

STATE OF MICHIGAN
IN THE 13TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY,
Plaintiff,

File No. 20-9238-CZ

v

Hon. Kevin A. Elsenheimer

ANTRIM COUNTY,
Defendant,

SECRETARY OF STATE JOCELYN BENSON,
Intervenor-Defendant.

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**GRAND TRAVERSE COUNTY CLERK'S BRIEF IN SUPPORT OF
MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER**

Grand Traverse County Clerk Bonnie Scheele has moved pursuant to MCR 2.305(A)(4) and MCR 2.302(C) to quash Plaintiff William Bailey's March 11, 2021 Subpoena and/or for a protective order. Support for this motion is as follows:

STATEMENT OF FACTS

On November 23, 2020, Plaintiff William Bailey filed his Verified Complaint in this Court, alleging improprieties in the November 3, 2020 election held in Antrim County, specifically with regard to its use of the Dominion election system. Plaintiff made no allegations regarding improprieties in the election conducted in Grand Traverse County, or with regard to any other (non-Dominion) election system.

For relief, Plaintiff sought an investigation of the Antrim County election equipment, and an independent audit to determine the accuracy and integrity of the November 3, 2020 election in Antrim County. On December 4, 2020, this Court entered an Order for a forensic audit of the Antrim County election and the Dominion tabulators used by Antrim County.

On or about March 11, 2021, the Grand Traverse County Clerk, who is not a party to this case, was served with a Subpoena issued by Plaintiff's attorney in this case (Exhibit A), seeking an in-person "forensic review" of information and documentation at the Grand Traverse County Clerk's Office pertaining to the November 3, 2020 election, including all election tapes, paper ballots, system logs, tally server and/or election management server, election media, election reports, tallies and spreadsheets, and canvasser paperwork and notes, such review to be held on March 31, 2021 at 9:00 a.m.

There would be substantial costs involved in responding to the Subpoena, as well as interference with the security and integrity of the Election Systems & Security election system used in Grand Traverse County. The Clerk therefore objects to the Subpoena, and has moved to have it quashed.

ARGUMENT

I. PLAINTIFF'S SUBPOENA SHOULD BE QUASHED

A. Applicable Standards

MCR 2.302(B)(1) governs the scope of discovery and provides:

Parties may obtain discovery regarding any non-privileged **matter that is relevant to any party's claims or defenses and proportional to the needs of the case**, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable. (Emphasis added.)

Further, MCR 2.305 governs subpoenas directed to non-parties like the one at issue here.

Subsection (A)(4) of that Court Rule provides:

A subpoena issued under this rule is subject to the provisions of MCR 2.302(C), and the court in which the action is pending or in which the subpoena is served, **on timely motion made by a party or the subpoenaed non-party** before the time specified in the subpoena for compliance, may:

- (a) **quash or modify the subpoena** if it is unreasonable or oppressive;
- (b) enter an order permitted by MCR 2.302(C); or
- (c) conditionally deny the motion on prepayment by the party on whose behalf the subpoena is issued of the reasonable cost of producing documents or other tangible things.

The non-party's obligation to respond to the subpoena is stayed until the motion is resolved.

(Emphasis added.) Finally, MCR 2.302(C) provides:

Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance,

embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;

If the motion for a protective order is denied in whole or in part, the court may, on terms and conditions as are just, order that a party or person provide or permit discovery. The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion.

The decision to quash a subpoena is within the Court's sound discretion. *Fette v Peters Const Co*, 310 Mich App 535, 547 (2015).

B. The Information Sought by Plaintiff's Subpoena is Irrelevant

The Livingston County Clerk is not a party to this litigation, and the information sought is not relevant to this case, as Plaintiff's Complaint alleges improprieties in the election held in Antrim County using the Dominion election system, whereas Plaintiff makes no allegations of any kind as to the conduct of the election in Grand Traverse County which, in any event, uses the Elections Systems and Security election system. In *Cabrera v Ekema*, 265 Mich App 402, 406-407 the Court of Appeals "a trial court should also protect the interests of the party opposing discovery so as not to subject that party to . . . irrelevant discovery requests." That logic applies to this case where Plaintiff has not made claims that the Grand Traverse County elections results are flawed or that the system used in Grand Traverse County is flawed.

