit the first
15 issue. The plaintiffs, as I -- pardon me, the
16 defendants first argue that plaintiff's claims are
17 moot, as there is no case in controversy involved. In
18 other words, the Court has already granted the relief
19 sought by the plaintiff in this case, and the Court,
20 therefore, lacks subject matter jurisdiction. Now, a
21 case is moot which presents a "abstract question of
22 law, which does not rest upon existing facts or
23 rights." And that is People versus Richmond, 489
24 Mich. 29, 2010 case.

25 At the outset of this case, in deciding the

1 plaintiff's ex-parte motion for temporary restraining
2 order, show cause order, and preliminary injunction,
3 the Court, in its order of December 4th of 2020,
4 allowed a "forensic audit" subject to protective order
5 to -- of the tabulator in the possession of Antrim
6 County, limited the tabulator's connectivity to the
7 Internet, and required Antrim County to preserve and
8 protect records in its possession with regard to the
9 tabulation of votes on November 3rd of 2020 -- pardon
10 me, regarding that election.

11 This relief is largely what the plaintiff
12 asked for in bringing this litigation. The question
13 before the Court is whether the plaintiff's request
14 for an audit has also been resolved. The only avenue
15 for such an audit that is available is a so-called
16 constitutional audit, and the plaintiff's complaint
17 seeks such an independent audit of the November 3rd,
18 2020, election.

19 The people initiated Prop -- Proposition 3
20 of 2018, which amended the 1963 Constitution at
21 Article II, Section 4 to guarantee "Every citizen of
22 the United States who is an elector qualified to vote
23 in Michigan, the right to have the results of
24 statewide elections audited in such a manner as
25 prescribed by law, to ensure the accuracy and

1 integrity of elections." This language has not been
2 fully reviewed by any appellate court in this state,
3 although it has come up in the trial courts.

4 First, it came up in the Wayne County
5 Circuit matter of Costantino versus the City of
6 Detroit. Wayne County file 20-014780-AW. Costantino
7 involved a series of challenges to the process of the
8 November 3rd, 2020, election, in Wayne County, and
9 included a request from the plaintiffs for a
10 constitutional results audit under Article II, Section
11 4(1) (h) .

12 Judge Kenny, from the Wayne County Circuit
13 Court wrote that, "Following the adoption of amended
14 Article II, Section 4, the Michigan Legislature
15 amended MCL 168.31a, effective December 28th of 2018.
16 MCL 168.31a provides for the Secretary of State and
17 appropriate county clerks to conduct a results audit
18 of at least one race in each audited precinct.
19 Although plaintiffs may not care for the wording of
20 the current MCL 168.31a, a results audit has been
21 approved by the Legislature. Any amendment to MCL
22 168.31a is a question for the voice of the people
23 through the Legislature, rather than action by the
24 Court."

25 The Court of Appeals denied leave, as did

1 the Michigan Supreme Court, to review Judge Kenny's
2 decision. In the order denying leave, there were
3 several comments that were of note. First, Justice
4 Viviano's dissent argues that the Supreme Court should
5 hear the nature of the right to an audit pursuant to
6 Article II, Section 4(1)(a). Justice Zahra, joined by
7 now-retired Justice Markman, in concurring with the
8 order, notes that the Costantino plaintiffs "raised
9 important constitutional issues regarding the precise
10 scope of constitutional -- pardon me, Article II,
11 Section 4(1)(h), and its interplay with MCL 168.31a
12 and other election laws."

13 The Supreme Court's order is -- pardon me,
14 the Supreme Court's order recognizes that a minority
15 of the Court at the time had concerns with the scope
16 of Article II, Section 4(1)(h), but is not
17 precedential and is not binding authority on this
18 Court's review. Another trial court, the Court of
19 Claims, acting -- pardon me, the Court of Appeals
20 acting as the Court of Claims in the matter of
21 Genetski versus Benson, file 20-0216-MM, per Judge
22 Christopher Murray, addressed the Allegan County
23 Clerk's request for declaratory relief regarding an
24 Article II, Section 4(1)(h) audit to evaluate the
25 process of reviewing signatures on absentee ballots

1 from the general election in November of 2020.

2 In reviewing the language of the article,
3 Judge Murray focuses on a citizen's right to audit
4 results of statewide elections in a manner provided by
5 law. Both Genetski and Benson acknowledged that
6 Article II, Section 4(1)(h) audit or an audit under
7 that section did take place, or was about to take
8 place, following the November 3rd, 20 -- of '20,
9 general election. The Legislature, using authority
10 set forth in Article II, Section 4, did adopt MCL
11 168.31a, which at (2) gives the Secretary of State the
12 authority to "prescribe procedures for election
13 audits" under this constitutional section.

14 Judge Murray, for the Court of Claims, found
15 that plaintiff Genetski had, "No support in the
16 statute for plaintiffs to demand that an audit cover
17 the subject of their choosing, or to dictate the
18 manner in which an audit is conducted. MCL 168.31a(2)
19 leaves that to the Secretary of State."

