

FILED

Bonnie Scheele

Grand Traverse 13th Circuit Court

03/20/2024

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

STUDIO 8 HAIR LAB, LLC, a Michigan
limited liability company,

Plaintiff,

v

File No. 2023036818CB
HON. KEVIN A. ELSENHEIMER

CITY OF TRAVERSE CITY, a Municipal
Corporation, LEE MAYNARD, an individual,
MADELINE HARRIS, an individual,
HEATHER SPOONER, an individual, and
MICHIGAN DEPARTMENT OF CIVIL
RIGHTS,

Defendants.

/

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DECISION AND ORDER AFTER FEBRUARY 21, 2024 HEARINGS

The City of Traverse City is a municipal corporation located in Grand Traverse County, Michigan. Pursuant to the Michigan Constitution, Traverse City (hereinafter the "City") has the power to adopt resolutions and ordinances relating to its municipal concerns, property and

government.¹ In 2010, the City adopted a Non Discrimination Ordinance stating, “It is the intent of the City of Traverse City that no person be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his or her civil rights or be discriminated against because of their actual or perceived race, color, religion, national origin, sex, age, height, weight, marital status, physical or mental disability, family status, sexual orientation or gender identity.”² Under the Ordinance:

- no person shall discriminate in making available full and equal access to all goods, services, activities, privileges and accommodations of any place of public accommodation;³
- no person shall adopt, enforce or employ any policy or requirement, publish, post or broadcast any advertisement, sign or notice which discriminates or indicates discrimination in providing housing, employment or public accommodations;
- no person shall discriminate in the publication or distribution of advertising material, information or solicitation regarding housing, employment or public accommodations;
- no person shall coerce, threaten or retaliate against a person for making a complaint or assisting in the investigation regarding a violation or alleged violation of this ordinance, nor require, request, conspire with, assist or coerce another person to retaliate against a person for making a complaint or assisting in an investigation; [and]
- no person shall conspire with, assist, coerce or request another person to discriminate in any manner prohibited by this ordinance.⁴

These prohibitions against discrimination are intended to supplement state and federal civil rights law, however, the Ordinance shall be construed and applied in a manner consistent with First Amendment jurisprudence regarding the freedom of speech and the exercise of religion.⁵ Any person claiming a violation of the Ordinance shall file a signed, written complaint

¹ Constitution 1963 Article VII § 22.

² Ordinance §605.01. The prohibitions against discrimination as provided for in this ordinance are intended to supplement state and federal civil rights law prohibiting discrimination in the areas of employment, public accommodations, and housing. Provided, however, this ordinance shall be construed and applied in a manner consistent with First Amendment jurisprudence regarding the freedom of speech and exercise of religion. “Discriminate” is defined as to make a decision, offer to make a decision or refrain from making a decision based in whole or in part on the actual or perceived race, color, religion, national origin, sex, age, height, weight, marital status, physical or mental disability, family status, sexual orientation, or gender identity of another person. Ordinance §605.02(4). “Gender identity” is defined as the gender with which one identifies regardless of that person’s biological makeup. *Id.* at (9). “Place of public accommodation” is defined as an educational, governmental, health, entertainment, cultural, refreshment, transportation, financial institution, business or facility of any kind, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public. *Id.* at 15.

³ Ordinance §605.04.

⁴ Ordinance §605.06.

⁵ Ordinance §605.01(b).

with the City Manager or his or her designee setting forth the details, including the names, dates, witnesses and other factual matters relevant to the claim within 180 days of the incident forming the basis of the complaint.⁶ Within 30 days of a written complaint being filed, the City Manager or his or her designee shall undertake an investigation of any complaint alleging a violation not currently recognized or proscribed by Michigan or federal anti-discrimination statutes, and cause all other complaints to be referred to an appropriate state or federal agency for review.⁷ The City Attorney has discretion to prosecute a violation of the Ordinance as a municipal civil infraction.⁸