The information sought by Plaintiff's Subpoena has no bearing on his dispute with Antrim County, as it would have no tendency to further any fact relevant to his claim that votes were miscounted in Antrim County, or that the Dominion machines in that county did not function properly—claims which have already been addressed by this Court. The relief requested in Plaintiff's Complaint, i.e., a forensic audit of the Antrim County election and the Dominion tabulators, was granted in this Court's December 4, 2020 Order, and thus any further discovery in the case would be moot.

Moreover, Plaintiff is a resident of Antrim County, and therefore lacks standing under MCL 600.4545 to challenge the election results in Grand Traverse County, which have already been certified, and for which there are no allegations of fraud or error in Plaintiff's Complaint.

C. The Information Sought is Overbroad and Unduly Burdensome.

Plaintiff's Subpoena to the Grand Traverse County Clerk is overbroad, not proportional to the needs of the case, and compliance would be unduly burdensome and expensive. Compliance would necessarily entail: substantial staff time, the likely renting of a facility of sufficient size to space the clerks of all fourteen municipalities and the Board of Canvassers, the coordination of the collection of the material from these fourteen different jurisdictions, and arranging the presence of the vendor's expert. All of those steps would be necessary to monitor and assist with the requested review and, moreover, the review would interfere with the security and preparedness of the system for the May 2021 election. The extreme burden that would be imposed on Grand Traverse County goes to the question of proportionality, and renders the challenged Subpoena worthy of being quashed.

All of the factors set forth in MCR 2.302 weigh against the enforcement of Plaintiff's Subpoena. MCR 2.302(B)(1). As further support, in *Ferguson v Delaware International*

Speedway, 164 Mich App 283, 298 (1987) the Court of Appeals stated that courts have the authority to restrict discovery in order to prevent annoyance, embarrassment, oppression or undue burden or expense and *In re Hammond Estate*, 215 Mich App 379, 386 the Court of Appeals wrote that “discovery that takes on the appearance of a ‘fishing expedition’ is properly denied.”

II. A PROTECTIVE ORDER IS WARRANTED

If this Court determines that the information sought by Plaintiff’s Subpoena is relevant to Plaintiff’s claims, and is otherwise valid, the Grand Traverse County Clerk requests that a Protective Order be issued pursuant to MCR 2.302(C), as follows:

A. Require prepayment by Plaintiff for the reasonable costs of complying with the Subpoena, including all personnel costs incurred by Grand Traverse County while monitoring Plaintiff’s inspection process;

B. Require a reasonable deadline as to the completion of the forensic review so as not to interfere with the security and integrity of the May 2021 election;

C. Require Plaintiff to articulate the process by which the equipment will be inspected;

D. Require Plaintiff’s inspection team to show that they have the requisite training, knowledge, skill, experience, and credentials to access Grand Traverse County’s election equipment;

E. Require Plaintiff to establish and guarantee that his inspection will not alter, damage, or compromise Grand Traverse County’s election equipment; and


F. Any other conditions that the Court determines to be appropriate.

CONCLUSION AND RELIEF

For all the foregoing reasons, the Grand Traverse County Clerk respectfully requests that this Honorable Court (a) quash Plaintiff's March 11, 2021 Subpoena issued to the Grand Traverse County Clerk, (b) enter a Protective Order preventing Plaintiff from seeking discovery of the requested information from the Grand Traverse County Clerk, or if this Motion is denied to otherwise order prepayment of the Clerk's reasonable costs required to respond to the Subpoena, with provisions guaranteeing the security and integrity of the election system, and (c) award Grand Traverse County the costs and attorney fees incurred in this response.

