STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Michigan Secretary of State and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

No. 24-000165-MZ

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DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' 10/14/2024 MOTION FOR SUMMARY DISPOSITION

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1. Whether Plaintiffs' motion must be denied where they have not demonstrated that they are entitled to judgment as a matter of law?

2. Whether Plaintiffs should be sanctioned for filing a frivolous and harassing complaint and motion for summary disposition?

INTRODUCTION

Plaintiffs Michigan Republican Party, Republican National Committee and Chesterfield Township Clerk Cindy Berry filed this lawsuit on October 8, without an accompanying motion. On October 10, this Court entered an order requiring Defendants to respond to the complaint by noon on October 14. Between October 8 and October 14—six days—Plaintiffs took no action whatsoever. They did not advise the Defendants or the Court of any intention to file a motion. Then, on October 14—just barely an hour after Defendants filed their motion for summary disposition—Plaintiffs produced this motion and a 14-page brief seeking summary disposition under MCR 2.116(I)(1) and 2.116(C)(10).

Plaintiffs' argument, however, consists of only 6 pages, in which they fail entirely to address any of the legal deficiencies of their complaint, including but not limited to (1) that the six-month residency requirement of the state constitution is no longer valid, or that the Michigan Constitution authorizes the legislature to define residence for voting purposes and that the legislature has done so; (2) that MCL 168.759a explicitly allows American citizens who are spouses and dependents accompanying military and overseas voters to register using that military or overseas voters' Michigan residence; or (3) that Plaintiffs' claims are barred by laches because MCL 168.759a and the instruction this lawsuit seeks to challenge have existed virtually unchanged for years, but Plaintiffs did not bring this lawsuit until less than a month before the election.

Instead, Plaintiffs argue that the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) does not preempt the state constitution. But this was not an argument that Defendants raised, indeed Defendants generally agree that UOCAVA does not preempt article 2, § 1 of Michigan's Constitution, and so the argument does not refute or negate any of the legal claims raised in Defendants' motion. More pointedly, the absence of preemption does

not entitle Plaintiffs to any relief as a matter of law. They must still demonstrate a viable legal claim, which—for the reasons stated in Defendants' earlier motion and brief—the Plaintiffs have not. Plaintiffs' motion has no meritorious argument, and its only apparent purpose is to require the Defendants to file another brief. As a result, Plaintiffs' motion must be denied, and it only further demonstrates that sanctions for frivolous and vexatious pleadings are appropriate.

STATEMENT OF FACTS

In order to avoid needless duplication, the Defendants rely on the facts and procedural history stated in their brief supporting their October 14, 2024, motion for summary disposition.

STANDARD OF REVIEW

MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." Under this rule, a trial court has authority to grant summary disposition *sua sponte*, as long as one of the two conditions in the rule is satisfied. *Al-Maliki v LaGrant*, 286 Mich App 483, 485 (2009), quoting *Boulton v Fenton Twp*, 272 Mich App 456, 462-463 (2006).

Summary disposition is appropriate under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5 (2016).

ARGUMENT

I. Plaintiffs fail to demonstrate that they are entitled to judgment under MCR 2.116(I)(1) or MCR 2.116(C)(10).

Again, Defendants rely upon, and incorporate by reference here, the facts and arguments in their earlier-filed October 14, 2024 motion for summary disposition. Because the Defendants are entitled to judgment as a matter of law for the reasons stated in that motion, Plaintiffs are also not entitled to judgment in their favor.

Nonetheless, the arguments raised in Plaintiffs' motion would still fail to demonstrate their entitlement to a judgment in their favor under either court rule. Plaintiffs' motion asserts only that the Defendants' instructions for spouses and dependents accompanying military and overseas voters conflict with article 2, § 1 of the Michigan Constitution. (Pl's Mot, p 3). Plaintiffs' brief, however, does not demonstrate a constitutional violation, and instead appears to assume that one is obvious. (Pl's Br, p 9). Plaintiffs' assumption is erroneous, and their legal analysis is superficial and poorly reasoned.