The Michigan Department of Civil Rights (MDCR) is the operational arm of the Michigan Civil Rights Commission (“Commission”).⁹ The MDCR investigates and resolves complaints of discrimination, while promoting voluntary compliance with civil rights laws, such as the Elliott-Larsen Civil Rights Act.¹⁰ If the Commission, after a hearing on a charge issued by MDCR determines that the ELCRA has been violated, the Commission shall state its findings of fact and conclusions of law and shall issue a final order requiring the respondent to cease and desist from the discriminatory practice and to take such other action as it deems necessary to secure equal enjoyment and protection of civil rights.¹¹ After the Commission has issued a final order, then the complainant or respondent have the right to appeal the decision in the circuit court for the county in which the alleged violation occurred.¹²

Lee Maynard is a resident of Central Lake, Michigan; Madeline Harris is a resident of Traverse City, Michigan, and Heather Spooner is a resident of Williamsburg, Michigan. Neither Maynard, Harris nor Spooner are employees of or affiliated with either the City or MDCR.

⁶ Ordinance §605.10(a).

⁷ *Id.* at (d).

⁸ Ordinance §605.13. A violation of any provision of the Ordinance is a municipal civil infraction punishable by a fine of not more than \$500, plus all costs of the action. The court may issue and enforce any judgment, writ, or order necessary to enforce the Ordinance, including reinstatement, payment of lost wages, hiring and promotion, sale, exchange, lease or sublease of real property, admission to a place of public accommodation and other relief deemed appropriate. Ordinance §605.14.

⁹ See <http://www.michigan.gov/mdcr>.

¹⁰ *Id.* The Elliott-Larsen Civil Rights Act (ELCRA) MCL §37.2101 *et seq.* is an act to define civil rights, to prohibit discriminatory practices, policies and customs in the exercise of those rights based upon religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, familial status, or marital status; to proscribe the powers and duties of the civil rights commission and the department of civil rights; and to provide remedies and penalties. On March 16, 2023, the ELCRA was amended to add sexual orientation and gender identity or expression as protected classifications. The changes became effective February 13, 2024. See Act 6 of 2023.

¹¹ MCL §37.2605.

¹² MCL §37.2606.

Studio 8 Hair Lab LLC, a Michigan limited liability company, is a licensed hair salon. Christine Geiger is the owner of Studio 8 Hair Lab LLC (hereinafter “Plaintiff.”) On or about July 7, 2023, the following was posted to the Plaintiff’s Facebook page:

 **Studio 8 Hair Lab - Education & Beauty**

Supply · Follow

1d · 

If a human identifies as anything other than a man/woman please seek services at a local pet groomer. You are not welcome at this salon. Period.

Should you request to have a particular pronoun used please note we may simply refer to you as “hey you”. Regardless of MI HB 4744. (F* my ASS Governor Witchmere)**

This is America; free speech. This small business has the right to refuse services. We are not bound to any oaths as realtors are regarding discrimination. My recent airport experience validates this. 

**#takeastand
#garrettsoldono**

The City received at least 16 emailed complaints indicating that Plaintiff’s Facebook post was in violation of the Ordinance and on August 4, 2023, the City Attorney submitted a request for service to the MDCR. Defendant Maynard, as an individual, submitted a complaint to MDCR regarding Plaintiff’s discriminatory advertising on July 20, 2023; Defendant Harris, as an individual, submitted a complaint to MDCR on July 28, 2023, and on September 8, 2023, Defendant Spooner, as an individual, submitted a complaint to MDCR.¹³

¹³ MDCR served Plaintiff with the complaints and requested a response. Plaintiff elected not to respond. MDCR then invited Plaintiff to attend a conciliation conference, but Plaintiff elected not to participate. After conducting an investigation into the alleged ELCRA discrimination, MCRD issued a Charge of Discrimination against Plaintiff on November 15, 2023. On February 27, 2024, Administrative Law Judge Robert Meade issued an Order Denying Studio 8’s Motion for Relief from ALJ Order Denying Summary Disposition; Request for Oral Argument and Demand for Jury Trial. ALJ Meade determined that, “Studio 8 does have the ability to ask a court to review the constitutionality of the underlying statute and rules prior to an administrative hearing but must do so through the Michigan Court of Claims.” Ultimately ALJ Meade indicated that, should Studio 8 wish the matter be held in abeyance, it must file a request for review in the Court of claims otherwise the matter must proceed to an administrative hearing.