20 In our matter, Mr. Bailey argues that no
21 audit took place. The Secretary of State did perform
22 two relevant reviews, however. The first is a hand
23 recount of the Antrim County presidential votes, which
24 occurred on or about December 15th of 2020. The
25 defendant Secretary of State admitted at oral

1 argument, however, that this hand recount was not an
2 audit pursuant to the power given to the Secretary of
3 State under 168.31a(2); rather, the defendants point
4 to the statewide election audit discussed in the Court
5 of Claims, as their 168.31 subway [sic] audit. A
6 process outlined in press releases dated 2/12 of '21
7 and 3/2 of '21, from the Secretary of State in their
8 argument on this motion.

9 The plaintiff argues these releases wouldn't
10 be admissible, as they're hearsay, but the Court
11 believes that the record -- records would likely be
12 admissible pursuant to 803(8) as public records, or be
13 introduced pursuant to direct evidence from one of the
14 state actors in this case. There is, therefore,
15 evidence of an audit conducted pursuant to 168.31a.
16 To be clear, that audit is not what the plaintiff
17 would have liked. As indeed, the audit in Genetski
18 was not what the Allegan County Clerk would have
19 liked.

20 However, it did occur, and it appears to
21 have been done so, pursuant to authority set forth in
22 168.31a. I do find Judge Murray's analysis regarding
23 the availability of an Article II, Section 4(1)(h)
24 audit beyond the Secretary of State's audit, pursuant
25 to 168.31a, to be persuasive. There is no right,

1 either in the constitutional section or the statute,
2 for the independent audit that Mr. Bailey seeks. A
3 petitioner under Article II, Section 4 does not get to
4 choose his own audit criteria.

5 Rather, the Legislature has given that
6 authority pursuant to Article II, Section 4(1)(h) of
7 review, to the Secretary of State. So while a citizen
8 may seek to audit the results of a statewide election,
9 it must do so according to the law. That law provides
10 for performance of the audit by the Secretary of
11 State. There is no other relief available to the
12 plaintiff in this -- on this point. As the plaintiffs
13 have either received all of the requested relief from
14 this Court, or are not entitled to the relief
15 requested as a matter of law, pursuant to my previous
16 discussion, the plaintiff's claims are, in fact, moot.

17 Granting judgment to plaintiff on its claims
18 would have no practical legal effect, as the audit
19 available under Article II, Section 4(1)(h) has
20 already been done. There is no reason to do it twice.
21 As the plaintiff has no additional relief available,
22 there is no need to review the remaining counts that
23 it has brought. The plaintiff's claims in this case
24 are moot. No additional relief is available; and,
25 therefore, no claim has been stated.

1 Summary disposition is granted to the
2 plaintiffs, as to plaintiff's complaint under
3 2.116(C)(4). As an aside, the Court would note that
4 at its core, this case has involved, from the
5 beginning, something that we all learned to do in
6 kindergarten, and that is count. We've, over time,
7 and perhaps with good reason, in the conduct of our
8 elections, taken this very simple function and made it
9 into a complex and often computerized exercise. By
10 deciding this motion, the Court is not saying that
11 there were no problems in the way that Antrim County
12 conducted its November 2020 elections.

13 The Clerk has admitted that there were
14 challenges and problems in the elections. Although,
15 the hand count ultimately of the presidential election
16 showed results largely consistent with the canvas
17 totals that were entered by the state and reported by
18 the county. Nor am I saying that the processing of
19 election data here wasn't corrupted or corruptible. I
20 don't have the facts to make that determination.

21 The plaintiff's reports and the news of the
22 day, including a computer hack recently of a main
23 petrol fuel pipeline on the East Coast might well
24 suggest that this is something that policy makers
25 should be looking into in the future. If election

1 results were to be held for ransom in the future, one
2 can only imagine what would happen. I am saying that,
3 as pled, the plaintiff's request for an audit is not
4 available. Anticipating the possibility of appeal,
5 this Court will take all pending motions under
6 advisement. This Court's order with regard to the
7 preservation of ballots, et cetera, entered in
8 December is stayed.

9 I will need an order from Mr. Grill as to my
10 decision today, for the reasons that have been stated
11 on the record. All right. Thank you all very much,
12 and good luck going forward on this case.

13 MR. DEPERNO: Thank you, your Honor.

14 MR. GRILL: Just, your Honor, before
15 proceeding, just to be clear, all other matters are
16 taken under advisement. There are some discovery
17 matters open this week. Should we -- those also be
18 stayed as well?

19 THE COURT: They -- yes. It's my
20 anticipation that all matters will be stayed pending
21 the -- we'll see what the parties wish to do with
22 regard to appeal, but pending the possibility of
23 appeal.

24 MR. GRILL: Okay.

25 THE COURT: All right. Thank you, all.

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MR. GRILL: Thank you, your Honor.
MR. VANDER LAAN: Thank you, your Honor.
(At 1:55 PM., proceedings concluded)

1 State of Michigan)

2 County of Antrim)

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Date: Thursday, May 27th, 2021

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/s/Jessica L. Jaynes
Jessica L. Jaynes, CSR 7597, RPR
Official Court Reporter
328 Washington Street
Suite 300
Traverse City, Michigan 49684
(231) 922-4576

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