Plaintiffs do not address the U.S. Supreme Court's decision in *Dunn v Blumstein,* 405 US 330, 342 (1972), which held that such "durational residence requirements"—much like the one in art 2, § 1—must satisfy strict scrutiny, or the 1978 opinion of Attorney General Frank Kelley, which opined that the six-month requirement of art 2, § 1 was "no longer valid." OAG 1977-1978, No 5356 (August 23, 1978). An opinion that every Michigan Secretary of State has followed since its issuance. They make no attempt to show that a six-month durational residency requirement satisfies strict scrutiny—with good reason. Federal courts have long recognized that such requirements were not sustainable under the constitution. In 1972, the Connecticut District Court had already recognized that, "Whether a state has the power to impose a six month durational residence requirement on the right of a citizen to vote is no longer an open

constitutional question," and that, "In view of *Dunn v. Blumstein*, it is frivolous for the defendants to contend that the constitutional and statutory requirements of six months residence in a town as a condition on the right to be admitted as an elector are not unconstitutional." *Nicholls v. Schaffer,* 344 F Supp 238, 241 (D Conn, 1972). It was a frivolous argument then, and it remains a frivolous argument today.

If that were not enough, in 1970 Congress amended the federal Voting Rights Act to abolish durational residency requirements in the states for elections for President and Vice President. See 52 USC 10502. Upon reviewing this 1970 amendment to the Voting Rights Act, the U.S. Supreme Court held that "the ban of durational residency in presidential elections is plainly a permissible one in [Congress's] efforts...to 'enforce' the Fourteenth Amendment." *Oregon v Mitchell*, 400 US 112, 150 (1970).

Moreover, Plaintiffs also ignore that article 2, § 1 expressly authorizes the Michigan Legislature to define residence for voting purposes, and they make no attempt to reconcile that authorization with MCL 168.759a(3), which provides that, "A spouse or dependent of an overseas voter who is a citizen of the United States, is accompanying that overseas voter, and is not a qualified and registered elector anywhere else in the United States, may apply for an absent voter ballot even though the spouse or dependent is not a qualified elector of a city or township of this state."[1] The legislature has exercised its authority to define residence for spouses and dependents of Michigan military and overseas voters. And Plaintiffs do not challenge the

[1] Plaintiffs cite MCL 168.11(1), which defines "residence" "for registration and voting purposes" as "that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging." Section 11 also recognizes that "[a]n elector does not gain or lose a residence while employed in the service of the United States[.]" MCL 168.11(2). Section 11 and subsections 759a(1) and (3) are consistent since Michigan residency is established through the primary military or overseas voter.

constitutionality of the statute. The Secretary's instruction is essentially identical to this statute and perforce is not unconstitutional.

Plaintiffs' argument instead spends several pages arguing that UOCAVA does not preempt the six-month residence requirement of art 2, § 1. But preemption is irrelevant where the six-month requirement has been invalid since at least 1978. Further, the mere absence of pre-emption does not entitle Plaintiffs to any relief—it would still be necessary to affirmatively demonstrate that they are entitled to relief. In short, even if Plaintiffs were correct about pre-emption, they would still not be entitled to declaratory relief unless they could show a constitutional violation. They have failed to do so, both in their complaint and in their ill-conceived motion.

II. This Court should sanction Plaintiffs because their motion for summary disposition has only needlessly increased the cost and burden of litigation.

Defendants previously argued that this Court should sanction Plaintiffs sua sponte because (1) they brought this lawsuit with no other purpose but to harass and injure Defendants, and (2) their claims are devoid of legal merit. MCR 2.109(E), MCL 600.2591(a)(i),(iii). Plaintiffs' motion for summary disposition provides a third reason for this Court to impose sanctions: their motion was brought for the improper purpose of needlessly increasing the cost of litigation. MCL 600.2591(a)(i). But, in addition, the facts and circumstances also show that Plaintiffs' motion for summary disposition was frivolous, and that Plaintiffs should be subject to additional sanctions as a result.

MCR 1.109(E)(5)(c) provides in relevant part that filings are "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If a document is signed contrary to these principles, sanctions must be imposed. MCL 600.2591 also provides for an award of costs for a frivolous filing.