On October 25, 2023, Plaintiff filed a Complaint against the City, Maynard, Harris and Spooner asserting Violation of the Free Speech and Free Press Clauses of Article I of the Michigan Constitution: Content and Viewpoint Discrimination, Compelled Speech, Expressive Association, Unconstitutional Conditions, Unbridled Discretion and Overbreadth (Count I); Violation of Plaintiff's Article I §4 Right to Free Exercise of Religion (Count II); Violation of Plaintiff's Article I §2 Right to Equal Protection (Count III); Violation of Plaintiff's Article I §17 Right to Due Process (Count IV); Article I §17 Substantive Due Process and Article I §2 Equal Protection Challenge to Denial of Article I §4 Religious Identity, Personal Dignity, Personal Autonomy and Personal Liberty (Count V). On December 11, 2023, Plaintiff filed an Amended Complaint, adding MDCR as a Defendant, and asserting Individual Defendants Violations of MCL 37.2302(b), Not a Protected Class, Lack of Standing, Complaint Not Grounded in Fact, Complaint Not Made in Good Faith, Complaint Made to Harass and Cause Unnecessary Expense to Studio 8 (Amended Count I); Civil Rights Act and Non-Discrimination Ordinance, Unconstitutional on Its Face, Pure Speech is Protected, Internet and Facebook Speech is Protected, Speech is Not an Act of Discrimination, Government May Not Punish Future Speech (Amended Count II); Violation of Free Speech and Free Press Clause of Article I of the Michigan Constitution, Content and Viewpoint Discrimination, Compelled Speech, Expressive Association, Unconstitutional Conditions, Unbridled Discretion and Overbreadth (Amended Count III); Violation of Plaintiff's Article I §4 Right to Free Exercise of Religion (Amended Count IV); Violation of Plaintiff's Article I §2 Right to Equal Protection (Amended Count V); Violation of Plaintiff's Article I §17 Right to Due Process (Count VI); Article I §17 Substantive Due Process and Article I §2 Equal Protection Challenge to Denial of Article I §4 Religious Identity, Personal Dignity, Personal Autonomy and Personal Liberty (Count VII).¹⁴

On November 22, 2023, Plaintiff filed a Motion for Immediate Declaratory Judgment Re: Michigan Civil Rights Act and Traverse City Non Discrimination Ordinance. Maynard, Harris and Spooner filed a Joint Consolidated Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and Sanctions Pursuant to MCR 1.109(E) and MCL 600.2591 on November 28, 2023. The City filed a Motion to Dismiss Action for Declaratory Relief No Justiciable Controversy on December 1, 2023. On February 21, 2024, the Court heard oral argument by the parties, not including MDCR,

¹⁴ The Court notes that the MDCR was not served, pursuant to the Michigan Court Rules, until January 23, 2024.

and took the matters under advisement.¹⁵

As to Plaintiff's claims against MDCR, the Court of Claims has exclusive jurisdiction to hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers.¹⁶ Alternatively, after the Commission issues a final order on an MDCR charge, then the complainant or respondent *then* have the right to appeal the decision in the circuit court for the county in which the alleged violation occurred.¹⁷ Since the Commission has yet to issue a final order in its case, the Court is precluded from addressing any claims relating to the ELCRA in this decision and order.

The Court will first address the Joint Consolidated Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and Sanctions Pursuant to MCR 1.109(E) and MCL §600.2591 filed by Maynard, Harris and Spooner. A motion under MCR 2.116(C)(8), tests the *legal sufficiency* of a claim based solely on the factual allegations in the complaint.¹⁸ When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone.¹⁹ A motion under MCR 2.116(C)(8), may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery.²⁰ However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action.²¹

The Michigan Constitution's declaration of rights provisions have never been interpreted as extending to purely private conduct; these provisions have consistently been interpreted as limited to protection against state action.²² Proscriptions of equal protection and due process clauses only apply to actions of the state and not to private conduct.²³ The presumption is then that,

¹⁵ MDCR filed a Motion to Dismiss in Lieu of Answer Pursuant to MCR 2.116(C)(4) on February 20, 2024, asserting the Court of Claims has exclusive jurisdiction to hear and determine any claim, demand, statutory or constitutional or any demand for monetary, equitable or declaratory relief against the state or any of its departments or officers.

¹⁶ MCL §600.6419. "The state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties.

¹⁷ MCL §37.2606.