Respectfully submitted,

March 24, 2021



Christopher D. Tholen (P76948)
Deputy Civil Counsel
Grand Traverse County

Exhibit A

Approved, SCAO

Original - Return
1st copy - Witness
2nd copy - File
3rd copy - Extra

STATE OF MICHIGAN JUDICIAL DISTRICT 13th JUDICIAL CIRCUIT COUNTY PROBATE	SUBPOENA Order to Appear and/or Produce	CASE NO. 2020-9238-CZ
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Court address 205 E. CAYUGA ST., BELLAIRE, MI 49615

Court telephone no.

(231) 533-6353

Police Report No. (if applicable):

Plaintiff(s)/Petitioner(s) <input type="checkbox"/> People of the State of Michigan <input checked="" type="checkbox"/> WILLIAM BAILEY	v	Defendant(s)/Respondent(s) ANTRIM COUNTY, c/o Haider Kazim, 310 West Front Street, Suite 221, Traverse City, MI 49684 MICHIGAN SECRETARY OF STATE, c/o Erik A. Grill, PO Box 30736, Lansing, MI 48909
<input type="checkbox"/> Civil <input type="checkbox"/> Criminal		Charge
<input type="checkbox"/> Probate In the matter of _____		

In the Name of the People of the State of Michigan TO:

BONNIE SCHEELE, Grand Traverse County Clerk; Grand Traverse County Gov't Bldg, 400 Boardman Ave., Traverse City, MI 48843

If you require special accommodations to use the court because of disabilities, please contact the court immediately to make arrangements.

YOU ARE ORDERED TO:

<input type="checkbox"/> 1. Appear personally at the time and place stated below: You may be required to appear from time to time and day to day until excused.		
<input type="checkbox"/> The court address above		<input checked="" type="checkbox"/> Other: The Office of the Grand Traverse County Clerk, Grand Traverse County Gov't Bldg, 400 Boardman Ave., Traverse City, MI 48843
Day WEDNESDAY	Date MARCH 31, 2021	Time 9:00 AM

2. Testify at trial / examination / hearing.

3. Produce/permit inspection or copying of the following items: See EXHIBIT A, attached

4. Testify as to your assets, and bring with you the items listed in line 3 above.

5. Testify at deposition.

6. Abide by the attached prohibition against transferring or disposing of property. (MCL 600.6104(2), 600.6116, or 600.6119.)

7. Other: _____

<input checked="" type="checkbox"/> 8	Person requesting subpoena		Telephone no.
	MATTHEW S. DePERNO (P52622)		(269) 321-5064
	Address		
951 W. MILHAM AVENUE, PO BOX 1595			
City	State	Zip	
PORTAGE	MI	49081	

NOTE: If requesting a debtor's examination under MCL 600.6110, or an injunction under item 6, this subpoena must be issued by a judge. For a debtor examination, the affidavit of debtor examination on the other side of this form must also be completed. Debtor's assets can also be discovered through MCR 2.305 without the need for an affidavit of debtor examination or issuance of this subpoena by a judge.

FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR TO APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT.

MARCH 11, 2021

Date

Judge/Clerk/Attorney

P52622

Bar no.

Court use only

Served Not served



EXHIBIT A

Plaintiff, William Bailey, by and through his attorneys and expert witnesses shall conduct a forensic review the following information and documentation at the Clerk's Office on the date identified on the front page of the subpoena:

1. all election tapes from the November 3, 2020, election;
2. all paper ballots for the November 3, 2020 election;
3. all system logs for the November 3, 2020 election;
4. the tally server and/or election management server used in the November 3, 2020 election;
5. all election media, including but not limited to, all compact flash cards and poll books and USB drives used in the November 3, 2020 election;
6. all election reports and tallies, .pdf files, and spreadsheets used in the November 3, 2020 election;
7. all canvasser paperwork and notes used in the November 3, 2020 election.

Data Retention

52 U.S. Code § 20701 - Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both.