The frivolous-claim-or-defense provisions of MCL 600.2591 require an attorney "to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *Meisner L Grp PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 731 (2017), quoting *Attorney General v Harkins*, 257 Mich App 564, 576 (2003). The "reasonableness of the attorney's inquiry is determined by an objective standard, not the attorney's subjective good faith." *Id.* Here, Plaintiffs fail to meet an objective standard of reasonableness.

To make an objective determination regarding frivolousness, "a trial court must 'evaluate the claims or defense at issue at the time' the allegedly frivolous pleading was filed," a determination which "depends on the particular facts and circumstances of the claim involved." *Clark v Garratt & Bachand, PC*, No. 344676, 2019 WL 3941493, at *4 (Mich Ct App Aug 20, 2019), citing *In re Costs & Attorney Fees*, 250 Mich App 89, 94-95 (2002).

Plaintiffs' latest motion needlessly increased the cost of litigation by forcing Defendants to make the same arguments that were already before the Court in the Defendants' own motion for summary disposition. Plaintiffs' motion for summary disposition only reiterates the argument in their complaint: namely, that the UOCAVA does not preempt article 2, § 1 of the Michigan Constitution. (Pl's Mot, pp 6-11). Their motion provides no new arguments, and no new affidavits or documentary evidence to support their claims. Also, while it was filed after Defendants' motion for summary disposition, it fails to rebut or even acknowledge Defendants' arguments. Plaintiffs' motion was filed without regard for the Secretary's defenses, and offers nothing additional that was not in the complaint. This separate motion simply served no purpose.

To the extent that Plaintiffs wished to invoke MCR 2.116(I)(1) or seek judgement in their favor, they could have done so all the same by invoking the rule in their response to the

Defendants' motion. Indeed, a party does not even need to make a motion under Subrule (I), and Courts may make such rulings sua sponte. So, a motion under MCR 2.116(I)(1) was not required or necessary. And insofar as Plaintiffs sought summary disposition under MCR 2.116(C)(10), their motion offered little more than a restatement of the allegations of the complaint and included no affidavits or new documentary evidence. Further, Plaintiffs made no effort to respond to or refute the affidavit of Director of Elections Jonathan Brater or explain how they could still be entitled to judgment after accepting his averments in a light most favorable.

But, because Plaintiffs filed a motion for summary disposition, the Defendants were obliged to respond to Plaintiffs' motion, or their failure to do so would result in the Plaintiffs' motion being treated as uncontested under Court of Claims Local Rule 2.119(C)(3). Defendants were necessarily required to read Plaintiffs' motion, analyze its arguments, research appropriate law, and draft a response. Even when a motion is meritless, this takes time to do. In addition, because this Court required responses to the motion to be filed by noon on October 16, it was necessary for the Defendants to drop everything and turn attention to this matter in order to draft a timely response. This had the effect of imposing additional burdens on the Defendants, as well as increasing costs of litigation. MCR 1.109(E)(5)(c).

There was nothing in this motion that could not have been accomplished just as effectively—if not more so—through Plaintiffs' forthcoming response to Defendants' own motion for summary disposition. This motion served no purpose other than to require the Defendants to file another brief responding to the same meritless arguments. Its only purpose, then, was to harass or to cause unnecessary delay or needless increase in the cost of litigation. MCR 1.109(E)(5)(c).

Plaintiffs' eleventh-hour lawsuit challenging long-existing—and lawful—instructions while the election is already underway divert public resources to responding to Plaintiffs' meritless claims and arguments. Based on the facts and circumstances of this lawsuit and under an objective standard, this Court should sanction Plaintiffs and award Defendants costs and fees incurred in opposition of this needless motion.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater respectfully request that this Honorable Court grant their motion for summary disposition and dismiss the complaint in its entirety and order any other relief the Court determines to be appropriate under the circumstances, including an award of costs, fees, or other sanctions as the Court deems appropriate under MCR 1.109(E) and MCL 600.2591.

Respectfully submitted,

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Dated: October 16, 2024

PROOF OF SERVICE

Erik A. Grill certifies that on October 16, 2024, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Erik A. Grill
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