¹⁸ *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

¹⁹ *Bailey v Schaaf*, 494 Mich 595, 603; 835 W.2d 413 (2013); MCR 2.116(G)(5).

²⁰ *Adair v Mich*, 470 Mich 105, 119; 680 NW2d 386 (2004).

²¹ *Duncan v Mich*, 300 Mich App 176, 214; 832 NW2d 761 (2013).

²² *Sharp v City of Lansing*, 465 Mich 792; 629 NW2d 873 (2001).

²³ *Harvey v Aetna Life Ins Co*, 72 Mich App 285; 252 NW2d 471 (1976).

constitutionally guaranteed protections are applicable only against the government.²⁴

Plaintiff states that, “Maynard is party to a Charge of Discrimination with the Michigan Department of Civil Rights against Studio 8 Hari Lab, LLC; Harris is party to a Charge of Discrimination with the Michigan Department of Civil Rights against Studio 8 Hari Lab, LLC [and] Spooner is party to a Charge of Discrimination with the Michigan Department of Civil Rights against Studio 8 Hair Lab, LLC.” The only allegations against the individual Defendants are that they filed complaints with MDCR. Private citizens making charges, filing complaints and testifying, assisting or participating in investigations, proceedings or hearings relating to the ELCRA are permitted by the statute.²⁵ Moreover, there is no claim by Plaintiff that any of the individual Defendants, improperly or otherwise, filed “a signed, written complaint with the City Manager or his or her designee setting forth the details, including the names, dates, witnesses and other factual matters relevant to the claim within 180 days of the incident forming the basis of the complaint.”²⁶

Under either a state statute or a local ordinance, there is no question that a private citizen independently reporting a claim of discrimination is a private, not a state action. Further, Plaintiff does not allege that Maynard, Harris or Spooner are state actors or identify any actions that the individual Defendants took while acting in a governmental capacity that could constitute violations of Plaintiff’s due process or equal protection rights. To make a viable claim for an actionable constitutional violation, a party must establish that ‘state action’ is present.²⁷ As to the individual Defendants in this matter, Plaintiff has failed to demonstrate that their actions in filing complaints with the MDCR constitute ‘state action.’ Similarly, Plaintiff has failed to demonstrate that the individual Defendants were engaging in ‘state action,’ versus private conduct, by notifying the

²⁴ *Woodland v Mich Citizens Lobby*, 423 Mich 188; 378 NW2d 337 (1985).

²⁵ MCL §37.2701. The ELCRA actually prohibits certain retaliatory conduct against such individuals. By statute, two or more persons shall not conspire to, or a person shall not: retaliate or discriminate against a person because the person has opposed a violation of the Act; aid, abet, incite, compel, or coerce a person to engage in a violation of the act; attempt directly or indirectly to commit an act prohibited by the act; willfully interfere with the performance of a duty or the exercise of a power by the commission or 1 of its members or authorized representatives; willfully obstruct or prevent a person from complying with the act or an order issued or rule promulgated under the act; and/or coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the act.

²⁶ See FN 6. Defendant Harris did send an email to the City indicating that Plaintiff’s Facebook post was in violation of the Ordinance, however, on information and belief, no formal complaint was filed pursuant to the Ordinance. Additionally, the City has not pursued any investigation or prosecution against the Plaintiff for violation of the Ordinance.

²⁷ *Woodland, supra*.

City about Plaintiff's Facebook post. For these reasons, Plaintiff has failed to state a claim upon which relief can be granted against Maynard, Harris and Spooner and the claims against the individual Defendants must be dismissed pursuant to MCR 2.116(C)(8).

An action is frivolous if the party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party; the party had no reasonable basis to believe that the facts underlying the party's legal position were in fact true or the party's legal position was devoid of arguable legal merit.²⁸ A party may be entitled to costs and fees if a civil action or defense to a civil action was frivolous.²⁹ The intent behind permitting sanctions for asserting frivolous claims is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose.³⁰

As discussed above, the law is clear that proscriptions of equal protection and due process clauses only apply to actions of the state, not to private conduct, making constitutionally guaranteed protections applicable only against the government not private individuals. Plaintiff's claims against the individual Defendants are entirely premised on alleged violations of constitutional equal protection and due process, without any contention that said Defendants were/are state actors. In this matter, Maynard, Harris and Spooner seek sanctions as the claims brought in Plaintiff's complaints are devoid of arguable legal merit and appear to be aimed principally at retaliating against the individual Defendants for filing complaints with the MDCR.

It does appear that the Plaintiff's primary purpose in initiating the action against Maynard, Harris and Spooner was to harass, intimidate, threaten and/or retaliate against the individual Defendants as complainants in the MDCR's matter. Further, the constitutional claims made against the individual Defendants were devoid of arguable legal merit as there was no question Maynard, Harris and Spooner were *not* state actors.³¹ As such, the civil action against Maynard, Harris and

²⁸ MCL §600.2591.

²⁹ MCL §600.2591.

³⁰ *FMB- First Mich Bank v Bailey*, 232 Mich App 711; 591 NW2d 676 (1998).

³¹ For the bulk of the Amended Complaint, Plaintiff lumps the state/governmental actors (eg MDCR and the City) together with the individual Defendants, stating for example: "290. Defendants enforce the Banned-Speech Provision in a viewpoint discriminatory manner at least in relation to the topic of gender identity. 291. Defendants will not prosecute or threaten to prosecute under the Banned-Speech Provision businesses that provide services and state that they support gender identity and create and promote messages in favor of gender identity. 292. Defendants will, however, prosecute under the Banned-Speech Provision businesses [sic] owners that provide services and who state that they oppose gender identity that they exclusively favor the creation of a man and a women or that they decline to express messages favoring gender identity." Aside from filing a complaint with either MDCR and/or the City, the

Spooner was frivolous and these Defendants are entitled to costs and fees.

Next, the Court will address the Plaintiff's Motion for Immediate Declaratory Judgment Re: Michigan Civil Rights Act and Traverse City Non Discrimination Ordinance and the City's Motion to Dismiss Action for Declaratory Relief No Justiciable Controversy. Relying on the holding in *303 Creative LLC v Elenis*, Plaintiff contends that the Facebook post was constitutionally protected 'religious' speech and enforcement of the Ordinance would improperly compel speech.³² The City asserts that the Ordinance does not violate the Constitution by failing to protect religious speech, Plaintiff has not demonstrated the necessary existence of an actual controversy between the parties and the Court lacks jurisdiction to decide the claims.

Various doctrines limit the judicial power by preventing courts from deciding abstract questions when no live controversy between adverse parties exists, requiring courts to abide by binding precedent, and prohibiting courts from exercising power over persons and entities who are not parties to the case before the court.³³ Judicial power is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.³⁴ Abstract questions cannot be made the subject of an action.³⁵ Where it is apparent that the object of a case is not the vindication of a right, but a desire to obtain an interpretation of a statute by a test case, the court will not assume jurisdiction of the cause.³⁶ Courts further lack jurisdiction over the subject matter if a claim is not yet ripe for judicial review or when an issue becomes moot.³⁷ A claim lacks ripeness, and there is no justiciable controversy, where the harm asserted has not matured sufficiently to warrant judicial intervention.³⁸

individual Defendants have no ability to "prosecute or threaten to prosecute" the Plaintiff." The remainder of the Amended Complaint makes similar, generalized claims and fails to distinguish how the individual Defendants' activities constitute 'state action.

³² *303 Creative LLC v Elenis*, 600 US 570; 143 S Ct 2298; 216 L Ed2d 1131 (2023). Discussed, *infra*.

³³ *In re Jarzynka*, 989 NW2d 224 (2023). Viviano concurrence.

³⁴ *Anway v Grand Rapids R Co*, 211 Mich 592; 179 NW 350 (1920) citing *Muskrat v United States*, 219 US 346; 31 S Ct 250; 55 L Ed 246 (1911).

³⁵ *In re Jarzynka*, *supra*.

³⁶ *Id.*

³⁷ *Norton v Ashcroft*, 298 F3d 547 (CA 6, 2002); *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242; 701 NW2d 144 (2005).

³⁸ *Warth v Seldin*, 422 US 490, 499 n. 10; 95 S Ct 2197; 45 L Ed 2d 343 (1975).

To assert a claim for declaratory judgment, the plaintiff must: (1) allege a case of actual controversy within the jurisdiction of the court and (2) the claimant must be an interested party seeking a declaratory judgment.³⁹ Actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal right.⁴⁰ An essential requirement for finding that an actual controversy exists is that the plaintiff plead and prove facts which indicate an adverse interest necessitating the sharpening of issues raised.⁴¹ The court is not precluded from reaching issues before actual injuries or losses have occurred, but there must still be a present legal controversy, not one that is merely hypothetical or anticipated in the future.⁴²

Governments in the United States have a compelling interest in eliminating discrimination in places of public accommodation.⁴³ Therefore, many states have enacted public accommodations laws that forbid business from engaging in discrimination when they sell goods or services to the public.⁴⁴ By enacting these public accommodations laws, States may protect gay persons and other classes of individuals in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.⁴⁵ Yet, public accommodations laws are not immune from the requirements of the Constitution.⁴⁶

The First Amendment does not tolerate governments forcing creative professionals to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so.⁴⁷ While the Free Speech Clause of the First Amendment does not protect status-based discrimination unrelated to expression, generally it does protect a speaker's right to control her own message—even when others may disapprove of the speaker's motive or the message itself.⁴⁸

³⁹ *T & V Associates, Inc. v Director of Health and Human Services*, ___ Mich App ___; ___ NW2d ___ (June 29, 2023).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *303 Creative, LLC, supra.*

⁴⁴ *Id.*

⁴⁵ *Masterpiece Cakeshop Ltd v Colorado Civil Rights Comm*, 584 US 617; 138 S Ct 1719; 201 L Ed2d 35 (2018).

⁴⁶ The First Amendment protects acts of expressive association and speech, including the printed word, oral utterances, pictures, films, paintings, drawings, engravings books, plays, movies and video games. *Kaplan v California*, 413 US 115; 93 S Ct 2680; 37 L Ed2d 492 (1973); *Brown v Ent. Merchants Ass'n*, 564 US 786; 131 S Ct 2729; 180 L Ed2d 708 (2011). The First Amendment also protects inherently expressive conduct. For conduct to qualify as inherently expressive under First Amendment, actor must intend to express particularized message by engaging in action, and high likelihood must exist that audience who sees action will understand its message. *Lichtenstein v Hargett*, 83 F 4th 575 (CA 6, 2023).

⁴⁷ *303 Creative LLC, supra.*

⁴⁸ *Id.*

In *303 Creative*, the sole member-owner of a limited liability company that provided wedding website and graphic design services brought a pre-enforcement action against the Colorado Civil Rights Commission and the Colorado Attorney General, seeking to enjoin the defendants from forcing plaintiffs, through enforcement of Colorado's public accommodation law, to convey on wedding websites messages inconsistent with the member-owner's religious belief that marriage should be reserved to unions between one man and one woman.⁴⁹ Plaintiffs claimed they did not seek to sell ordinary commercial goods, but intended to create, via websites, customized and tailored speech that will be expressive in nature for each couple.

In the district court, the parties stipulated that plaintiffs were "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender" and would gladly create custom graphics and websites for clients of any sexual orientation; but would not produce content that "contradicts biblical truth," demeans or disparages others, promotes sexual immorality, supports the destruction of unborn children, incites violence or "promotes any conception of marriage other than marriage between one man and one woman."⁵⁰ Ultimately the parties agreed that plaintiffs did not distinguish between customers based on protected class status.

On appeal, the Supreme Court held that: the wedding websites the owner sought to create for her customers qualified as pure speech under the First Amendment, the websites involved the owner's speech, the owner had standing to bring a pre-enforcement action as she faced a credible threat of sanctions under the statute and it would violate the First Amendment to compel the owner to create speech she did not believe. Essentially, the Supreme Court held that a State cannot force

⁴⁹ The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. *Masterpiece Cakeshop Ltd v Colorado Civil Rights Comm*, 584 US 617; 138 S Ct 1719; 201 L Ed2d 35 (2018). It offends the First Amendment for the government to seek to compel a person to speak its message when she would prefer to remain silent or to force an individual to include other ideas with her own speech that she would prefer not to include. *303 Creative, supra*.

⁵⁰ A similar argument was made in *Masterpiece Cakeshop, Ltd., supra*. In *Masterpiece*, a bakery owner told a same sex couple he would not create a wedding cake for their union because of his religious opposition to same-sex marriage, elaborating that this type of cake uses artistic skills and makes an expressive statement and "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible would [be] a personal endorsement and participation in the ceremony and relationship that they were entering into." However, the baker indicated that he would sell the couple other baked goods, like birthday cakes, shower cakes, cookies and brownies. After the couple filed a charge with the Colorado Civil Rights Commission, the Administrative Law Judge rejected the baker's claims that requiring him to create a cake for a same sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. The Supreme Court reversed after finding that the Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in manner that is neutral toward religion and the baker was entitled to a neutral decision maker who would give full and fair consideration to his religious objection.

someone who provides expressive services to abandon her conscience and speak the State's preferred message.

After reviewing the holding in *303 Creative, LLC*, the Court finds the facts of this case distinguishable. In *303 Creative*, the plaintiffs stipulated that the owner was willing to work with all people, regardless of sexual orientation or other protected classifications, whereas here, the Plaintiff's Facebook post indicated that she will not provide services to transgender individuals ("If a human identifies as anything other than a man/woman please seek services at a local pet groomer. **You are not welcome at this salon.**")⁵¹ Moreover, in *303 Creative*, the plaintiffs were providing a unique, customized good or service that involved expressive speech; the websites promised to contain images, words, symbols and other modes of expression. In this case, Plaintiff is providing hair services and products which do not contain images, words, symbols or other modes of expression. The main difference in *303 Creative* however, is that the Colorado public accommodation law would have compelled or coerced the plaintiffs to speak contrary to the owner's beliefs on a significant issue of personal conviction. In contrast, the Ordinance prohibits discrimination, due to sexual orientation or gender identity, in making available full and equal access to all goods, services, activities, privileges and accommodations of any place of public accommodation and prohibits publishing, posting or broadcasting that discriminates or indicates discrimination in providing public accommodations. There is no application of the Ordinance that would compel or coerce an individual to *create* or publish speech that is contrary to one's religious beliefs.

Statutes and ordinances are presumed to be constitutional and the burden of proving otherwise rests with the challenger.⁵² Courts must construe a statute or ordinance as constitutional unless its unconstitutionality is clearly apparent.⁵³ In this case, the Plaintiff has failed to demonstrate that the Ordinance is clearly unconstitutional and therefore, Plaintiff's Motion for Immediate Declaratory Judgment Re: Michigan Civil Rights Act and Traverse City Non Discrimination Ordinance is denied.

⁵¹ Interestingly, Plaintiff appears to try and reverse course in her Amended Complaint, stating "Studio 8 is willing to work with all people regardless of classifications such as race, creed, sexual orientation and gender identity [and] Studio 8 does not object to and will gladly provide services for gender identity clients so long as the services do not violate its religious beliefs, as is true for all customers. See Amended Complaint ¶¶165-166.

⁵² *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594; 673 NW2d 111 (2003).

⁵³ *Id.* Injunctive and declaratory relief are available to restrain any acts found to violate the state equal protection clause. *Sharp, supra*.

The in final motion, the City argues that Plaintiff has effectively filed a pre-enforcement challenge of the Ordinance and further, that the case must be dismissed as there is no actual controversy between the parties. For pre-enforcement challenges, a case is ordinarily ripe for review only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.⁵⁴ In a First Amendment pre-enforcement challenge, the ripeness inquiry focuses on how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an intention to refuse to comply with the law.⁵⁵ Although the ripeness requirement is somewhat relaxed in the First Amendment context, there nonetheless must be a credible fear of enforcement of the allegedly violative law.⁵⁶ When the record is completely devoid of any facts supporting an actual or imminent injury in fact, a claim is not ripe for review and is not justiciable.⁵⁷ Additionally, where it is apparent that the object of a case is not the vindication of a right, but a desire to obtain an interpretation of a statute, or ordinance, by a test case, courts will not assume jurisdiction of the cause.⁵⁸

The Ordinance outlines the procedure after the City receives a discrimination claim, and here, none of the subsequent steps towards prosecution have been taken. On information and belief, the City has neither conducted an investigation pursuant to the Ordinance, nor threatened to enforce the Ordinance against Plaintiff. Instead, the City merely forwarded the complaints it received to the MDCR for review. The City correctly notes that comments made by local elected officials do not equate with an imminent threat of prosecution “particularly where those officials are not tasked under the Ordinance with its enforcement.” There is no indication that the City is poised to proactively enforce the Ordinance against Plaintiff. Moreover, Plaintiff has not suffered an injury that is concrete, actual and imminent due to the *Ordinance*. Plaintiff has asserted injuries such as physical damage to her business and the MDCR investigation, but these injuries do not stem from the Ordinance or enforcement or threatened enforcement of the Ordinance. No fines have been assessed and no prosecution has occurred or is likely to occur. Given that Plaintiff has failed to establish any facts supporting an actual or imminent injury in fact, has not presented more than allegations of a subjective chill and cannot demonstrate an injury that is concrete, actual and

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Johnson v Muskegon Hts.*, 330 Mich 631; 48 NW2d 194 (1951).

⁵⁸ *In re Jarzynka, supra.*

imminent, her claims are unripe and she is not entitled to declaratory relief.

Similarly, Plaintiff's request for injunctive relief must be denied. Injunctive relief is generally considered an extraordinary remedy that issues where justice requires, there is an inadequate remedy at law, and there is a real and imminent danger of irreparable injury.⁵⁹ In determining whether to issue a preliminary injunction, the trial court must evaluate whether: (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued.⁶⁰ A preliminary injunction requires a particularized showing of irreparable harm; an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural.⁶¹ To determine whether an injury constitutes irreparable harm, as would support a preliminary injunction the injury is evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the party seeking injunctive relief.⁶² The irreparable-harm factor is considered an indispensable requirement for a preliminary injunction.⁶³ As discussed above, there is no danger that Plaintiff will suffer irreparable injury if the injunctions are not issued. The City has taken no action against Plaintiff and she has failed to demonstrate any injury based on the City's inaction. As Plaintiff has failed to establish the first element required for injunctive relief, consideration of the remaining elements by the Court is unnecessary.

Lastly, the City requests summary disposition pursuant to MCR 2.116(C)(4). A motion for summary disposition filed pursuant to MCR 2.116(C)(4) asserts that the court lacks jurisdiction of the subject matter.⁶⁴ Whether subject matter jurisdiction exists is a question of law.⁶⁵ When reviewing a (C)(4) motion, the court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law or whether the affidavits and other proofs show

⁵⁹ *Mich AFSCME Council 25 v Woodhaven-Brownstone School Dist*, 293 Mich App 143; 809 NW2d 444 (2011).

⁶⁰ *Detroit Fire Fighters Ass'n v City of Detroit*, 482 Mich 18; 753 NW2d 579 (2008).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Jurisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. *Winkler by Winkler v Marist Fathers of Detroit, Inc.*, 500 Mich 327, 333; 901 NW2d 566 (2017).

⁶⁵ *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000).

there was no genuine issue of material fact.⁶⁶ Under the court rules, a determination that there is no genuine issue of material fact can play a part in ruling on a motion for summary disposition under MCR 2.116(C)(4), and this may, of necessity, involve the evaluation of the factual elements of a case.⁶⁷ Any evaluation of factual elements in ruling on a motion for summary disposition based on lack of subject matter jurisdiction must be made by a judge, not a jury.⁶⁸ The City argues that because Plaintiff's claims are not ripe for review, there is no justiciable controversy and therefore the Court lacks jurisdiction. The Court agrees that because there is no genuine, current controversy between Plaintiff and the City is entitled to summary disposition pursuant to MCR 2.116(C)(4).

In conclusion, for the reasons stated herein, Maynard, Harris and Spooner's Joint Consolidated Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and Sanctions Pursuant to MCR 1.109(E) and MCL §600.2591 is granted. Plaintiff's Motion for Immediate Declaratory Judgment Re: Michigan Civil Rights Act and Traverse City Non Discrimination Ordinance is denied. The City's Motion to Dismiss Action for Declaratory Relief No Justiciable Controversy is granted. This Decision and Order resolves the outstanding claims and closes the case.⁶⁹

IT IS SO ORDERED.



03/20/2024
10:12AM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

⁶⁶ *Id.*

⁶⁷ *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 176; 756 NW2d 483 (2008).

⁶⁸ *Id.*

⁶⁹ Depending on the final order issued by the Commission, the respondent may appeal the decision in the circuit court.